

HOUSE OF LORDS

Select Committee on the Constitution

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9th Report of Session 2015–16

**Delegated  
Legislation and  
Parliament:  
A response to the  
Strathclyde Review**

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### *Committee staff*

The current staff of the committee are Antony Willott (Clerk), Dr Stuart Hallifax (Policy Analyst) and Hadia Garwell (Committee Assistant). Professor Stephen Tierney and Professor Mark Elliott are the legal advisers to the Committee.

### *Contact details*

All correspondence should be addressed to the Constitution Committee, Committee Office, House of Lords, London SW1A 0PW. Telephone 020 7219 5960. Email [constitution@parliament.uk](mailto:constitution@parliament.uk)

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## SUMMARY

Following a defeat in the House of Lords on the Draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015, the Government asked Lord Strathclyde to examine how the Government might “secure their business in Parliament” and to consider how to ensure “the decisive role of the elected House of Commons in relation to its primacy on financial matters, and secondary legislation”.

There are indeed serious problems with the current system of delegated legislation that must be addressed. But by tasking Lord Strathclyde to consider the balance of power between the two Houses of Parliament, it seems to us that the Government focused his Review on the wrong questions. It consequently addressed the wrong issues. We believe that the more serious concerns arising from the delegated legislation process are rooted in the relationship between Parliament and the Executive. For that reason our report examines not only the options considered by the Strathclyde Review, but wider issues relating to the delegated legislation process that were outside the remit of that Review.

Successive governments have proposed primary legislation containing broad and poorly-defined delegated powers, including Henry VIII powers, that give wide discretion to ministers—often with few indications as to how those powers should be used. This Committee and others have noted a trend whereby delegated legislation has increasingly been used to address issues of policy and principle, rather than to manage administrative and technical changes.

The reasons for this are clear. Delegated legislation cannot be amended, so there is little scope for compromise. Far less time is spent by Parliament debating delegated legislation than primary legislation, and there is little incentive for members of either House, but particularly the House of Commons, to spend their precious time debating legislation that they cannot change. Finally, established practice is that the House of Lords does not vote down delegated legislation except in exceptional circumstances. The result is that the Government can pass legislative proposals with greater ease and with less scrutiny where they are able to do so through secondary, rather than primary, legislation.

These developments have strengthened the Executive at the expense of Parliament’s legislative authority.

We do not, in this report, put forward concrete proposals to improve the recommendation of the Strathclyde Review; we believe that proceeding with changes to Parliament’s role as an overseer of the Executive on the misdirected remit of that Review—whatever the political impetus behind those changes—will only damage Parliament’s role and reputation in the long run.

We consider that the Government should not seek to move forward with proposals based on the Strathclyde Review without proper consideration of the delegated legislation process in its entirety. A six week review based on informal consultation following highly politicised events in both Houses is not a proper basis for determining constitutional change.

We note that there have been calls for a Joint Committee to review the operation of the current system of secondary legislation. We do not seek to prescribe how Parliament and the Government should take forward a more comprehensive review of delegated legislation. Both Houses of Parliament, however, either

together or separately, need to play an active role in considering how powers should be delegated appropriately in primary legislation, how those powers should be exercised by Government and the way in which both Houses scrutinise and approve delegated legislation.

The balance of power between Parliament and the Executive lies at the heart of our constitution. There is a strong case for reviewing the operation of delegated legislation, but change must be careful, considered and, importantly, not undertaken in haste or for the wrong reasons.



# Delegated Legislation and Parliament: A response to the Strathclyde Review

## CHAPTER 1: INTRODUCTION

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1. On 26 October 2015, the House of Lords considered the Draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015. The Regulations altered the thresholds at which various tax credits could be claimed, and the rates at which various tax credits were withdrawn. After three divisions on amendments to the motion to approve the Regulations, the House agreed to decline to consider the Regulations until certain conditions were met by the Government.<sup>1</sup> Both in the run up to and aftermath of the vote there was considerable, and occasionally heated, debate as to the exact nature of the conventions and established practice governing the Lords' powers over delegated legislation, the extent to which financial privilege applies to delegated legislation, and whether the motion agreed by the House was 'fatal' or not.
2. Following the vote, the Government asked Lord Strathclyde, a former Leader of the House of Lords, to conduct a review into the relationship between the two Houses in relation to secondary legislation. John Penrose MP, Parliamentary Secretary in the Cabinet Office, told the House of Commons on 4 November that:

“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 ...

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.”<sup>2</sup>
3. The Strathclyde Review was published in December 2015 and set out three options:

Option 1: to remove the House of Lords from statutory instrument procedure altogether.

Option 2: for the House of Lords to pass a resolution or new Standing Orders setting out how it will use its powers in relation to statutory instruments and to “revert to a position where the veto is left unused”.

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1 HL Deb, 26 Oct 2015, [cols 976-1042](#) . The final motion is reproduced below (see paragraph 19).

2 See Cabinet office, *Strathclyde Review: Secondary Legislation and the primacy of the House of Commons*, Cm 9177, December 2015, Appendix A, p 25: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/486790/53088\\_Cm\\_9177\\_Web\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486790/53088_Cm_9177_Web_Accessible.pdf) [accessed 15 March 2016]

Option 3: to set out in statute a procedure whereby the Commons can insist on the passage of secondary legislation, in effect overriding the House of Lords.

The Review recommended that option 3 be taken forward by the Government.

4. Part of this Committee's terms of reference is to "keep under review the operation of the constitution". The issues raised in the Strathclyde Review are of clear constitutional importance, affecting as they do the relationship between the two Houses of Parliament and, crucially, the balance of power between Parliament and Government. In this report we first set the parliamentary scrutiny of delegated legislation in context. We then turn our attention to broader issues surrounding the Review's remit, before setting out our views on the three options set out in the Review.



## CHAPTER 2: BACKGROUND

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5. Delegated, or secondary, legislation is the product of law-making powers delegated by Parliament to the Government, generally through provisions in primary legislation (the latter being the “parent Act” of the delegated legislation). These powers are usually exercised through statutory instruments. The rationale for delegating power in this manner is to avoid the need for the inclusion in primary legislation of very detailed provisions, or to allow for legislation to be adjusted to keep track of developments (for example periodic adjustments or technological changes) without the need for frequent amendments to primary legislation by Parliament.

### The scale of delegated legislation

6. Delegated legislation has increased in recent decades both in the number of instruments passed and in the size of individual statutory instruments. Whilst there were rarely more than 2,500 statutory instruments laid in any calendar year before 1990, since 1992 there have generally been between 3,000 and 3,600 per year (see Figure 1 in the Appendix for more detail). Moreover, the total number of pages of statutory instruments laid has doubled compared with the years before 1990.<sup>3</sup>
7. In addition to the increase in both the size and number of statutory instruments compared with the situation before 1990, the nature of the instruments has also changed. Delegated powers in primary legislation have increasingly been drafted in broad and poorly-defined language that has permitted successive governments to use delegated legislation to address issues of policy and principle, rather than points of an administrative or technical nature. We discuss this issue further later in this report (paragraphs 37-44).
8. Not all delegated legislation is subject to parliamentary procedures, and these figures include both instruments that are not subject to parliamentary approval or annulment but are simply ‘made’ (passed into law) by the Minister, as well as statutory instruments passed by the National Assembly for Wales. Both the Scottish Parliament and Northern Ireland Assembly also consider and pass delegated legislation so the total number of statutory instruments passed into law across the United Kingdom is greater still.<sup>4</sup>
9. The number of statutory instruments laid before Parliament in each session since 1997 has been between 790 and 1,500—with the exception of the first session of each Parliament which saw over 1,700 being laid in each case.<sup>5</sup> In total, over 23,000 instruments have been laid before Parliament since 1997.<sup>6</sup> Put another way, between six and ten statutory instruments have been laid

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3 In each of the last five years for which figures are available (2005–2009) there were between 10,800 and 13,000 pages of statutory instruments laid (this compares to between 2,800 and 5,000 pages of Public Acts of Parliament). By contrast there were generally between 4,500 and 6,000 pages of SIs laid in the years for which figures are available between 1965 and 1985. See House of Commons Library, [Acts and Statutory Instruments: the volume of UK legislation 1950 to 2015](#), CBP-7438, Tables 1a, 1b and 3.

4 A total of 7,842 Scottish SIs came into law in 1999–2015 and over 3,800 Northern Irish statutory rules from the resumption of devolved rule in 2007 to 2015; House of Commons Library, [Acts and Statutory Instruments: the volume of UK legislation 1950 to 2015](#), CBP-7438, Tables 1b and 2.

5 This is the figure for statutory instruments laid before the House of Commons, and includes a number of instruments that are only subject to proceedings in that House.

6 Hansard Society, Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation*, 2014, Appendix H, available at <http://www.hansardsociety.org.uk/research/delegatedlegislation>; House of Commons, [Sessional Returns 2014–15](#) (Session 2015–16, HC 1)

before the House of Commons each sitting day, increasing to between ten and thirteen in the shorter last session of each Parliament.

### Parliamentary scrutiny of delegated legislation

10. Except in extremely rare cases, statutory instruments cannot be amended by either House.<sup>7</sup> There are 16 variations of the procedures by which statutory instruments pass through Parliament, including 11 variations of rarely-used enhanced and super-affirmative procedures.<sup>8</sup> The majority of statutory instruments, though, can either be approved or annulled, depending on whether they are subject to the affirmative or negative procedure

*Negative procedure (and annulment):* There are two versions of this procedure:

- The instrument is made (becomes law) but can be annulled if a motion to annul is passed within 40 days.
- More rarely, the instrument must be laid in draft, and can be made only if it is not disapproved within 40 days.

*Affirmative procedure:* There are three versions of this procedure:

- The instrument is laid in draft but cannot be made unless the draft is approved.
- The instrument is laid after making but cannot come into force unless and until it is approved.
- 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).

11. Around three-quarters of instruments laid in each session are subject to the negative procedure, most of the remainder being subject to the affirmative procedure (with a small number subject to a super-affirmative procedure,<sup>9</sup> or a separate enhanced procedure that applies to Legislative Reform Orders). In the last full session (2014–15), 979 instruments were subject to the negative procedure and 267 to the affirmative.<sup>10</sup> Some instruments are subject to Commons-only procedures, but most need to be approved, or not annulled, by both Houses.
12. Parliamentary scrutiny of statutory instruments is assisted by a select committee, the Joint Committee on Statutory Instruments (JCSI), which assesses the content of statutory instruments for compliance with technical and legal rules and with proper process. It does not consider the policy merits of instruments. It may draw instruments to the attention of both Houses on a number of grounds as set out in its remit.<sup>11</sup> The Commons members of the JCSI sit as the Select Committee on Statutory Instruments when considering Commons-only instruments. The JCSI also offers the Government

7 There are a very small number of exceptions where the parent Act specifically allows for amendment by Parliament (e.g. Census Act 1920 and, in relation to emergency regulations, Civil Contingencies Act 2004).

8 Hansard Society, Ruth Fox and Joel Blackwell, *The Devil is in the Detail*, p 5

9 The ‘super-affirmative’ procedure provides for additional scrutiny by each House, including a statutory 60-day consultation period (following which the Minister must have regard to any representations made by either House).

10 House of Commons, *Sessional Returns 2014–15*

11 Standing Orders of the House of Commons: Public Business (2016), [Standing Order 151](#) (HC 2)

“informal advance scrutiny” of draft instruments.<sup>12</sup> The Joint Committee’s most common reason for bringing an instrument to Parliament’s attention is defective drafting, which accounted for 47 of the 94 grounds for reporting instruments in the 2014–15 Session.<sup>13</sup> In addition, the Joint Committee on Human Rights scrutinises Remedial Orders (a form of delegated legislation that seeks to correct breaches of human rights identified either by domestic courts, or by the European Court of Human Rights) and may draw them to the attention of both Houses on the same grounds as the JCSI.<sup>14</sup>

### *Scrutiny by the House of Commons*

13. In the House of Commons, most business on delegated legislation is conducted in meetings of Delegated Legislation Committees (DLCs), of which there were 215 in the 2014–15 Session.<sup>15</sup> Motions to approve are generally taken without debate in the Chamber subsequently. DLCs are ad hoc committees with members appointed for each meeting; the members are appointed by the Committee of Selection and, while other MPs may attend and speak, only appointed members may vote on or make any motion.<sup>16</sup> Their meetings last for up to 90 minutes (they may be longer if they relate exclusively to matters in Northern Ireland) and are on a motion ‘That the Committee has considered the instrument [or draft instrument]’, which cannot be amended. MPs generally spend between 10 and 20 hours each session debating motions relating to statutory instruments in the House of Commons Chamber.<sup>17</sup> It is very rare for the House of Commons to reject a statutory instrument: this last happened in October 1979, apparently the result of some confusion on the Government benches.<sup>18</sup> The last defeat of an instrument on a division in the Commons was in March 1979.<sup>19</sup>

### *Scrutiny by the House of Lords*

14. In addition to the JCSI (as mentioned above in paragraph 12), the House of Lords is also advised by the Secondary Legislation Scrutiny Committee, which was established in 2003 to scrutinise the merits of statutory instruments (and which was until 2012 known as the Merits of Statutory Instruments Committee). From 2003 to the end of the 2014–15 Session, the Committee scrutinised 11,603 instruments and brought 718 of them to the special attention of the House in its reports.<sup>20</sup> The six grounds on which statutory instruments can be brought to the attention of the House are set out in the Committee’s terms of reference,<sup>21</sup> but in most cases they are reported for their political importance or public policy impact.<sup>22</sup> The Delegated Powers

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12 For example, see Joint Committee on Statutory Instruments, Considerations of SIs: <http://www.parliament.uk/business/committees/committees-a-z/joint-select/statutory-instruments/prescrutiny/> [accessed 23 February 2016]

13 House of Commons, *Sessional Returns 2014–15*. Note that SIs can be reported for multiple grounds.

14 Standing Orders of the House of Commons, Public Business (2016), [Standing Order 152B](#) (HC 2)

15 House of Commons, *Sessional Returns 2014–15*

16 Standing Orders of the House of Commons, Public Business (2016), [Standing Order 118](#) (HC 2)

17 House of Commons, *Sessional Returns 2014–15*; Hansard Society, Ruth Fox and Joel Blackwell, *The Devil is in the Detail*, Figure 5

18 See HC Deb, 24 October 1979, [cols 561–88](#)

19 See HC Deb, 22 March 1979, [cols 1833–59](#)

20 House of Lords, Secondary Legislation Scrutiny Committee, *Historical note*: [http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/committee\\_history\\_for\\_website.pdf](http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/committee_history_for_website.pdf) [accessed 23 February 2016]

21 House of Lords, Secondary Legislation Scrutiny Committee, Terms of Reference: <http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/role/tofref> [accessed 23 February 2016]

22 See Hansard Society, Ruth Fox and Joel Blackwell, *The Devil is in the Detail*, Appendix J

and Regulatory Reform Committee meanwhile advises the House on the appropriateness of the delegation of legislative power proposed in primary legislation.

15. The House of Lords divides its consideration of delegated legislation between debates on the floor of the House and in Grand Committee, with formal approval subsequently sought in the House if a debate is held in the latter. In the 2014–15 Session, a total of 27 hours and 35 minutes was spent debating delegated legislation in the main chamber.<sup>23</sup> Table 1 in the Appendix sets out the time spent on business relating to delegated legislation in more detail.

### **The Draft Tax Credits (Income Thresholds and Determination of Rates) (Amendments) Regulations 2015**

16. As we noted in the introduction, the Government asked Lord Strathclyde to carry out his review *Secondary legislation and the primacy of the House of Commons* following a defeat in the House of Lords on the Draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 (the ‘Tax Credit Regulations’). The exact motion and amendments considered by the House are set out in the Strathclyde Review<sup>24</sup> and we do not intend to reproduce them all here.
17. The controversy surrounding this defeat focused on three issues: whether or not the motion agreed by the House was ‘fatal’; the exact nature of the conventions and established practice governing the Lords’ powers over delegated legislation; and the extent to which financial privilege applies to delegated legislation. We lay the different arguments out here in brief for the information of the House.

#### *Fatal and non-fatal motions in the House of Lords*

18. As the vast majority of statutory instruments laid by the Government cannot be amended, the main options available to the House of Lords are to approve or reject them under the affirmative procedure, or to annul them under the negative procedure. The House can also express its views through a ‘non-fatal’ amendment to a motion to approve an instrument or through a regret motion on a negative instrument.
19. There is disagreement on whether the motion agreed by the House on 26 October 2015 on the Tax Credits Regulations was fatal. The Regulations had already been approved on division by the House of Commons.<sup>25</sup> Although a Liberal Democrat amendment explicitly rejecting the Regulations was defeated, the House finally agreed to decline to consider the Regulations until specific actions were taken by Government. The final motion reads:

“That this House declines to consider the draft Regulations laid before the House on 7 September until the Government, (1) following consultation have reported 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 before 5 April 2016, such transitional

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23 House of Lords, Statistics on Business and Membership (March 2014) p 4: <http://www.parliament.uk/documents/publications-records/House-of-Lords-Publications/Records-activities-and-membership/Business-membership-statistics/HL-Sessional-Statistics-on-Business-and-Membership-2014-15.pdf> [accessed 16 March 2016]

24 See Strathclyde Review, pp 13–14

25 HC Deb, 15 September 2015, cols 964–989

protection to be renewable after three years with parliamentary approval, and (2) have laid a report before the House, detailing their response to the analysis of the draft Regulations by the Institute for Fiscal Studies, and considering possible mitigating action.”<sup>26</sup>

20. The Strathclyde Review notes that “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”. Lord Strathclyde expanded upon this in a speech in the House of Lords on 13 January 2016:

“the two noble Baronesses in their Motions ... had rather cleverly and innovatively found a frame of words that ... were neither fatal nor non-fatal ...

My view is that, in practice, whatever the technicalities, they proved fatal because they took the order hostage and would not pass it unless certain conditions were met.”<sup>27</sup>

21. On the other hand, Baroness Hollis of Heigham, the mover of one of the amendments on which the Government were defeated, stated in debate that:

“this is a delaying amendment. It is not fatal, as the Government know. ... it calls for a scheme of transitional protection before the House further considers the SI.”<sup>28</sup>

22. Professor Meg Russell, Director of the Constitution Unit at University College London, told the Commons Public Administration and Constitutional Affairs Select Committee (PACAC) that the House had done nothing unprecedented in voting against the Regulations, except that “there was this rather clever phrasing of the motion, in effect to delay approval rather than to veto the instrument. Veto of the instrument would have been something that had been done before, such as was done in 2012 and 2007. This delay motion was new. So that is constitutionally innovative, but I do not think that, in itself, causes the problem.”<sup>29</sup>

*Conventions and established practice in relation to delegated legislation*

23. While the House of Lords has previously resolved “That this House affirms its unfettered freedom to vote on any subordinate legislation submitted for its consideration”,<sup>30</sup> it has rarely been the House’s practice to reject delegated legislation. In 2006, the Joint Committee on Conventions of the UK Parliament scrutinised various elements of relations between the two Houses. On delegated legislation, it 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”. The report then set out a non-prescriptive list of ‘exceptional circumstances’.<sup>31</sup> It noted that in the absence of any exceptional or special circumstances, “opposition parties

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26 HL Deb, 26 October 2015, [col 1034](#)

27 HL Deb, 13 January 2016, [col 275](#)

28 HL Deb, 26 October 2015, [col 991](#)

29 Oral evidence taken before the House of Commons Public Administration and Constitutional Affairs Committee, 19 January 2016 (Session 2015–16), [Q 15](#)

30 LJ (1993–94) 683

31 Joint Committee on Conventions, *Conventions of the UK Parliament* (Report, Session 2005–06, HL Paper 265, HC 1212), paras 227–229

should not use their numbers in the House of Lords to defeat an SI simply because they disagree with it.”<sup>32</sup>

24. There is no doubt that rejecting a statutory instrument is a significant act. The 2011 report of the Leader’s Group on Working Practices, chaired by Lord Goodlad, stated that “the use by Parliament of its statutory power either to annul or to decline to approve SIs is seen as a ‘nuclear option’, to be used rarely, or not at all.”<sup>33</sup>
25. The Strathclyde Review set out the difficulty faced by members of the House:
 

“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.”<sup>34</sup>
26. Some members argue that the defeat of the Tax Credits Regulations was covered by the ‘exceptional circumstances’ qualification set out in the Joint Committee’s description of the convention. Others suggest that since the motion was arguably not fatal the convention did not apply. **What is clear is 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. We are wary of describing the House’s pattern of behaviour in relation to statutory instruments as constituting a constitutional convention at all; it might better be described as long-established practice.**
27. It is clear that motions to reject delegated legislation are still uncommon.<sup>35</sup> The House has divided on delegated legislation over 150 times since 1950; slightly over half have been on fatal motions. These resulted in six statutory instruments being defeated (if one includes the Tax Credits Regulations), five of them since 1997.<sup>36</sup> The Government has won over 90% of divisions on fatal motions since 1950; including 84% since 1997.<sup>37</sup>
28. It should be acknowledged, however, that the number of instruments subject to divisions on fatal motions in the current Session has been relatively high (see Figure 2 in the Appendix). There have been divisions on fatal motions on five instruments so far in this Session. The only sessions in which more instruments have been the subject of fatal motions were the 2006–07 Session, when six divisions took place and one instrument was not approved, and the long 1979–80 Session, when the Government faced and won nine divisions on fatal motions.<sup>38</sup>

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32 [Joint Committee on Conventions](#), p 63

33 Leader’s Group on Working Practices, *Report* (Report of Session 2012–12, HL Paper 136), para 146

34 Strathclyde Review, p 15

35 The Leader of the House of Commons acknowledged this in his evidence to the Secondary Legislation Scrutiny Committee, 2 February 2016, [Q 2 and Q 4](#) (Rt Hon. Chris Grayling MP).

36 The other Government defeat being over the Southern Rhodesia (United Nations Sanctions) Order 1968.

37 These proportions exclude the division on a motion to decline to approve the Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015 in February 2015, which was not a whipped division; the motion was defeated.

38 House of Lords Library, Divisions on Delegated Legislation in the House of Lords 1950–1999, Library Note, [LLN 2000/01](#), January 2000; House of Lords Library, Delegated Legislation in the House of Lords since 2000, Library Note, [LLN 2012/012](#), April 2012,

29. The number of divisions and rejections of instruments should be considered in the context of the huge scale of delegated legislation. In the last ten full sessions (2004–05 to 2014–15), the House considered over 2,000 motions on delegated legislation, nearly 13,000 statutory instruments were laid before Parliament,<sup>39</sup> and some 36,000 statutory instruments became law.<sup>40</sup> In that same period, the House of Lords rejected two instruments.

*Financial privilege*

30. The final point of contention was over the extent to which the House of Commons' financial privilege applies to delegated legislation. As John Penrose MP stated when announcing the Strathclyde Review: "By long-standing convention the House of Lords does not seek to challenge the primacy of the elected House on spending and taxation".<sup>41</sup> This primacy is based on a resolution of the House of Commons of 1671 which states "That in all aids given to the King by the Commons, the rate of tax ought not to be altered by the Lords", and on a further resolution of 1678 which restates the "undoubted and sole right of the Commons" to deal with all bills of aids and supplies.<sup>42</sup> It was confirmed in the 1911 Parliament Act in relation to primary financial legislation relating to taxing and spending.
31. The Strathclyde Review states that Commons financial privilege applies to delegated legislation: "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."<sup>43</sup> Many members in the chamber supported his view in the debate on the Tax Credits Regulations. Former Lord Chancellor Lord Mackay of Clashfern, for example, stated:

"It is clear that these tax credit payments are made out of the supply raised by taxation and that the other place has decided that the Tax Credits Act 2002 should be amended in terms of the approved draft. I am clearly of the opinion that a failure on the part of this House to approve the draft of this instrument would be a breach of the fundamental privileges of the elected Chamber."<sup>44</sup>

32. Others have disagreed. Dr Ruth Fox, Director of the Hansard Society, told the Secondary Legislation Scrutiny Committee that financial privilege does not apply to secondary legislation.<sup>45</sup> Professor Russell told PACAC that the Review had offered no evidence for the assertion financial privilege applied to delegated legislation. Professor Russell concluded that: "there never has been any kind of a clear convention of financial privilege applying to secondary legislation. I have never been aware of a convention on financial

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39 Hansard Society, Ruth Fox and Joel Blackwell, *The Devil is in the Detail*, Appendix H

40 See Figure 1 in the Appendix; this is the total number of instruments dated 2005–2015 inclusive.

41 Strathclyde Review, p 25

42 See Constitution Committee, *Money Bills and Commons Financial Privilege* (10th Report, Session 2010–12, HL Paper 97)

43 Strathclyde Review, p 21

44 HL Deb, 26 October 2015, [col 998](#)

45 Oral evidence taken before the Secondary Legislation Scrutiny Committee, 2 February 2016 (Session 2015–16), [Q 12](#)

privilege on statutory instruments. This is a new issue that has come to the agenda in this context.”<sup>46</sup>

33. It is worth noting that not all statutory instruments are laid before both Houses. A little over 10% of instruments laid before Parliament are subject to Commons-only procedures, either affirmative or negative, as set out in their parent Act.<sup>47</sup> To this extent, a measure of financial privilege for the Commons already exists in the current arrangements. The controversy is over whether the legal requirement for other statutory instruments to be passed (or not annulled) by both Houses is restricted by a wider understanding of the Commons’ financial privilege.

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46 Oral evidence taken before the House of Commons Public Administration and Constitutional Affairs Committee, 19 January 2016, (Session 2015–16), [Q 15 and Q 18](#)

47 Joel Blackwell of the Hansard Society estimated that 11% of SIs laid before Parliament in the current Session were subject to Commons-only procedures (Evidence to the Secondary Legislation Scrutiny Committee, 2 February 2016, [Q 12](#) (Dr Ruth Fox)). The Chairman of the House of Commons Treasury Committee notes that 122 SIs were scrutinised by the Select Committee on Statutory Instruments in the 2014–15 Session (and were therefore subject to Commons-only procedures), compared with over 2,000 by the Joint Committee. House of Commons, [Sessional Returns 2014–15](#).



### CHAPTER 3: THE REMIT OF THE STRATHCLYDE REVIEW

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34. Before we turn to consider the propositions put forward by the Strathclyde Review, we make first some overarching observations about the delegated legislation process and about the remit set by the Government for the Review. These concern:
- The relationship between Parliament and the Executive
  - The proper scope of delegated legislation
  - The House of Commons
  - The role of the House of Lords in relation to statutory instruments

#### The relationship between Parliament and the Executive

35. Lord Strathclyde was asked “how to secure the decisive role of the elected House of Commons in the passage of legislation”. This remit, set by the Government, cast the Strathclyde Review’s consideration of secondary legislation procedure as concerning the balance of power between the two Houses of Parliament. The title of the Review, *Secondary legislation and the primacy of the House of Commons*, echoes that emphasis on inter-House relations. **But a focus on inter-House relations ignores the other, vital, balance of power that would be altered should changes be made to statutory instrument procedure in the House of Lords: the balance of power between Parliament and the Executive. By tasking Lord Strathclyde with considering the balance of power between the two Houses of Parliament, the Government focused his Review on the wrong questions. We believe that consequently it addressed the wrong issues.**
36. Delegated legislation is the product of a delegation of power from Parliament to the Government. Parliamentary scrutiny of secondary legislation is the mechanism by which Parliament assures itself that the Government is exercising that delegated authority in an appropriate way, and in a manner which accords with Parliament’s intentions. Yet Parliamentary scrutiny of delegated legislation is less intensive and arguably less effective than its scrutiny of primary legislation. Statutory instruments cannot be amended, so there is little scope or incentive for compromise. Far less time is spent debating delegated legislation than is spent debating primary legislation. And, as we previously noted, it is established practice that the House of Lords does not vote down delegated legislation except in exceptional circumstances. **The result is that the Government can pass legislative proposals with greater ease and with less scrutiny if it can do so as delegated, rather than primary, legislation. It is in this context that proposals to weaken the powers of the House of Lords should be considered.**

#### The proper scope of delegated legislation

37. The Strathclyde Review focuses on the actions of the House of Lords in relation to delegated legislation, but was prevented from considering in any detail the other side of the equation—the framing and use of delegated powers by Government. This Committee has brought the widening scope of the delegated powers proposed in primary legislation to the attention of the House on a number of recent occasions. In several reports in this Session

alone we have expressed concerns about vaguely-worded legislation that left much to the discretion of ministers.<sup>48</sup> Likewise we have expressed serious reservations about wide discretionary powers, including Henry VIII powers,<sup>49</sup> being conferred on ministers with few indications as to how those powers should be used to achieve the objectives set out in the parent Bill.<sup>50</sup>

38. The Chair of the Lords Delegated Powers and Regulatory Reform Committee, together with the Chairman of this Committee, wrote to Mr Chris Grayling MP, Leader of the House of Commons, in July 2015 expressing concern about this issue. That letter concluded:

“delegations of legislative power must be appropriate, the degree of flexibility afforded to ministers proportionate to the objectives set out in primary legislation, and ... ‘skeleton’ bills should be introduced only when absolutely necessary and with a full justification for the decision to adopt that structure of powers.”<sup>51</sup>

39. The trend observed by our Committee has also been noted by the Hansard Society:

“the use of delegated legislation by successive governments has increasingly drifted into areas of principle and policy rather than the regulation of administrative procedures and technical areas of operational details ... It is used extensively, for example, in areas such as the criminal law”.<sup>52</sup>

40. Parliament rejects statutory instruments extremely rarely. Only 17 statutory instruments have been rejected by the two Houses over the last 65 years out of nearly 170,000, including five instruments out of some 23,000 laid before Parliament since 1997. Since statutory instruments are, except in extremely unusual cases, unamendable by Parliament, that legislation is passed into law precisely as drafted by Government. There are obvious incentives for successive Governments to propose broad delegated powers that make it possible for ministers to pass significant policy decisions through Parliament without undergoing the full scrutiny afforded to primary legislation.
41. One of the consequences of broadly drafted delegated powers is their use by Government in ways that were not envisaged at the time the powers were granted by Parliament. The Tax Credit Regulations that sparked the Strathclyde Review contained £4.4 billion worth of spending cuts. Many argued that it was a vehicle for a policy change that was not envisaged at the time the delegated power was granted. We note that it was put to Lord Strathclyde, when he gave evidence before PACAC, that:

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48 Constitution Committee reports on the *Childcare Bill [HL]* (3rd Report, Session 2015–16, HL Paper 16); *Cities and Local Government Devolution Bill [HL]*, *the Psychoactive Substances Bill [HL]* and *the Charities (Protection and Social Investment) Bill [HL]* (2nd Report, Session 2015–16, HL Paper 9). See also bill correspondence on the *Education and Adoption Bill*.

49 Henry VIII powers are delegated powers which enable primary legislation to be amended or repealed by means of delegated legislation.

50 Constitution Committee, *Cities and Local Government Devolution, Psychoactive Substances and Charities (Protection and Social Investment) Bills* (2nd Report, Session 2014–15; HL Paper 9), para 2

51 Letter from Baroness Fookes and Lord Lang of Monkton to Chris Grayling MP, 22 July 2015, on Government legislation: <http://www.parliament.uk/documents/lords-committees/constitution/Correswithministers/ChairmanDPRctoGraylingLegislation220715.pdf>

52 Hansard Society, Ruth Fox and Joel Blackwell, *The Devil is in the Detail*

“this delegated legislation [on tax credits] was intended to vary rather than to abolish the benefit altogether, and that is what amounted to exceeding the powers intended by the primary legislation?”.

Lord Strathclyde replied that:

“I am sure that was the original intention of Ministers who brought it forward, but the drafting of the founding Act was such that what the Government proposed in the tax credits regulation was entirely *intra vires* with the founding Act ... under law they were totally within their correct powers.”<sup>53</sup>

42. Lord Strathclyde’s answer illustrates how the Government may use delegated powers in ways not necessarily anticipated by Parliament. Professor Russell, in evidence to PACAC stated:

“If the peace is to be kept between the Government and the House of Lords on statutory instruments, then it requires the House of Lords to act with restraint, but it also requires the Government to act with restraint.”<sup>54</sup>

43. The Strathclyde Review acknowledges the importance of considering the role of Government: “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.” **We welcome this recognition of the many concerns that have been expressed by parliamentarians and other observers at the extent and use of delegated powers in recent years.**<sup>55</sup>
44. **Given the increasing concerns we and others have in respect of broad or poorly-defined powers, and the key role played by the House of Lords in the scrutiny of delegated legislation, any diminution of the House’s power to hold the Government to account over its use of delegated powers is of great concern. Weakening the House’s power to hold the Government to account for delegated legislation—making it easier for “elected Governments to secure their business in Parliament”—would increase the incentives for Governments to widen the use of delegated legislation.**

### The House of Commons

45. The Strathclyde Report envisages the House of Commons as having a “decisive role” in the process of approving delegated legislation. Yet we are concerned that no attempt has been made to determine what the effect would be on the overall quality of parliamentary scrutiny of delegated legislation if the Government, with its majority in the House of Commons, were able simply to disregard with little inconvenience the Lords’ views on delegated legislation.

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53 Oral evidence taken before the House of Commons Public Administration and Constitutional Affairs Committee, 19 January 2016 (Session 2015–16), [Q 78](#)

54 Oral evidence taken before the House of Commons Public Administration and Constitutional Affairs Committee, 19 January 2016 (Session 2015–16), [Q 21](#)

55 Hansard Society Ruth Fox and Joel Blackwell, *The Devil in the Detail*; ‘Conservative Government accused of ‘waging war’ on Parliament by forcing through key law changes without debate’, *The Independent* (18 January 2016): <http://www.independent.co.uk/news/uk/politics/government-accused-of-waging-war-on-parliament-by-forcing-through-key-legal-changes-without-debate-a6820176.html> [accessed 15 March 2016]

46. Our concern about relying solely or primarily on the House of Commons to scrutinise delegated legislation is twofold. First is the degree to which the Commons is able to devote time and resources to scrutinising secondary legislation. The Hansard Society, which conducted a thorough review of delegated legislation in its 2014 report *The Devil is in the Detail: Parliament and Delegated Legislation*, concluded that “a heavy burden of scrutiny responsibility falls on the House of Lords in large part because House of Commons procedures and the engagement of MPs is wholly inadequate.”<sup>56</sup>
47. The second problem is structural: except in extremely rare circumstances, statutory instruments cannot be amended. Hence the only option open to MPs if they have concerns about an instrument is to reject it. The Government can be forced by either House to compromise in relation to primary legislation; Government amendments are often tabled as a result of backbench or opposition pressure, and the Government may need to reach a compromise with the House of Lords as each House considers amendments made by the other (‘Ping Pong’). But as secondary legislation cannot be amended, there is no scope for compromise—and thus little opportunity for parliamentarians to affect the substance of secondary legislation. There are few incentives for MPs to devote precious time to scrutinise legislation which cannot be amended. In a House of Commons dominated by a Government majority, outright Government defeats are rare. This is particularly true in relation to delegated legislation: as we have noted, the last time the House of Commons rejected a statutory instrument was in 1979.<sup>57</sup> If it is assured of getting delegated legislation through the House of Commons, the threat of defeat in the House of Lords in exceptional circumstances is a major bulwark protecting effective scrutiny of the Government’s delegated legislation.
48. We recognise that, although there is little scope for compromise after an instrument has been laid, the threat of defeat in either House can cause the Government to change its position. While the House of Commons has not rejected a statutory instrument for over 35 years, it can have an impact by forcing a withdrawal; the Hunting Act 2004 (Exempt Hunting) (Amendment) Order 2015 was withdrawn in July 2015, reportedly over fears that it would be defeated on division.<sup>58</sup>
49. The consequence of altering the process by which secondary legislation is considered by the House of Lords was set out clearly by the Hansard Society: “any reform that curtails the role of the House of Lords in relation to delegated legislation risks turning an already flawed process into a farce.”<sup>59</sup> Given the challenges MPs face in scrutinising delegated legislation, the effect of diluting or weakening scrutiny in the Lords is to “empower the executive, not the House of Commons.”<sup>60</sup>
50. The thinking behind the Strathclyde Review is premised upon the notion that the balance of power between the two Houses must be adjusted in order

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56 Hansard society, Delegated Legislation: Frequently Asked Questions: <http://blog.org.uk/delegated-legislation-frequently-asked-questions>, [accessed 15 March 2016]

57 24 October 1979, the Paraffin (Maximum Retail Prices) (Revocation) Order 1979

58 ‘Government shelves foxhunting vote after SNP opposition’, *The Guardian* (14 July 2015): <http://www.theguardian.com/uk-news/2015/jul/14/foxhunting-vote-shelved-by-tories-in-face-of-snp-opposition> [accessed 25 Feb 2016]

59 The Constitution Unit, Reflections on the Strathclyde Review, <https://constitution-unit.com/2016/01/13/reflections-on-the-strathclyde-review/> [accessed 15 March 2016]

60 The Constitution Unit, Reflections on the Strathclyde Review, <https://constitution-unit.com/2016/01/13/reflections-on-the-strathclyde-review/> [accessed 15 March 2016]

that democratic concerns about the frustration of the will of the Commons might adequately be addressed. We note that Lord Lisvane, a former Clerk of the House of Commons, stated in evidence to the Secondary Legislation Scrutiny Committee that “It would be much better if the events of the last few weeks were to result in Parliament as a whole getting a better grip on the totality of how to deal with delegated legislation ... this is not about Lords and Commons; I see this as about Parliament and the Executive”.<sup>61</sup>  
**We agree.**

51. **We recognise the primacy of the House of Commons. But it is essential that any proposals to change the means by which delegated legislation is agreed by Parliament must be evaluated not only in terms of their effect on the balance of power between the two Houses, but between the Executive and Parliament as a whole.**
52. The Government stated that the Review’s remit was “to examine how to protect the ability of elected governments to secure their business in Parliament”,<sup>62</sup> and Lord Strathclyde stated in his foreword that he tried to balance parliamentary scrutiny against “the certainty that government business can be conducted in a reasonable manner and time”.<sup>63</sup> **We consider that the starting point for reviewing how Parliament scrutinises the Executive should not be how the Executive can secure its business. The focus should be on how to ensure that the actions of the Executive are scrutinised effectively and that parliamentary approval of delegated legislation—by members of both Houses of Parliament—is not a mere box-ticking exercise.**

#### The “role of the House of Lords with respect to delegated legislation”

53. At the conclusion of its ‘Background’ chapter, the Strathclyde Review states that “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.”<sup>64</sup>
54. This statement seems to us to rest on two assumptions. The first is the ‘confirmation’ that the role of the House of Lords in relation to delegated legislation is currently to ask the House of Commons to think again. That may or may not be considered to be an appropriate role for the House in principle, but given that the Lords has historically exercised a veto over delegated legislation it would seem proper to consider whether that should indeed be the entirety of its role before arriving at that conclusion. Indeed, at a purely practical level, the House of Lords may consider statutory instruments before they are debated by the Commons. It is therefore hard to understand how its role at present could be characterised simply as a mechanism by which the Commons might ‘think again’.
55. The second assumption is that the role of the House of Lords in relation to primary legislation is also to ask the Commons to “think again”. This seems to be us to be significantly underplaying not only the powers of the House

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61 Oral evidence taken before the Secondary Legislation Scrutiny Committee, 9 Feb 2016 (Session 2015–16), [Q 17](#)

62 Strathclyde Review, p 25

63 Strathclyde Review, p 3

64 Strathclyde Review, p 15

of Lords in relation to primary legislation, but also the role the Lords plays in practice. In most circumstances, the two Houses need to agree on the text of Bills for them to receive Royal Assent. While the Lords may usually give way when the Commons insist on their amendments at ‘Ping Pong’, the two Houses will often compromise to reach agreement. The Lords’ role in relation to primary legislation goes beyond simply asking the Commons to ‘think again’: the Lords is able to reject the Commons’ position and to offer amendments in lieu, multiple times if necessary. It uses this power, on occasion, to achieve a compromise. History has shown that, in all but a handful of cases,<sup>65</sup> the two Houses have chosen to compromise rather than invoke the Parliament Acts (by which the House of Commons can override the House of Lords), which involve a lengthy process and are not used lightly.

56. **We do not attempt in this report to reach a conclusion as to the proper role of the House of Lords in the delegated legislation process. It is a complicated matter which requires greater thought than a simple statement that purports to “clarify” and “confirm” the existing role of the Lords. The role of the House of Lords needs to be considered alongside the roles of the House of Commons and the Government. Full consideration needs to be given to the constitutional relationship between Parliament as a whole and the Executive.**

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65 The Parliament Acts 1911 and 1949 have been used seven times since 1911.

## CHAPTER 4: THE STRATHCLYDE REVIEW

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57. Before turning to the substance of the three options, we make a general comment about the approach of the Strathclyde Review. The Review was triggered by the House of Lords’ agreement to a motion to decline to consider the Tax Credits Regulations, leading to talk of a ‘constitutional crisis’.<sup>66</sup> While the Review set out a number of the controversies surrounding that motion as background, it did not consider whether it might be sufficient, or indeed more effective, to take action to address some of those issues individually, rather than changing the basis on which all statutory instruments are scrutinised by Parliament. We consider two such issues briefly.

### Financial privilege and delegated legislation

58. John Penrose MP and the Strathclyde Review both stressed the financial nature of the Tax Credits Regulations and argued that the Commons’ primacy over matters of tax and spending had been challenged. If Parliament accepts the Government’s concern in this regard—and that is clearly controversial in and of itself—there are various other means by which that concern could be addressed without changing the delegated legislation system in a way that affects all statutory instruments, including those that have no financial implications. For example, procedures for Commons-only scrutiny of statutory instruments already exist. A process of certification, akin to that already in place for bills, has been suggested as a solution.<sup>67</sup> We note that the Strathclyde Review recommends that the Government should carry out a review, in consultation with the 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”<sup>68</sup>—but this is in addition to wholesale reform of the Lords’ role with respect to delegated legislation.
59. **We believe the Government should consider the extent to which it is appropriate to be making legislative changes with significant budgetary implications through delegated legislation. The financial privilege of the Commons is already assured in relation to budget measures contained in finance bills.**

### The “ability of elected Governments to secure their business in Parliament”

60. This phrase in Mr Penrose’s statement seems to assume that the Government’s ability to secure its business has been, or is likely to be, impaired. Yet there seems to have been little consideration of whether existing mechanisms could be used to insist that the Lords reconsider. The Government could, for example, re-lay a defeated instrument in substantively the same form to insist on its passage following approval by the House of Commons, or lay a modified instrument by way of compromise.
61. **We do not believe the House of Lords’ rejection of the Tax Credits Regulations constituted a constitutional crisis. A single Government defeat on a statutory instrument, even one with such unusually significant financial implications, does not seem a sound foundation**

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66 ‘Lords v Commons: Tax credit battle gets constitutional’, *BBC News*, (27 October 2015): <http://www.bbc.co.uk/news/uk-politics-34614716> [accessed 10 March 2016]

67 See, for example, HL Deb, 13 January 2016, [col 329](#)

68 Strathclyde Review, p 23

**upon which to base significant and lasting reform of parliamentary scrutiny of delegated legislation.**

62. **The Strathclyde Review put forward a single broad recommendation that would affect parliamentary scrutiny of all delegated legislation. We believe that consideration of a range of more precise measures might have addressed the Government's concerns without recourse to such drastic measures as a statutory override power for the House of Commons.**

#### *The options in the Review*

63. We now turn to consider the specific options set out in the Strathclyde Review. These are as follows:

Option 1: to remove the House of Lords from statutory instrument procedure altogether.

Option 2: for the House of Lords to pass a resolution or new Standing Orders setting out how it will use its powers in relation to statutory instruments and to "revert to a position where the veto is left unused".

Option 3: to set out in statute a procedure whereby the Commons can insist on the passage of secondary legislation, in effect overriding the House of Lords.

#### *The effects of weakening the Lords' powers over delegated legislation*

64. All three options have a common theme: they would weaken the Lords' powers over delegated legislation to a greater or lesser degree. All three options would, in effect, remove the House's power to veto delegated legislation (whether by removal of the Lords from the process altogether, by binding resolution or by statute allowing the House of Commons to override the Lords). We note the following effects which might occur should any of the three options be enacted (although in some cases to a greater extent were option 1 to be chosen, and to a lesser extent were option 3 preferred).
65. First, **removing or weakening the Lords' powers over delegated legislation might encourage the Government to draft delegated powers as broadly as possible, so that secondary legislation could be used to pass measures which might otherwise face greater opposition in the Lords as primary legislation.** This would risk encouraging the use of secondary legislation which would, in turn, exacerbate the constitutional concerns mentioned above (see paragraphs 37-44).
66. Second, as the Strathclyde Review itself acknowledges, the House of Lords plays a valuable role in relation to the scrutiny of secondary legislation. **There is a significant risk that if the Lords were to be deprived of any real power in respect of statutory instruments the impact of its scrutiny function would be diminished.** As noted above (see paragraph 27), the Lords has only rarely exercised its power to annul or reject statutory instruments. However, the existence of the power and the possibility of its exercise form the context in which delegated legislation is drafted. Should that power be absent it may well affect the extent to which the views and concerns of the Lords were considered during the drafting process.



67. **Third, if the Government could simply override the House of Lords at will in respect of delegated legislation, it would imply that secondary legislation warrants less scrutiny than primary legislation where the Lords' significant power of delay means its wishes cannot simply be ignored. This would be particularly concerning with regard to Henry VIII powers which amend or repeal primary legislation enacted by both Houses.** Given our concerns about the extent and use of delegated powers granted to ministers, this position is hard to justify. The mere fact that a given measure is legislated for by delegated legislation rather than in primary legislation does not necessarily mean that it is a matter of technical detail that requires less in terms of scrutiny. Should steps be taken to ensure that the powers granted to ministers by primary legislation were more detailed, with less latitude given to them, then this argument might be deprived of some of its force—as perhaps was intended by the statement in the Review that primary legislation should contain “appropriate detail”. However, in the light of the vagueness of the “appropriate detail” criterion, and the fact that any changes would have no effect on existing regulation-making powers, it does not appear to us that this argument yet carries sufficient weight to justify reducing the level of scrutiny of delegated legislation.
68. **Fourth, if the Lords' powers over delegated legislation were to be significantly diminished then it might become more assertive when considering the delegation of powers in primary legislation.** An unintended consequence might therefore be to change the site of possible confrontation between the two Houses in relation to delegated legislation. For instance, if the House of Lords were to be denied any means by which to block or significantly delay statutory instruments in exceptional circumstances, the House might consider it appropriate to assert itself to a greater extent in respect of Bills that, if enacted, would confer particularly broad or potentially controversial delegated powers. This might increase the time taken in scrutinising primary legislation and, in particular, make the Lords more assertive on such matters at ‘Ping Pong’, should it feel the Commons were being unreasonable in dismissing its concerns.
69. Finally, as we note in paragraphs 35-36 above, these proposals must be considered in the context of the balance of power between Parliament and the Executive. **We believe that a weakening of the House of Lords' powers over delegated legislation, in particular when unaccompanied by a strengthening of the House of Commons' role in respect of scrutinising statutory instruments, will result in a significant shift of power from Parliament to the Executive.**
70. These concerns arise in respect of all the three options set out in the Strathclyde Review. We now make some further, more specific, comments about the three options in turn.

### *Option 1*

71. We do not intend to comment on this option in detail—the Strathclyde Review itself deprecates option 1 by reference to the following compelling arguments against it:

“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.”<sup>69</sup>

72. In addition to removing the Lords’ veto over delegated legislation, option 1 would prevent the House from even expressing an opinion on delegated legislation, or indeed from asking the House of Commons to think again. **Option 1 is clearly unacceptable. It would significantly curtail the capacity and responsibility of Parliament to oversee the Executive.**

*Option 2*

73. The Review concludes that limiting the Lords’ role by means of adopting a binding resolution or new Standing Orders would be inadequate because “it is difficult to envisage any agreement being reached or accepted widely enough to be an effective inhibition”.<sup>70</sup> The Review reaches this conclusion because, it says, “a wide range of different views has been expressed about what the convention” currently is concerning the Lords’ role in relation to delegated legislation.<sup>71</sup>
74. The fact that there is presently disagreement about when the House’s veto can properly be deployed does not mean that an agreement could not be reached. We note that the Royal Commission on Reform of the House of Lords, the Joint Committee on Conventions and the Leader’s Group chaired by Lord Goodlad were all able to reach conclusions on what the ‘conventions’ were or should be. Moreover, if such agreement were reached, the fact that there is currently a diversity of views about the circumstances in which the veto can legitimately be used would cease to be relevant, and the new agreement would become the standard by which the House’s future behaviour would be governed.
75. There is, however, a more fundamental point. The Strathclyde Review concludes that a resolution would be inadequate because it would be impossible to agree sufficiently precise wording. The implicit assumption is that only a rigid, cut-and-dried rule would be sufficient because leaving scope for flexibility or the exercise of judgement on the part of the House of Lords would be undesirable. In contrast, the Review proposes that in order to mitigate the risk of over-use of the statutory override proposed in option 3, its preferred approach, the Government would need to ensure that bills were drafted with “an appropriate level of detail” in the first place.<sup>72</sup> This assumes that Government, in the drafting of bills, can be expected to exercise restraint by reference to a vague and open-ended notion such as ‘appropriate detail’ in a way that the House of Lords, according to the Review’s analysis of option 2, cannot. This assumption sits in tension with the fact that elements of the relationship between the two Houses have long been governed effectively by convention and established practice.

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69 Strathclyde Review, p 16

70 Strathclyde Review, p 17

71 Strathclyde Review, p 17

72 Strathclyde Review, p 25

76. **We are not persuaded by the Strathclyde Review’s reasons for rejecting a way forward based on convention or established practice, not least because elements of the relationship between the two Houses have been effectively governed in such ways for many years. Option 2 would not, however, address the wider concerns we have expressed earlier in this report. Those concerns cannot be addressed by any proposals that consider the powers of the House of Lords in isolation.**

*Option 3*

77. The Strathclyde Review recommends option 3, a statutory procedure for the Commons to override the Lords, arguing that:

“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.”<sup>73</sup>

78. The Review goes on to argue that this should be done by means of legislation permitting the House of Commons to override the Lords should it veto a statutory instrument, suggesting that this would be equivalent to the current position with regard to primary legislation. In one respect, however, there is an important difference between the Lords’ present powers in respect of primary legislation under the Parliament Acts and the Lords’ proposed powers in respect of statutory instruments. Whereas the Parliament Acts enable the Lords to hold up primary legislation for one year, the Strathclyde Review proposes no fixed period of delay in relation to statutory instruments rejected by the Lords. An objection registered by the Lords to a statutory instrument would therefore be subject to the possibility of rapid override by the Commons.

79. The Review dismisses any suggestion that the Lords should be able to delay delegated legislation for a fixed (or indeed any) period:

“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 ... 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.”<sup>74</sup>

This raises two issues, one practical and one of principle.

80. As to the first, the assumption that a fixed period of delay could not be built into any new system for parliamentary scrutiny of delegated legislation is puzzling. Option 3 would require primary legislation to be adopted. If primary legislation were to be enacted, we see no insurmountable reason why a fixed period of delay could not be provided for whilst anticipating and avoiding the problems referred to in the Strathclyde Review in the passage set out above. Indeed, the Royal Commission on House of Lords Reform proposed that the Lords’ power to block SIs should be replaced with a three-

73 Strathclyde Review, p 15

74 Strathclyde Review, p 20

month power of delay,<sup>75</sup> while the Leader’s Group on Working Practices, chaired by Lord Goodlad, suggested a delay of at least one month.<sup>76</sup>

81. As to principle, it is unclear why the Strathclyde Review believes the Lords’ powers in respect of secondary legislation should be fundamentally misaligned with the Lords’ powers in respect of primary legislation. In particular, assuming that any technical obstacles to giving the Lords a power to impose a fixed period of delay were dealt with, it is unclear why the Lords should not be equipped to delay the adoption of secondary legislation for a fixed significant period, so that the Commons faces the choice of compromise or delay, as in the case of primary legislation. The Review states that “[t]he Commons needs the ability to override the Lords rapidly in cases of urgency”.<sup>77</sup> It does not, however, explain why that need should arise in respect of delegated but not primary, legislation. Nor is there any evidence to suggest that the House of Lords has used its existing powers in relation to delegated legislation in a way that has caused difficulty in situations in which urgent legislative action is required.
82. The Review goes on to state that:
- “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.”
83. The decision on whether a delaying power would be appropriate depends on what the underlying role of the Lords is considered to be. If the aim, as the Review argues, is to make the Commons debate (and the Government consider) a statutory instrument once again in the light of the Lords’ concerns, then that might be achieved by requiring the Government to make time for a substantive debate in the Commons—although a delay would be needed for the Commons properly to consider the substance of debate in the Lords and to allow time for the various reactions of the public and civil society to be heard. If, however, the aim is to give the Lords leverage, such that the Government would be more likely to re-lay the statutory instrument in a form that met at least some of the Lords’ concerns, then a power to delay for a fixed period would be necessary.
84. As a final point, we note that the Review takes it for granted that the absence of a delaying power would not reduce the likelihood of “proper consideration [by the Commons] of the Lords’ decision, and a serious reconsideration of the instrument”.<sup>78</sup> The position adopted in the Review boils down to trusting that the Government and the House of Commons would take seriously the Lords’ objection and give due reconsideration to the instrument in question

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75 Cabinet Office, *A House for the Future: Reform of the House of Lords*, Cm 4534, January 2000, para 7.36: <https://www.gov.uk/government/publications/a-house-for-the-future-royal-commission-on-the-reform-of-the-house-of-lords> [accessed 15 March 2016]

76 Leader’s Group on Working Practices, *Report* (Report of Session 2010–11, HL Paper 136) para 153; the Group recommended that the House should ask the Government to ‘think again’ when instruments were rejected by the House of Lords, which would then resolve not to reject the instrument again if laid after a specific time interval (of at least one month).

77 Strathclyde Review, p 20

78 Strathclyde Review, p 20

in the light of the Lords' concerns. If this is what is intended, then there is no reason why the arrangements for reconsideration by the Commons should not be formalised, for example by requiring that any reconsideration of an instrument following an objection by the Lords should take place by way of a full debate on the floor of the House of Commons. By not proposing this, the Strathclyde Review implicitly assumes that the Government and the House of Commons should be trusted to exercise good judgement and appropriate restraint in relation to matters of this nature. It is striking, however, that the Review, by rejecting option 2 out of hand, is not prepared to rely upon the exercise of such judgement and restraint by the House of Lords.

85. **If the Lords' powers over delegated legislation were sought to be constrained by statute without proper consideration of the wider context, then we would expect the following matters to be addressed in detail by both Parliament and the Government:**

- **What steps would be taken to ensure that delegated powers proposed in primary legislation are set out in appropriate detail, sufficiently narrow in scope, and restricted to matters of detail rather than of principle;**
- **Whether the exercise of Henry VIII powers, which permit the amendment or repeal of primary legislation, should still be subject to a Lords veto or to a modified procedure;**
- **Whether the Lords' powers would be intended to require the Government to reconsider its stance following Lords' opposition to an instrument, or simply to prompt reconsideration by the House of Commons;**
- **What the advantages and disadvantages would be of incorporating a fixed period of delay prior to Commons reconsideration should the Lords reject a statutory instrument;**
- **Whether and how Commons procedure would be altered to ensure that a statutory instrument rejected by the House of Lords would be given an appropriate degree of scrutiny on reconsideration;**
- **Whether any new procedures would apply only to powers delegated in the future, or whether they would apply to powers already delegated under an assumption that they would be subject to bicameral approval;**
- **Whether and how Commons financial privilege would be specifically extended to cover statutory instruments.**

## CHAPTER 5: THE WAY FORWARD

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86. The system of delegated legislation, as it operates at present, raises concerns that need to be addressed. We do not agree, however, that the assumptions inherent in the remit set for the Strathclyde Review concerning the proper role of the House of Lords and the overriding importance of the Government securing its business should be accepted without due consideration. Nor do we believe the Review, limited as it was by its remit, asks the right questions about the delegated legislation process. **Whilst the Strathclyde Review might be treated as a starting point for further consideration of the use and scrutiny of delegated legislation, it does not in our view provide sufficient basis for changing how Parliament holds the Executive to account.**
87. The challenges faced by Parliament in scrutinising the enormous volume of statutory instruments are exacerbated by an increase in broadly-drafted and poorly-defined powers in primary legislation and a willingness by successive governments to use delegated legislation to address issues of policy and principle. Given the challenges faced by Parliament in scrutinising delegated legislation, these developments have strengthened the Executive at the expense of Parliament.
88. The role of the House of Lords in the scrutiny of delegated powers has been, and continues to be, vital. The House of Lords devotes significant resources to scrutinising the conferral and exercise of delegated powers through the Secondary Legislation Scrutiny Committee and the Delegated Powers and Regulatory Reform Committee—select committees which have no equivalent in the House of Commons. The Lords also devotes far more time to debating statutory instruments on the floor of the House.<sup>79</sup> The Commons will always have a fundamental role to play, as the elected chamber, in holding the Government to account; but it does not follow that the role of the House of Lords can be weakened or altered without consequence. Together, the two Houses hold the Executive to account. Diminishing the role of the House of Lords in respect of delegated legislation weakens Parliament’s overall scrutiny of the Executive.
89. In 1932 the Committee on Ministers’ Powers stated that “We doubt ... whether Parliament itself has fully realised how extensive the practice of delegation has become, or the extent to which it has surrendered its own functions in the process, or how easily the practice might be abused”.<sup>80</sup> Those words might apply to Parliament even more today than they did then. **We trust that both Houses of Parliament will take this opportunity to give proper consideration to the whole system of delegated legislation, with a view to ensuring that Parliament retains and exercises appropriate oversight over its legislative authority. It is equally important that Government recognises the need to exercise restraint in its use of delegated powers, and takes care to ensure that any proposals for delegated powers are appropriately detailed and narrow in scope.**

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79 Hansard Society, Ruth Fox and Joel Blackwell *The Devil is in the Detail*, p 175

80 Committee on Ministers’ Powers, *Report*, Cmd 4060, April 1932, p 24. The Committee was established following the publication of a book by the then-Lord Chief Justice, Lord Hewart, entitled *The New Despotism* which criticised the growing use of delegated legislation. Following the publication of that book, Parliament appointed the Committee on Ministers’ Powers, chaired by the Earl of Donoughmore, to consider the use of delegated powers in more detail.

90. **We recognise the leading role that elected members of the House of Commons play in holding the Government to account. Consequently, effective scrutiny of delegated legislation depends as much on the House of Commons as the Lords. We do not seek to prescribe how Parliament and the Government should take forward a more comprehensive review of delegated legislation. Both Houses of Parliament, however, either together or separately, need to play an active role in considering how powers should be delegated appropriately in primary legislation, how those powers should be exercised by Government and the way in which both Houses scrutinise and approve delegated legislation.**
91. Our final remarks relate to process. This Committee has repeatedly stressed that the potential impact on existing constitutional arrangements should be considered when constitutional change is proposed.<sup>81</sup> It is also vital that changes to the constitution are not rushed through without appropriate consultation and deliberation.
92. We have recently expressed grave concerns about the process by which the Scotland Bill currently passing through Parliament was conceived and taken forward by the Government.<sup>82</sup> We hope that in this instance, the latest in a series of constitutional proposals brought forward as a response to political pressure rather than constitutional need, a proper process will be followed. As this Committee stated in its report *The Process of Constitutional Change*:
- “We regard it as essential that, prior to the introduction of a bill which provides for significant constitutional change, the government:
- consider the impact of the proposals upon the existing constitutional arrangements,
  - subject the proposals to detailed scrutiny in the Cabinet and its committees,
  - consult widely,
  - publish green and white papers, and
  - subject the bill to pre-legislative scrutiny.”<sup>83</sup>
93. **The use and scrutiny of delegated legislation is at the heart of the delicate balance of power between Parliament and the Executive. Change must be the result of careful and thorough consideration, and not undertaken in haste or for the wrong reasons.**

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81 See Constitution Committee, *The Process of Constitutional Change*, (15th Report, Session 2010–12, HL Paper 177), para 29 and *Proposals for the devolution of further powers to Scotland* (10th Report, Session 2014–15, HL Paper 145), para 22

82 Constitution Committee, *Proposals for the devolution of further powers to Scotland*, (10th Report Session 2014–15, HL Paper 145) paras 47–49, and *Scotland Bill*, (6th Report, Session 2015–16, HL Paper 59), para 25

83 Constitution Committee, *The Process of Constitutional Change*, Executive Summary

## SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

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### Background

1. 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. We are wary of describing the House’s pattern of behaviour in relation to statutory instruments as constituting a constitutional convention at all; it might better be described as long-established practice. (Paragraph 26)

### The remit of the Strathclyde Review

2. A focus on inter-House relations ignores the other, vital, balance of power that would be altered should changes be made to statutory instrument procedure in the House of Lords: the balance of power between Parliament and the Executive. By tasking Lord Strathclyde with considering the balance of power between the two Houses of Parliament, the Government focused his Review on the wrong questions. We believe that consequently it addressed the wrong issues. (Paragraph 35)
3. The Government can pass legislative proposals with greater ease and with less scrutiny if it can do so as delegated, rather than primary, legislation. It is in this context that proposals to weaken the powers of the House of Lords should be considered. (Paragraph 36)
4. We welcome the Strathclyde Review’s recognition of the many concerns that have been expressed by parliamentarians and other observers at the extent and use of delegated powers in recent years. (Paragraph 43)
5. Given the increasing concerns we and others have in respect of broad or poorly-defined powers, and the key role played by the House of Lords in the scrutiny of delegated legislation, any diminution of the House’s power to hold the Government to account over its use of delegated powers is of great concern. Weakening the House’s power to hold the Government to account for delegated legislation—making it easier for “elected Governments to secure their business in Parliament”—would increase the incentives for Governments to widen the use of delegated legislation. (Paragraph 44)
6. We recognise the primacy of the House of Commons. But it is essential that any proposals to change the means by which delegated legislation is agreed by Parliament must be evaluated not only in terms of their effect on the balance of power between the two Houses, but between the Executive and Parliament as a whole. (Paragraph 51)
7. We consider that the starting point for reviewing how Parliament scrutinises the Executive should not be how the Executive can secure its business. The focus should be on how to ensure that the actions of the Executive are scrutinised effectively and that parliamentary approval of delegated legislation—by members of both Houses of Parliament—is not a mere box-ticking exercise. (Paragraph 52)
8. We do not attempt in this report to reach a conclusion as to the proper role of the House of Lords in the delegated legislation process. It is a complicated matter which requires greater thought than a simple statement that purports to “clarify” and “confirm” the existing role of the Lords. The role of the House of Lords needs to be considered alongside the roles of the House of Commons and the Government. Full consideration needs to be given to the



constitutional relationship between Parliament as a whole and the Executive. (Paragraph 56)

### **The Strathclyde Review**

9. We believe the Government should consider the extent to which it is appropriate to be making legislative changes with significant budgetary implications through delegated legislation. The financial privilege of the Commons is already assured in relation to budget measures contained in finance bills. (Paragraph 59)
10. We do not believe the House of Lords' rejection of the Tax Credits Regulations constituted a constitutional crisis. A single Government defeat on a statutory instrument, even one with such unusually significant financial implications, does not seem a sound foundation upon which to base significant and lasting reform of parliamentary scrutiny of delegated legislation. (Paragraph 61)
11. The Strathclyde Review put forward a single broad recommendation that would affect parliamentary scrutiny of all delegated legislation. We believe that consideration of a range of more precise measures might have addressed the Government's concerns without recourse to such drastic measures as a statutory override power for the House of Commons. (Paragraph 62)
12. Removing or weakening the Lords' powers over delegated legislation might encourage the Government to draft delegated powers as broadly as possible, so that secondary legislation could be used to pass measures which might otherwise face greater opposition in the Lords as primary legislation. (Paragraph 65)
13. There is a significant risk that if the Lords were to be deprived of any real power in respect of statutory instruments the impact of its scrutiny function would be diminished. (Paragraph 66)
14. If the Government could simply override the House of Lords at will in respect of delegated legislation, it would imply that secondary legislation warrants less scrutiny than primary legislation where the Lords' significant power of delay means its wishes cannot simply be ignored. This would be particularly concerning with regard to Henry VIII powers which amend or repeal primary legislation enacted by both Houses. (Paragraph 67)
15. If the Lords' powers over delegated legislation were to be significantly diminished then it might become more assertive when considering the delegation of powers in primary legislation. (Paragraph 68)
16. We believe that a weakening of the House of Lords' powers over delegated legislation, in particular when unaccompanied by a strengthening of the House of Commons' role in respect of scrutinising statutory instruments, will result in a significant shift of power from Parliament to the Executive. (Paragraph 69)
17. Option 1 is clearly unacceptable. It would significantly curtail the capacity and responsibility of Parliament to oversee the Executive. (Paragraph 72)
18. We are not persuaded by the Strathclyde Review's reasons for rejecting a way forward based on convention or established practice, not least because elements of the relationship between the two Houses have been effectively governed in such ways for many years. Option 2 would not, however, address

the wider concerns we have expressed earlier in this report. Those concerns cannot be addressed by any proposals that consider the powers of the House of Lords in isolation. (Paragraph 76)

19. If the Lords' powers over delegated legislation were sought to be constrained by statute without proper consideration of the wider context, then we would expect the following matters to be addressed in detail by both Parliament and the Government: (Paragraph 85)
  - What steps would be taken to ensure that delegated powers proposed in primary legislation are set out in appropriate detail, sufficiently narrow in scope, and restricted to matters of detail rather than of principle;
  - Whether the exercise of Henry VIII powers, which permit the amendment or repeal of primary legislation, should still be subject to a Lords veto or to a modified procedure;
  - Whether the Lords' powers would be intended to require the Government to reconsider its stance following Lords' opposition to an instrument, or simply to prompt reconsideration by the House of Commons;
  - What the advantages and disadvantages would be of incorporating a fixed period of delay prior to Commons reconsideration should the Lords reject a statutory instrument;
  - Whether and how Commons procedure would be altered to ensure that a statutory instrument rejected by the House of Lords would be given an appropriate degree of scrutiny on reconsideration;
  - Whether any new procedures would apply only to powers delegated in the future, or whether they would apply to powers already delegated under an assumption that they would be subject to bicameral approval;
  - Whether and how Commons financial privilege would be specifically extended to cover statutory instruments.

### **The way forward**

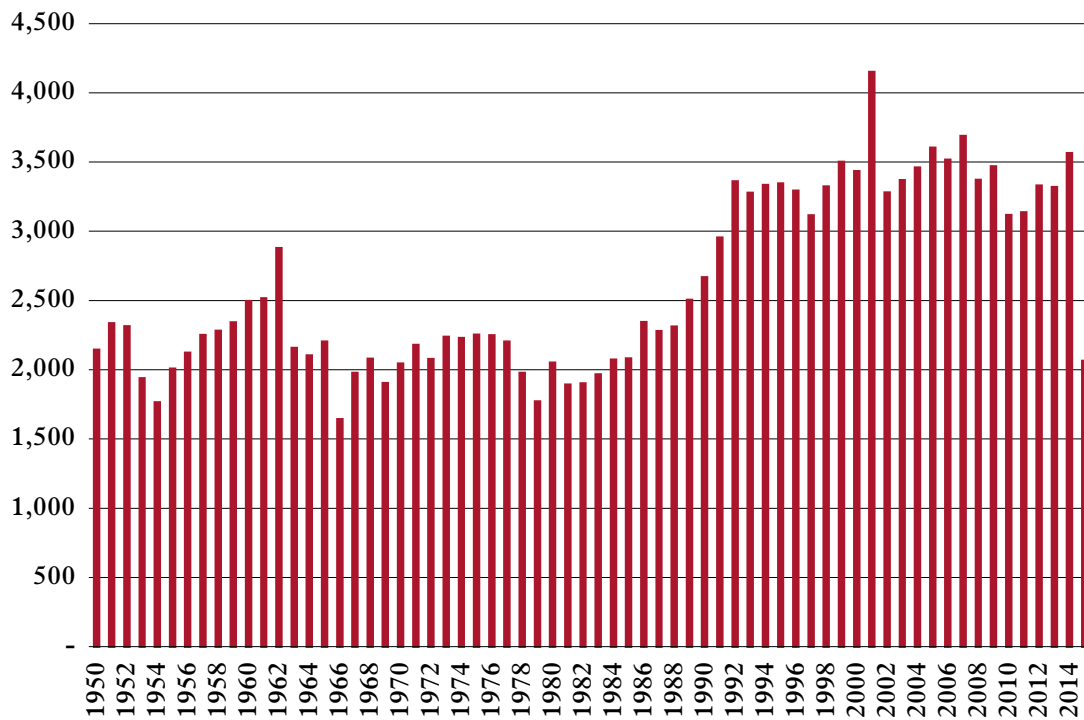
20. Whilst the Strathclyde Review might be treated as a starting point for further consideration of the use and scrutiny of delegated legislation, it does not in our view provide sufficient basis for changing how Parliament holds the Executive to account. (Paragraph 86)
21. We trust that both Houses of Parliament will take this opportunity to give proper consideration to the whole system of delegated legislation, with a view to ensuring that Parliament retains and exercises appropriate oversight over its legislative authority. It is equally important that Government recognises the need to exercise restraint in its use of delegated powers, and takes care to ensure that any proposals for delegated powers are appropriately detailed and narrow in scope. (Paragraph 89)
22. We recognise the leading role that elected members of the House of Commons play in holding the Government to account. Consequently, effective scrutiny of delegated legislation depends as much on the House of Commons as the Lords. We do not seek to prescribe how Parliament and the Government should take forward a more comprehensive review of

delegated legislation. Both Houses of Parliament, however, either together or separately, need to play an active role in considering how powers should be delegated appropriately in primary legislation, how those powers should be exercised by Government and the way in which both Houses scrutinise and approve delegated legislation. (Paragraph 90)

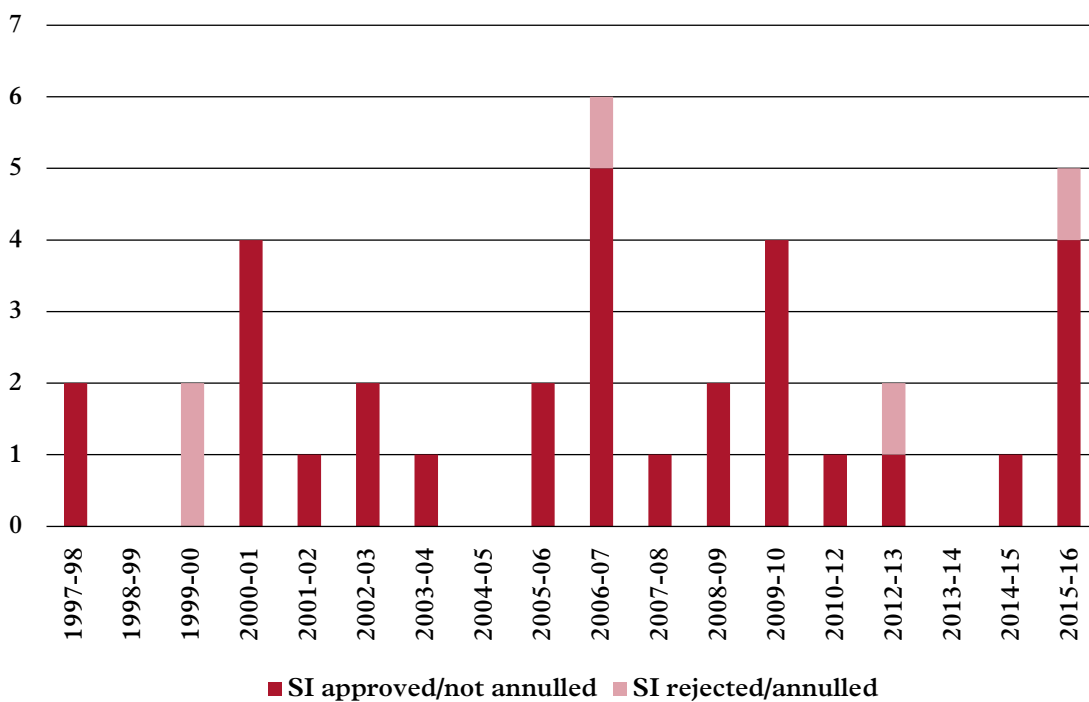
23. The use and scrutiny of delegated legislation is at the heart of the delicate balance of power between Parliament and the Executive. Change must be the result of careful and thorough consideration, and not undertaken in haste or for the wrong reasons. (Paragraph 93)

**APPENDIX 1: DELEGATED LEGISLATION IN NUMBERS**

**Figure 1: Total number of the UK Statutory Instruments, by year, 1950–2015<sup>84</sup>**



**Figure 2: Instruments subject to divisions on fatal motions, May 1997 to February 2016<sup>85</sup>**



84 House of Commons Library, [Acts and Statutory Instruments: the volume of UK legislation 1950 to 2015](#), CBP-7438, Tables 1a and 1b.

85 The three divisions on the Tax Credits Regulations are treated here as a constituting a single defeat on a fatal motion as they relate to only one instrument. The graph includes the Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015, which were approved in an unwhipped division in February 2015.

Table 1: House of Lords business relating to delegated legislation, 2004–05 to 2014–15<sup>86</sup>

Session	Chamber business					Grand Committee				
	Motions to approve	Time taken (Hr:min)	Motions to annul	Time taken (Hr:min)	Other proceedings	Time taken (Hr:min)	Number of instruments	Time taken (Hr:min)		
2004-5	102	23:06	2	1:03	3	1:06	22	7:16		
2005-6	219	42:09	11	6:42	7	5:36	106	26:21		
2006-7	169	35:21	6	7:50	5	5:21	92	34:56		
2007-8	185	40:14	17	9:16	6	5:06	103	36:23		
2008-9	187	27:44	3	5:41	9	6:29	124	41:39		
2009-10	145	27:41	2	2:40	9	6:44	92	38:23		
2010-12	258	38:07	8	9:26	21	15:49	205	80:53		
2012-13	121	22:46	1	2:28	10	10:22	161	67:16		
2013-14	181	17:06	2	2:14	9	12:14	174	56:57		
2014-15	315	22:01	1	0:22	8	5:12	286	79:35		
<b>Total</b>	<b>1882</b>	<b>296:15</b>	<b>53</b>	<b>47:42</b>	<b>87</b>	<b>73:59</b>	<b>1365</b>	<b>479:39</b>		