



In Focus

Strathclyde Review: Secondary Legislation and the Primacy of the House of Commons

Background

On 26 October 2015, the Government was defeated in the House of Lords after Members voted to support two amendments to the approval motion that sought to delay consideration of the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 until specific conditions had been met. On 27 October 2015, the Government announced a rapid review to examine “how to protect the ability of elected governments to secure their business”.¹ The same day a motion in the Lords was narrowly defeated which would have annulled the Electoral Registration and Administration Act 2013 (Transitional Provisions) Orders 2015.² The Leader of the House of Lords, Baroness Stowell of Beeston outlined the full terms of the review in a written statement on 4 November 2015:

The Government has 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 Two, 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.³

Strathclyde Review

[*The Strathclyde Review: Secondary Legislation and the Primacy of the House of Commons*](#), published on 17 December 2015, aimed “to consider how more certainty and clarity could be brought” to the passage of statutory instruments through Parliament. It included background information about statutory instruments (also called delegated or secondary legislation), their scrutiny in Parliament and relations between the two Houses. Lord Strathclyde noted that although “in the course of my deliberations, I have received many letters with ideas on composition of the House of Lords [...] this issue did not form part of the Terms of Reference of my review [and] I have not commented on them”; he pointed to

work currently being undertaken by the Lord Speaker, Leaders from several political parties in the Lords and the Campaign for an Effective Second Chamber on these issues.⁴

The review suggested three options which might “provide the House of Commons with a decisive role on statutory instruments”:

- **Option one** proposed the removal of the House of Lords from the statutory instrument procedure altogether. This had the benefit of providing simplicity and clarity. However, it was argued that the proposal would “be controversial and would weaken parliamentary scrutiny of delegated legislation and could make the passage of some primary legislation more difficult”.⁵
- **Option two** proposed maintaining the role of the House of Lords in relation to statutory instruments but sought to “codify the convention” on House of Lords powers. In this option the House, either in a resolution or in standing orders, would make clear “the restrictions on how its power to withhold approval or to annul should be exercised in practice and to revert to a position where the veto is left unused”. The review stated that “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”.⁶

It concluded that a resolution of the House could be superseded, or standing orders could be suspended, by further decisions of the House, and argued that past experience had demonstrated “that no agreement on vague principles contained in a resolution of the House could safely be relied on in future”.⁷ The review therefore concluded that option two “would not provide certainty of application”.⁸

- **Option three** would create a procedure whereby the Lords could “invite the Commons to think again when a disagreement exists and insist on its primacy”. The procedure would be set out in statute.⁹

The report recommended the third option, arguing that this would allow the Government certainty and “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”.¹⁰ The report also recommended that “in order to mitigate against excessive use of the new process” the Government should take steps to ensure that primary legislation contains “the appropriate level of detail and that too much is not left for implementation by statutory instrument”.

In addition, the report proposed a further review, with the involvement of the House of Commons Procedure Committee, to consider the circumstances where statutory instruments should be subject to Commons-only procedures, “especially on financial matters, with a view to establishing principles that can be applied in future”.

Response to the Review

In a statement to the House of Lords, Baroness Stowell of Beeston, the Leader of the House, welcomed the report, describing it as “thoughtful and measured”.¹¹ She told the House that the Government would consider the review’s recommendations and would be listening to the views of Members of the Lords and the Commons before deciding its preferred approach. Any approach selected, she added, would need to ensure that the House of Lords provided scrutiny and challenge to the Government while also ensuring that the elected House had the final say.

In response, Baroness Smith of Basildon, the Leader of the Opposition in the Lords, disputed the Government's view of the October defeats, stating that in acting as it did the Lords had "fulfilled its duty in scrutinising secondary legislation".¹² With regard to the review, Baroness Smith said that the preferred option put forward by Lord Strathclyde would be "a very significant change" and that it would be "a major departure to use legislation to address this issue". She said that the procedure would be problematic as for any statutory instrument there would be "no guarantee that the Commons will have considered it first and there is no indication of the timescale". She argued that the proposal in effect "denies your Lordships' House the opportunity to ask the Government to reconsider. It instead sends it to the House of Commons". She raised concerns about the "degree of scrutiny" statutory instruments received in the House of Commons, stating "any Government with a majority would just ensure that a small committee will consider and pass the SI".

Lord Dholakia, the Deputy Leader of the Liberal Democrats in the Lords, stated that both Houses needed to work together to improve scrutiny of the executive, and proposed the creation of a joint committee to "ensure that the matter is fully debated".¹³ He said that his party were interested in ways to "strengthen the role of Parliament as a whole" and recommended that the House of Lords ought to be able propose amendments to statutory instruments. Both Lord Butler of Brockwell (Crossbench) and Lord Wakeham (Conservative) argued that the creation of a new power to delay statutory instruments bore similarities to reforms proposed by previous reviews, such as the [Royal Commission on the Reform of the House of Lords in 2000](#), and that there was support in the Lords for improving the way in which statutory instruments were considered.¹⁴ The former Lord Speaker, Baroness Hayman, also spoke in support of improving Parliament's scrutiny of statutory instruments, but proposed that, were the Lords given a new delaying power, there would have to be adequate time to allow for reconsideration to take place in the Commons.¹⁵

In a statement to the House of Commons, Chris Grayling, the Leader of the House of Commons, said the Government would consider the review "carefully".¹⁶ He told MPs that Lord Strathclyde had proposed a "clearer and broader role" for the Lords in considering statutory instruments, while maintaining the primacy of the Commons. In response, the Shadow Leader of the House of Commons, Chris Bryant, said the decision by the Government to commission the review bore the hallmarks of a "fit of pique".¹⁷ He questioned the practicalities of implementing the proposal of a new delaying procedure given the differences between consideration of primary and secondary legislation in both Houses. He said the solution was simple: "use less secondary legislation and only use secondary legislation for non-contentious matters". The chair of the Public Administration and Constitutional Affairs Committee, Bernard Jenkin, welcomed the recommendation to introduce primary legislation to implement the change and said that his committee, and the House of Commons Procedure Committee, would look at the proposals in "great detail".¹⁸ Pete Wishart, the Shadow SNP Westminster Group Leader, dismissed the outcome of the review as "pre-arranged".¹⁹

Commenting on the report, Professor Meg Russell of the Constitution Unit at University College London argued that the review had set out proposals that would reduce the powers of the Lords, and as such would be likely to face opposition. However, she argued that reform might be achieved if it were part of a deal to regulate the appointment of new Peers.²⁰

Prior to the publication of the review, the *Times* editorial on 3 November 2015 argued that, in the light of the Government defeat on tax credits, while reform was likely to be a complex process, it was "no longer for the long grass".²¹ Writing in the *Telegraph*, Lord Hague of Richmond said that the Government ought to consider bringing forward a bill to amend the Parliament Acts to assert the supremacy of the Commons in regard to secondary legislation.²²

Following the publication of the review, writing in the *Observer*, Andrew Rawnsley argued that Lord Strathclyde's recommendations would, if implemented, denude the Lords of its ability to challenge

secondary legislation.²³ Isabel Hardman, in the *Spectator*, said that, while the Strathclyde Review's proposals would enforce the primacy of the Commons, the lack of opportunity for MPs to consider statutory instruments would lead to worse scrutiny overall.²⁴ In the *Times*, Matthew Parris argued that the issue of secondary legislation, and how it is used by the Government, ought to be considered more widely, rather than just in the context of the powers of the House of Lords.²⁵

Further Information

- Cabinet Office, [Strathclyde Review: Secondary Legislation and the Primacy of the House of Commons](#), December 2015, Cm 9177
- House of Lords Library, [Delegated Legislation in the House of Lords](#), 22 October 2015; and [Delegated Legislation in the House of Lords since 2000](#), 10 April 2012
- House of Commons Library, [Conventions on the Relationship Between the House of Commons and House of Lords](#), 4 November 2015; and [Acts and Statutory Instruments: The Volume of UK Legislation 1950–2015](#), 22 December 2015

¹ Nigel Morris and Charlie Cooper, '[Tax Credits: David Cameron Announces Urgent Review of House of Lords' Powers](#)', *Independent*, 27 October 2015.

² [HL Hansard, 27 October 2015, cols 1133–6.](#)

³ [House of Lords, Written Statement: Strathclyde Review, 17 December 2015, HLWS285.](#)

⁴ Cabinet Office, [Strathclyde Review: Secondary Legislation and the Primacy of the House of Commons](#), 17 December 2015, Cm 9177, p 22.

⁵ *ibid*, p 5.

⁶ *ibid*, p 17.

⁷ *ibid*, p 18.

⁸ *ibid*, p 5.

⁹ *ibid*, p 5.

¹⁰ *ibid*, p 5.

¹¹ [HL Hansard, 17 December 2015, cols 2189–91.](#)

¹² *ibid*, [cols 2191–3.](#)

¹³ *ibid*, [cols 2193–4.](#)

¹⁴ *ibid*, [col 2196.](#) Lord Wakeham chaired the Royal Commission and Lord Butler served as a member.

¹⁵ *ibid*, [cols 2200–1.](#)

¹⁶ [HC Hansard, 17 December 2015, cols 1740–1.](#)

¹⁷ *ibid*, [cols 1741–2.](#)

¹⁸ *ibid*, [col 1743.](#)

¹⁹ *ibid*, [col 1744.](#)

²⁰ Constitution Unit, '[Strathclyde Report Could Hold Key to Next Stage in Lords Reform](#)', 17 December 2015.

²¹ *Times*, '[Lords Dispensable](#)', 3 November 2015.

²² Lord Hague of Richmond, '[The Liberal Democrats Have Profaned their Principles by Blocking Tax Credits in the Lords](#)' *Telegraph*, 27 October 2015.

²³ Andrew Rawnsley, '[The Tories are Unstitching the Tapestry of our Democracy](#)', *Observer*, 20 December 2015.

²⁴ Isabel Hardman, '[The Strathclyde Review Won't Make Parliament Work Better](#)', *Spectator*, 17 December 2015.

²⁵ Matthew Parris, '[The Secret State is Eroding our Democracy](#)', *Times*, 19 December 2015.

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