Government Response to the Joint Committee on Conventions' Report of Session 2005-06:

Conventions of the UK Parliament

Presented to Parliament
by the Leader of the House of Commons and Lord Privy Seal

By Command of Her Majesty
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Introduction

1. The Government is very grateful for the work which the Joint Committee has undertaken in considering the conventions governing the relationship between the two Houses of Parliament. The evidence it has collected, both oral and written, provides a valuable source of information on the origins, development and meaning of the various conventions which give life to the relationship between the two Houses of Parliament. Not only will this work inform the current debate, it will also be an important source for future reference. The Government is also grateful to the Committee for producing its report to the tight timetable which was set.

2. The complex issue of the relationship between the two Houses sits at the core of the arrangements through which Parliament holds the Government to account. The House of Lords has a crucial part to play in the process, through its role as the revising chamber. But it is clear that in our constitutional arrangements the House of Commons retains primacy. Only the Commons has the power to grant or withhold supply, and, linked to this, it is only the Commons whose confidence a government must maintain in order to remain in office. These arrangements mean that there is a very different relationship between the Government and the two Houses of Parliament. They ensure that the party which secures a majority through a general election has the right to form a government and to carry through the programme set out in its election manifesto.

3. The House of Lords must be equipped with the power to perform its role as a revising chamber effectively, but it must not exercise this power in a way which undermines the position of the House of Commons. The constitutional backstops of Commons' primacy are the Parliament Acts and the rules on supply. However, there are other elements which underline this - those which govern the day to day relationship between the two Houses. These are the kinds of conventions that the Committee was asked to investigate.

4. We accept the Joint Committee's analysis of the effect of all the conventions, and the Joint Committee's recommendations and conclusions. Its report accurately defines the current relationship between the Lords and the Commons.

5. The conventions, as defined, will provide an essential point of reference in the months to come, as the Government works to build a consensus on further reform of the House of Lords.

6. This is the Government's response to the specific issues raised by the Joint Committee.

Primacy of the Commons, role of the Lords, and Lords reform (page 76, paras 1 & 2)

1. **We were instructed to accept the primacy of the House of Commons. None of our witnesses has questioned it, and neither do we. (Para 57) The primacy of the Commons is a present fact, requiring no codification. (Para 283 (a))**

2. **Our conclusions apply only to present circumstances. If the Lords acquired an electoral mandate, then in our view their role as the revising chamber, and their relationship with the Commons, would inevitably be called into question, codified or not. Given the weight of evidence on this point, should any firm proposals come forward to change the composition of the House of Lords, the conventions between the Houses would have to be examined again. What could or should be done about this is outside our remit. (Para 61)**

7. The Government welcomes the Committee's view on the primacy of the House of Commons. We also note that the Committee recognises that the question of what the conventions should look like in a reformed House of Lords is outside its remit.

8. As the 2005 manifesto made clear, the Government believes that it is necessary for there to be further reform of the House of Lords, removing the remaining hereditary peers and offering Parliament the chance to decide on whether there should be further changes to make the Lords more effective, legitimate and representative. The Government agrees with the Committee that such reform will raise the question of whether or not the current conventions should be carried forward to a differently constituted House.

9. Our answer to that question is that further reform should not alter the current role of the Lords as a revising chamber, and that the conventions governing its relationship with the Commons are fit for that purpose. We believe the relationship the Joint Committee describes is one which should apply to any differently composed chamber.

10. Effective and robust scrutiny of policies and proposals by the House of Lords is essential to good governance. We recognise that changes to the composition of the Lords could make it more assertive in performing this function, just as the 1999 reforms have done. We have no difficulties with this. Indeed overall our reforms have been designed to make Parliament as a whole more effective. Greater activity by the Lords, including more intense scrutiny of legislation, is not, of itself, disruptive of a settled and stable relationship between the two Houses, provided this is not taken to a point where it may threaten the primacy of the Commons. Indeed the Government's general election manifesto called for reform which allows the Lords to be effective "without challenging the primacy of the House of Commons." [1]

[1] Labour Party Manifesto 2005, *Britain Forward Not Back*, page 110.

11. Previous reforms to the House of Lords – such as the introduction of life peers and the removal of most of the hereditary peers – have, over time, altered the House in significant ways. As the Government said in evidence to the Committee:

"*the Government recognises that in respect of the particular constitutional and political environment in the UK that, as the Lords moved to becoming "more representative" new members especially those elected could well be more assertive about the powers of the Lords, and this in turn could appear to challenge the essential primacy of the Commons. The Leader of the House of Commons put it thus in the debate on the establishment of the Joint Committee:*

"any change in the composition of the [Lords] will inevitably change its appetite for its role in legislation and therefore in practice its sense of power" (Official Report, 10 May 2005, column 446).

Indeed, there has been a foretaste of this in the changed behaviour of the Lords since the first reforms were introduced seven years ago, with a rebalancing of its membership to ensure that no party has a majority.

For its part, the Government welcomes the active scrutiny which the Lords undertake of both primary and secondary legislation. The Leader of the House of Commons put it that this was "not a zero-sum matter" either between the Lords and the Commons or the Lords and the Government (Official Report, 10 May 2005, column 472). But in the Government's view it is fundamental to the effective working of our democratic constitutional arrangements that the primacy of the Commons—as described in this paper—is maintained, and that increases or changes in activity by the Lords have to be subject to that constraint." [2]

12. The Committee's report shows that there is general agreement about the current role of the Lords in Parliament. The Government believes that whatever further reform of the Lords takes place, that role is the right one. The question of composition of the House of Lords does not dictate its role. Function does not follow form. The questions of powers and composition certainly impact on each other, but are in fact separate.

13. As the Government made clear in its evidence, international comparisons bear out this point. There is a range of models of second chambers across the world, each constituted differently with varying degrees of power. There is no consistent correlation between the nature of a chamber's composition and its degree of power relative to the primary chamber. It does not follow, for example, that directly elected chambers necessarily have more power than appointed chambers, or that because their members have democratic legitimacy, they have a greater say over legislation.

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[2] Joint Committee on Conventions, *Conventions of the UK Parliament,* Report of Session 2005-2006, Volume II, *Minutes of evidence and appendices,* HL Paper 265-II, HC 1212-II (London, The Stationery Office Limited, 2006), *Memorandum by Her Majesty's Government*, Ev 3, paragraphs 14 – 16.

14. For example, the Canadian Senate is wholly appointed but has extensive powers in relation to legislation. Although, as the Clerk of the Canadian Senate pointed out to the Joint Committee, conventions have emerged there which have served to restrain the use of those powers, there nevertheless exists no formal mechanism, as there is in the UK, through which the Canadian House of Commons can exercise primacy. Legislation can shuttle between the two Houses indefinitely until agreement is reached. In contrast, the Czech Republic, Japan, and Poland all have wholly directly elected second chambers, which may be thought to correlate with extensive powers, yet in each case the primary chamber is able to override second chamber amendments.

15. Useful examples can be found in the federal systems of Austria and Germany, which have similar indirect methods of election for their second chambers, but quite different powers. In Austria, members of the Bundesrat (the second chamber) are elected by the Austrian provincial assemblies. In Germany, the state legislatures elect some of their own members to serve in their Bundesrat.

16. In Austria, Bills are usually introduced in the Nationalrat (the first chamber), which is the primary chamber. The Bundesrat has the right to submit Bills under certain conditions and can present motions and enquiries to the Nationalrat. In most cases, the Bundesrat has eight weeks to scrutinise a Bill. It may suggest amendments or veto it, but in most cases the Nationalrat can refuse to accept Bundesrat amendments or override a veto. However, when Bills affect the rights of the provinces or the powers of the Bundesrat, a Bundesrat veto is absolute (it cannot be overriden). Such a veto is rarely used.

17. In Germany, by contrast, many financial Bills and all Bills including details on administration (a state prerogative) can be finally vetoed by the Bundesrat. Only for the other 40-50% of Bills, can the veto be overridden by the first chamber.

18. Significantly, our view that the current powers of the House of Lords would be broadly fit for purpose in a reformed House is shared by previous reports on the issue:

- The Royal Commission on the Reform of the House of Lords (the Wakeham Commission), chaired by the Rt Hon Lord Wakeham, concluded in 2000 that the overall convention of Commons' primacy and the provisions of the Parliament Acts should remain, were the House to be reformed. This was subject to two important provisos:

"First, that the reformed second chamber should maintain the House of Lords convention that all Government business is considered within a reasonable time… Second, we agreed with those that argue that the principles underlying the Salisbury Addison Convention remain valid and should be maintained… where the Government has chosen a party to form a Government, the elements of that party's general election manifesto should be respected by the second chamber. More

generally, the second chamber should think very carefully before challenging the clearly expressed views of the House of Commons on any issue of public policy." [3]

- The Public Administration Select Committee (PASC), in its fifth report of the 2001-2002 session, examined the powers of the Lords in the context of the Government's proposals on Lords reform at that time. They concluded that: *"There is no proposal for any major change to the role and functions of the House of Lords. This is one of the fundamentals on which there is broad agreement, and it is one of the firm foundations on which reform must build."* [4] While it considered that the effectiveness of the Lords in its main functions could be improved, PASC nevertheless concluded that: *"We agree with the Government that no major change is required to the role or functions of the second chamber. It should continue to be a revising, scrutinising and deliberative assembly*." [5]

- The previous Joint Committee on House of Lords Reform, also chaired by Lord Cunningham, which was specifically asked to look at composition, came to similar conclusions as the Wakeham Commission, (and PASC when it reported in 2002 and 2003) and strongly supported the continuance of the existing conventions. In its first special report it said:

"*We envisage a continuation of the present role of the House of Lords*, ***and of the existing conventions governing its relations with the House of Commons.*** *These conventions, which are of a self-restraining nature, impact profoundly on the relations between the Houses and need to be understood as a vital part of any future constitutional settlement."* [6] *[emphasis added]*

  This was in the context of a number of different proposals on the future composition of the House of Lords – from an all appointed House right through to a fully elected House. The Committee's conclusions were to stand in any reformed House. The previous Joint Committee shared four members with the Joint Committee on Conventions - Viscount Bledisloe, the Rt Hon Lord Carter and Lord Tyler (then Paul Tyler MP), as well as the Chair, the Rt Hon Lord Cunningham (then Jack Cunningham MP).

- The cross-party proposals set out in "Reforming the House of Lords – Breaking the Deadlock" recommended in 2005 that no immediate change should be made to the powers of a reformed second chamber, suggesting that *"the*

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[3] Royal Commission on Reform of the House of Lords, *A House for the Future*, Cm 4534, (London, The Stationery Office, 2000), paragraphs 4.20, 4.21.

[4] Public Administration Select Committee, Fifth Report, *The Second Chamber: Continuing the Reform,* Session 2001-2002, 14 February 2002, HC 494-I (London, The Stationery Office Limited, 2002), paragraph 69.

[5] Ibid., paragraph 70.

[6] Joint Committee on House of Lords Reform, *House of Lords Reform: First Report,* Session 2002-03, HL Paper 17, HC 171 (London, The Stationery Office Limited, 2003), page 5.

current settlement on Lords powers has served us well for more than half a century, and should not be altered without careful thought." [7]

19. The crucial point is that these reports, all of which advocated an elected element or suggested that this was a viable option, suggested that the role and powers of the Lords should remain the same, no matter what method of composition was decided on.

20. Commons' primacy, as the Government argued in its evidence to the Joint Committee, is based on a number of factors. The most important are the constitutional longstop of the Parliament Acts, and, linked with the Parliament Acts, Commons' financial privilege and the ability to dismiss the Government of the day. There are no proposals to remove these fundamental aspects of Commons' primacy. The Parliament Acts are the legal framework which underpin this. It is a fact that, in a dispute between the two chambers concerning primary legislation, the Commons has the final say, albeit at the cost of delay.

21. Changes to composition must take account of the current role of the Lords and should be designed to make the Lords more effective at performing that role, rather than undermining or radically altering it. We should not assume that change means that the current conventions are not the right ones for the future. Quite the opposite: the continued application of these conventions should define the powers of a reformed House.

22. As a government, therefore, we support the application of the existing conventions, as described in the Joint Committee report, to any newly composed House. The extent to which there needs to be additional steps to secure that would need to be addressed if there was any suggestion that the major parties did not support this approach in the context of a new House.

The Lords since 1999

23. The Committee states: *"At the risk of over-simplifying, the opposition parties are broadly happy with the Lords' behaviour since 1999; the evidence we have received suggests that the public at large feel the same. The Government do not".* [8] This comment could be held to suggest that the Government objects to proper Parliamentary scrutiny of its actions. This is far from the case. The Government welcomes scrutiny of its policies, proposals and legislation, and believes it is essential in our democracy for Parliament to hold the Government properly to account. However, the Government believes that it is entitled on occasion to question whether or not the correct balance is struck, to use the Committee's words, "*between enabling the Government to do things and*

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[7] Clarke, K, Cook, R, Tyler, P, Wright T, Young G, *Reforming the House of Lords - Breaking the Deadlock*, (London, The Constitution Unit, 2005), page 17.

[8] Joint Committee on Conventions, *Conventions of the UK Parliament,* Report of Session 2005-2006, Volume I, HL Paper 265-I, HC 1212-I (London, The Stationery Office Limited, 2006), p 23, paragraph 59.

holding them to account". [9] That is part of a healthy tension between Government and Parliament, and, in part, is one of the reasons for seeking the establishment of the Joint Committee on Conventions. As we stated in our evidence: *"For its part, the Government welcomes the active scrutiny which the Lords undertake of both primary and secondary legislation."* [10]

Salisbury-Addison convention **(page 76, para 3)**

3. The Salisbury-Addison convention has changed since 1945, and particularly since 1999 (paragraph 97). Its provisions are:

In the House of Lords:

- **A manifesto Bill is accorded a Second Reading;**
- **A manifesto Bill is not subject to 'wrecking amendments' which change the Government's manifesto intention as proposed in the Bill; and**
- **A manifesto Bill is passed and sent (or returned) to the House of Commons, so that they have the opportunity, in reasonable time, to consider the Bill or any amendments the Lords may wish to propose (paragraph 99).**

4. It would be practical for the Lords to debate and agree a resolution setting out the terms of the Convention as it has evolved, and to communicate it by message to the Commons, which could then debate a motion to take note of the message (paragraphs 114, 283 (c)).

5. We do not recommend any attempt to define a manifesto Bill (paragraph 113). Without such a definition, it will be clear that the resolution is flexible and unenforceable (paragraph 283 (d)).

6. We recommend that in future the Convention be described as the Government Bill Convention (paragraph 115).

7. In addition the evidence points to the emergence in recent years of a practice that the House of Lords will usually give a Second Reading to any government Bill, whether based on the manifesto or not (paragraph 100).

24. We accept all of these conclusions and recommendations, although we make one further suggestion in relation to recommendation 6 above in recognition of the Committee's work in this area (see paragraph 27 below).

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[9] Ibid, p 7, paragraph 3.

[10] Joint Committee on Conventions 2005-2006, Volume II, op cit., paragraph 16.

25. The Government welcomes the Committee's view that the Salisbury-Addison convention, as evolved, remains. This convention is fundamental in supporting the primacy of the Commons, and the Government believes that it should remain in place in a reformed House of Lords.

26. The Government welcomes the Committee's recognition in its conclusions that the Lords will usually give a Second Reading to any government Bill, whether based on the manifesto or not.

27. The Committee has set out very clearly how the convention that started off as the Salisbury-Addison convention has evolved. The Government agrees with the Committee's description of how the convention works at the present time. It also agrees that, in recognition of the developments which have taken place over the last 60 years, the time has come to change the name of the convention. We accept the Committee's proposed new name of the 'Government Bills Convention'. However, we are aware of some concern that the name might imply that the same, more restrictive, conventions apply to the Lords handling of non-manifesto government Bills as apply to manifesto legislation (the Committee has in fact noted that all government Bills get a second reading, and manifesto legislation substantially more). We would therefore be receptive to other suggestions on the name of this convention. For example, successful conventions frequently have, as a short title, the name of the individual or individuals who were particularly responsible for formulating them. So, in this case, the convention could become know as the 'Cunningham Convention' in recognition of the work of the Committee and a sign that it was defined by the Committee.

28. The Government also believes that the formulation settled on by the Joint Committee - that: *"A manifesto Bill is not subject to 'wrecking amendments' which change the Government's manifesto intention as proposed in the Bill"* - will go a long way to helping address the difficulties, recognised by the Committee, in trying to specify in advance what a manifesto Bill is. [11] The Government agrees with the Committee's view that any attempt to further define a manifesto Bill would make the convention more difficult to operate.

Reasonable time **(page 77, paras 8 - 12)**

8. There is undoubtedly a convention that the House of Lords considers Government business in reasonable time (paragraph 153). A statement to that effect could be adopted by the House of Lords by resolution and included in the *Companion* (paragraph 283 (e)).

9. There is no conventional definition of "reasonable", and we do not recommend that one be invented (paragraph 154). Without such a definition, it will be clear that the resolution is flexible and unenforceable (paragraph 283 (f)).

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[11] Joint Committee on Conventions 2005-2006, Volume I, op cit., page 32, paragraph 99.

10. It would however be possible for a new symbol to appear on the Lords order paper, to indicate a Bill which has spent more than a certain period in the House (paragraph 156). If there is to be a number of sitting days as an indicative measure, for this purpose, of when a Bill may have spent long enough in the Lords, then 80 days is more appropriate than 60 (paragraph 157). This would be a matter for the Lords Procedure Committee (paragraph 283 (g)).

11. When the Government criticise the Lords for making slow progress with a Commons Bill, they are on firmer ground when they can point to full scrutiny in the Commons (paragraph 161).

12. There is scope for better planning of the parliamentary year as a whole, possibly involving greater use of pre-legislative scrutiny and carry-over. If the Government can even out the workload in both Houses throughout the Session, this should reduce time problems on individual Bills (paragraph 166).

29. Again, we accept these conclusions and recommendations. In particular, the Government welcomes the Committee's recognition of the existence of the convention on reasonable time.

30. This may go some way to addressing the point made by the Committee, that Bills are taking longer to get through the Lords, and that, as they rightly note, this is having an effect on the management of business. [12]

31. As stated in oral evidence by the Leader of the House of Commons, the purpose behind the Government's manifesto 60 days proposal was that the convention on reasonable time is respected. *"What we are seeking is the outcome that is behind the manifesto commitment, which is the consideration of Bills here as a revising chamber and their timely return to the Commons, but we are not necessarily wedded to the method which is specified in the manifesto."* [13] That being the case, the Government would support any efforts to ensure that the convention is adhered to, including the Committee's suggestion that an indication could appear on the Order Paper when a Bill has taken longer than half a session to be dealt with by the Lords. This would be helpful in indicating to members when there is a risk that the convention could be broken. We accept, as we have done throughout, that this would place as much discipline on the Government as on other parties and Members.

32. The Committee states that there is no conventional definition of "reasonable", and recommends that there should not be an attempt to invent one, in part because this will reduce flexibility. The Lord Chancellor and Secretary of State

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[12] Ibid, page 44, paragraph 153.

[13] Joint Committee on Conventions 2005-2006, Volume II, op cit., G*overnment oral evidence to the Joint Committee on Conventions*, Ev 11, Question 1.

for Constitutional Affairs recognised this point in oral evidence: "*You do need flexibility. The question the 60 days raises is, is it helpful to have a starting point in relation to it?"* [14] The Committee's suggestion that 80 days may be a useful indicator of when a Bill may have spent long enough in the Lords is helpful in this respect.

33. The Government notes that the Committee does not seem to address our argument that, under present rules, the Lords has the ability to delay an entire programme in order to pursue its opposition to one particular measure; or to threaten to do so in order to deter a government from bringing the measure forward in the first place. We take the implication of the report to be that this would infringe conclusion 8.

34. The Government notes the Committee's overall view on the reasonable time convention. We note and welcome the Committee's acceptance of the evidence of the then Clerk of the House of Commons, that the Lords should respect the Commons' use of its own time. [15] The Government regularly looks at measures which can help smooth out the peaks and troughs of Parliamentary work, such as improved scrutiny and the use of carry-over. Such measures were discussed in the recent report of the Select Committee on Modernisation of the House of Commons on the Legislative Process, which made a number of recommendations relating to the better use of time. In its debate on 1 November 2006, the Commons welcomed the Committee's report and Government business managers will be seeking to take account of the relevant recommendations in their management of the legislative programme. The Government will wish to look at the impact of these and other factors over time, in both Houses, before deciding whether further steps need to be taken in this area.

"Ping-pong"

13. The exchange of Amendments between the Houses is an integral part of the legislative process that is carried on within the context of the primacy of the House of Commons and the complementary revising role of the House of Lords (paragraph 188). It is not a convention, but a framework for political negotiation. We find no scope for codification (paragraph 283 (h)).

14. It would facilitate the exchange of Amendments between the two Houses if the convention that neither House will in general be asked to consider Amendments without notice was more rigorously observed, i.e. if reasonable notice was given of consideration of Amendments from the other House (paragraph 189).

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[14] Ibid., Ev 24, Question 37.

[15] Joint Committee on Conventions 2005-2006, Volume I, op cit., page, 45-46, paragraph 161.

35. The Government accepts the Committee's view on the nature of ping-pong, and notes the recommendation on the notice convention. As always, we will endeavour to give reasonable notice where possible. The Government believes, however, that continuation of the increase in the amount of ping-pong since 1997 could seriously disrupt any government's legislative programme.

Secondary legislation

15. Neither House of Parliament regularly rejects secondary legislation, but in exceptional circumstances it may be appropriate for either House to do so (paragraph 227). A statement to that effect could be adopted by either House, or both (paragraph 283(i)).

16. Although we offer below a list of examples of exceptional circumstances, we do not recommend defining them further. Without such a definition, it will be clear that the statement is flexible and unenforceable (paragraph 283 (j)).

17. There are situations in which it is consistent both with the Lords' role in Parliament as a revising chamber, and with Parliament's role in relation to delegated legislation, for the Lords to threaten to defeat an SI [Statutory Instrument]. For example:

- **i. where special attention is drawn to the instrument by the Joint Committee on Statutory Instruments or the Lords Select Committee on the Merits of SIs**
- **ii. when the parent Act was a "skeleton Bill", and the provisions of the SI are of the sort more normally found in primary legislation**
- **iii. orders made under the Regulatory Reform Act 2001, remedial orders made under the Human Rights Act 1998, and any other orders which are explicitly of the nature of primary legislation, and are subject to special "super-affirmative" procedures for that reason**
- **iv. the special case of Northern Ireland Orders in Council which are of the nature of primary legislation, made by the Secretary of State in the absence of a functioning Assembly**
- **v. orders to devolve primary legislative competence, such as those to be made under section 95 of the Government of Wales Act 2006**

vi. **where Parliament was only persuaded to delegate the power in the first place on the express basis that SIs made under it could be rejected (paragraph 229).**

18. This list is not prescriptive. But if none of the above, nor any other special circumstance, applies, then opposition parties should not use their numbers in the House of Lords to defeat an SI simply because they disagree with it (paragraph 230).

19. The most constructive way for the Lords, as the revising chamber, to reject an SI is by motion (or amendment) incorporating a reason (paragraph 232).

20. If the Government lose a vote on a non-fatal motion about a Statutory Instrument, they should respond to the House in some way, at least by Written Statement (paragraph 232).

36. Again, we accept these conclusions and recommendations.

37. The Government welcomes the Committee's conclusion that the Lords should only threaten to reject Statutory Instruments (SIs) in exceptional circumstances. Indeed, the Government suggested in its supplementary evidence some limited circumstances in which we would see it as appropriate. [16]

38. The Committee's view is consistent with our evidence that, though fatal motions are from time to time moved in the Lords, the House almost never chooses to approve such motions (twice in fifty years). The focus at such times is therefore more usually on requiring a government to meet the concerns expressed by Members, or to justify the proposed course of action.

39. The Government welcomes the Committee's conclusion that the opposition parties should not reject an SI simply because they disagree with it. It is important to remember that the power to create SIs, and the principles behind the primary legislation will already have been debated and considered by both Houses of Parliament. It goes without saying that it is at any time open to Parliament to change the primary legislation. The Government believes this principle should apply even in relation to the types of SI referred to in the Committee's conclusion 17.[17] Simply because a special procedure is required for particular SIs should not mean that the Lords can feel free to reject the

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[16] Joint Committee on Conventions 2005-2006, Volume II, op. cit., *Supplementary memorandum by Her Majesty's Government*, Ev 28.

[17] Joint Committee on Conventions 2005-2006, Volume I, op. cit., p 78, paragraph 17.

Order on the grounds it dislikes the policy, if the Order has in fact been properly made under the procedure set out.

40. In relation to the Committee's list of examples of the circumstances in which it could be appropriate for the Lords to reject an SI, the Committee may find it useful to be reminded that the Secretary of State for Northern Ireland has already agreed to consider different arrangements for scrutinising Northern Ireland Orders if devolution is not restored. Similarly, the Government has given a clear undertaking that Parliament will have the opportunity to give full and detailed pre-legislative scrutiny of Orders in Council transferring powers to the Welsh Assembly before they are laid. It is important to remember that these Orders do not make any substantive change to the law, but simply grant competence in a particular area to the National Assembly. The Assembly will arrange its own full scrutiny of resultant Measures, comparable to the scrutiny of primary legislation at Westminster.

41. The Committee's conclusion 18 will be particularly important in relation to a reformed House because just as has been the case since the 1999 reforms, it would be very difficult for a single party to command a majority of the political Members of the House, much less of the whole House. [18]

42. The Government does, as stated in its evidence, take very seriously the passing of non-fatal motions on SIs, but recognises that this is not always as apparent to Parliament as it could be. The Government therefore accepts the recommendation that it should respond to the House in some way if a non-fatal motion is passed.

43. We agree with the recommendation that in the very rare circumstances when the Lords actually reject an SI, rather than just threaten to, they should incorporate a reason for doing so.

44. The Government notes the Committee's comment that:

"There is no consensus around the Wakeham proposal for a suspensory veto for the second chamber. As a change in law it is in any case outside our remit." [19]

45. The Wakeham Commission's proposal was as follows:

"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

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[18] Ibid, page 78, paragraph 18.

[19] Ibid., p 63, paragraph 234.

take effect for three months and could be overridden by a resolution of the House of Commons." [20]

46. The Wakeham Commission believed that the change to a suspensory veto would give the House of Lords:

"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… At the cost of weakening the formal power of the second chamber, in comparison with 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." [21]

47. The Government will consider carefully whether any legislative changes in relation to secondary legislation are necessary, but hopes that they are not.

Financial privilege

21. When the Lords Economic Affairs Committee scrutinises the Finance Bill, it should continue to respect the boundary between tax administration and tax policy, to refrain from investigating the incidence or rates of tax, and to address only technical issues of tax administration, clarification and simplification. Provided it does so, we believe there is no infringement of Commons financial privilege, and no need to reopen the issue. If the House of Commons believe that their primacy or their privileges are being infringed, it is for them to act to correct the situation (paragraph 244).

22. If the Government are prepared to describe National Insurance as a tax, then they can seek to bring it within the scope of financial privilege (paragraph 249).

23. If the Commons have disagreed to Lords Amendments on grounds of financial privilege, it is contrary to convention for the House of Lords to send back Amendments in lieu which clearly invite the same response (paragraph 252). This matter could be considered by the House of Lords on the basis of a report from the Procedure Committee, with a view to adding to the guidance in the *Companion* (paragraph 283 (k)).

48. Commons' financial privilege and the limitations on the powers of the House of Lords in this area are fundamental cornerstones of our Parliamentary system. Their erosion or undermining carry grave constitutional consequences.

49. The Government agrees with the Committee that it is of paramount importance that the Lords Economic Affairs Committee respects the boundary between tax policy and tax administration and refrains from investigating the rates or

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[20] Royal Commission on Reform of the House of Lords, op. cit., paragraph 7.36.

[21] Ibid., paragraphs 7.37, 7.38.

incidence of tax. In the Government's view, the Lords Committee should take the utmost care to ensure that possible breaches of both the spirit and the letter of Commons financial privilege do not arise.

50. The Government will continue to keep the activities of the Economic Affairs Committee and its Finance Bill Sub-committee under review and will take whatever steps may be necessary to defend Commons' financial privilege.

51. The Government welcomes the Joint Committee's view on amendments in lieu, and will support consideration of this matter by the Lords Procedure Committee.

52. The Government notes the views of the Joint Committee on National Insurance. It remains unpersuaded that financial privilege should not encompass National Insurance and may wish to examine this issue afresh at a later date.

Codification

24. All recommendations for the formulation or codification of conventions are subject to the current understanding that conventions as such are flexible and unenforceable, particularly in the self-regulating environment of the House of Lords. Nothing in these recommendations would alter the present right of the House of Lords, in exceptional circumstances, to vote against the Second Reading or passing of any Bill, or to vote down any Statutory Instrument where the parent Act so provides (paragraph 281).

25. The courts have no role in adjudicating on possible breaches of parliamentary convention (paragraph 285).

53. The Government agrees with the Committee's conclusion that the courts have no role in adjudicating on questions of breaches of convention, and will not introduce any proposal which would lead to this happening.

54. The Government will support efforts in both Houses to provide time for debate to give effect to the Committee's recommendations.

55. There will always be circumstances where Parliament will feel that it is necessary to depart from convention and usual practice. However, having a shared conception of what the conventions and usual practices actually are helps make clear when they are being departed from, and gives focus to discussions about whether it is right to do so. The Government agrees that the support of all three main parties will be essential to creating a shared understanding, and recognises too that the views of the Crossbench peers will carry great weight.

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