



Public Administration and Constitutional Affairs Committee (PACAC)

Oral evidence: Strathclyde Review, HC 752

Tuesday 19 January 2016

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Members present: Mr Bernard Jenkin (Chair); Ronnie Cowan; Oliver Dowden; Paul Flynn; Mrs Cheryl Gillan; Kelvin Hopkins; Mr David Jones; Gerald Jones; Tom Tugendhat; Mr Andrew Turner.

Questions 1-110

Witness: **Professor Meg Russell**, Director, Constitution Unit, University College London, gave evidence.

Q1 Chair: Can I welcome our witness to this session on the Strathclyde Review of Secondary Legislation in the House of Lords? Could you identify yourself for the record, please?

Professor Russell: I am Professor Meg Russell from the Constitution Unit at University College London.

Chair: Thank you very much for being with us. We will ask swift and brisk questions, and if you can keep your answers swift and brisk as well, that would assist us. I may have to pull you up if I feel the answers are going on too long, or the questions.

Q2 Mrs Cheryl Gillan: Professor Russell, what is your understanding of the present conventions that regulate the House of Lords' ability to reject statutory instruments?

Professor Russell: I think our best source on this is the Joint Committee on Conventions that met in 2006, that indicated that its view was that there was a convention that the House of Lords should not routinely—I am not quoting from the report here—reject statutory instruments, but that it retained the right to do so in exceptional circumstances, and it indicated what some of those exceptional circumstances might be.

Q3 Mrs Cheryl Gillan: How contested do you think these conventions are?

Professor Russell: Pretty contested, particularly between the Houses, I suppose. We have had a lot of debate on this recently. We obviously had major debate on the tax credit regulations in the Lords, and we have had discussions in this House and the other House on the Strathclyde review—we had a major debate last week on the Strathclyde review. I am getting the impression that the House of Lords is forming a rather firmer opinion,

having been a little bit divided, that there has not really been a breach of convention here, reading last week's debate. There has been less debate in the House of Commons; I do not know what the mood is here now. You have had less opportunity to express your views. But contested, certainly, yes, and if you read the speech by Professor Philip Norton, the Conservative constitutional expert, in the debate last week, he makes the point very firmly that a contested convention is not a convention and, therefore, as soon as there is disagreement, in effect the convention does not exist.

Q4 Mrs Cheryl Gillan: Why do you think previous attempts to reform the Lords' powers over statutory instruments have failed?

Professor Russell: To give context, I have been studying this topic for 18 years. I joined UCL 18 years ago to conduct a project on reform of the House of Lords. Reform of the House of Lords is always with us. Eighteen years is a short time, as many of you know, in the history of debates about Lords reform. You can trace it back 300 years to the first attempt to limit prime ministerial patronage over the Lords, for example, in 1719, so way back before 1911.

Eighteen years is a fairly short time, but in that time it is striking that debates—and I have commented on this frequently over the years—have very much been dominated by concerns about the composition of the House of Lords, and the powers of the House of Lords have been fairly uncontroversial during that period. They came to the fore rather more in the debates on the Clegg Bill in 2012 because, faced with a Bill to introduce election to the House of Lords, people began to get concerned that maybe an elected House of Lords, or a partially elected House of Lords, would use its powers rather more, and that maybe there was a need to trim the existing powers.

In the context of those 18 years of debate, there has been very little discussion about power. There was a proposal in the Wakeham commission report that you might want to talk about, there was a proposal from Lord Goodlad's leaders group on Lords working practices, but it has never really been at the forefront. I would say now—this is a point I would make very firmly to the Committee—that while this is a very valid topic for discussion and I am very happy to discuss it for as long as you would like, I do not think it is the most burning problem facing the House of Lords. I think the most burning problem remains a compositional problem and the constitutional anomaly of unregulated prime ministerial patronage to the Lords, which is leading to its size growing and its reputation declining.

Q5 Mrs Cheryl Gillan: So in fact, the discussion on statutory instruments is really another way of getting at discussing the composition of the Lords, to be truthful, which has remained controversial over hundreds of years.

Professor Russell: Not for everybody. There are people who have genuine concerns here, and here is one thing that is interesting in this debate. I do not know whether you have seen the front page of *The Independent* today; it is quite astonishing that the front page of *The Independent* is dedicated to the question of statutory instruments. Who ever would have thought the front page of a newspaper would focus on that? I think that this debate touches on questions of the Lords, and of course it is related to the compositional questions, but it is also leading us into a bigger question about the legislative process and the appropriateness of delegated legislation and whether the system is too complicated,

whether the powers that are delegated are too great and so on. That is a question very much for the Commons as well as for the Lords.

Q6 Mrs Cheryl Gillan: Also the effectiveness of the scrutiny of delegated legislation, which has always been a huge issue.

Professor Russell: Absolutely.

Q7 Mrs Cheryl Gillan: I do not know whether you use the word “routine” or “regular” defeat of statutory instruments, but I think statutory instruments have only been defeated five times in 50 years. Is that correct?

Professor Russell: It is approximately that, yes. We have had one defeat in this Parliament on tax credits; we had one defeat in the last Parliament in 2012 on a matter that I don’t wholly remember, I confess, but one in the 2010 to 2015 Parliament; we had one in the 2005 to 2010 Parliament on the Manchester super-casino; we had one back in 2000 in the 1997 to 2001 Parliament on the arrangements for the London mayoral elections; and one in 1968, and that is it.

Q8 Mrs Cheryl Gillan: In the same vein as “one swallow doesn’t a summer make”, were you surprised that one defeat triggered a whole review?

Professor Russell: Well, tempers had got very high. I was a little surprised at the way it was handled, although not entirely. One of the things that I commented on, which is another crucial piece of context for all of this, was when I published something immediately after the 2010 election saying, we are now in uncharted political waters. We have a majority Conservative Government, albeit a slender majority in the Commons, facing a House of Lords that is potentially politically hostile to it, in which the Labour Opposition can potentially join forces with others to outnumber the Conservative Government.

This is a new situation, and I think it is taking Ministers some time to get used to that situation. I think it has also taken the Opposition some time to get used to that situation, and Lord Strathclyde acknowledged this in his speech in the debate last week. This is a new situation for the Conservatives. It is also a new situation for Labour, and indeed for the Liberal Democrats, who are very important voters in the Lords.

In that sense it is not surprising, because this is new and people are finding their feet in this new situation, but I think what was potentially surprising was that Ministers raised the temperature so much on this issue so early, because this is not by any means the first time that there have been rumblings in the House of Lords that a statutory instrument is problematic and that it might be rejected. What has historically happened is that Ministers have thought about it before the vote and withdrawn the instrument, and sometimes relaid an amended instrument in order to defuse the situation, whereas the Government’s approach here was that they wanted to have the fight. Once tempers had got that raised, perhaps it is not surprising that you end up with a review to see what is going on.

Q9 Mrs Cheryl Gillan: It is fair to say that the drive came from Ministers, and it was surprising that the drive was quite so vociferous to move to a review. Is that what you are inclined to say?

Professor Russell: I do not have any difficulty with there being a review. I think it is a perfectly reasonable thing to do. It is an important area. It is a very thorough review. It presents us with some nice evidence that we can discuss. It is difficult to criticise Ministers for deciding that there should be a review, but the reason that this became such a contested topic was perhaps in the end because Ministers were not adequately aware of the risk of defeat and the fact that speaking out against the Lords publicly would not necessarily make the problem go away.

Q10 Mrs Cheryl Gillan: They had not done their homework, is what you are saying?

Professor Russell: It is the job of the business managers to advise Ministers as to what they can get through Parliament, and somehow Ministers seemed to have the impression that by pushing ahead very loudly they would be able to get this through, and it did not work.

Q11 Mrs Cheryl Gillan: Coming to the Strathclyde proposals, with the current setup, to what extent is the agreement of the House of Lords required to implement those proposals?

Professor Russell: That depends on which route you take. Ultimately, I would say the consent of the House of Lords is required politically, whichever route you take. I am inclined to think that the second option is the most viable, although there is a blurry line between the second option, which is doing it by convention, by resolution, and the third option. The third option, as laid out in the Strathclyde report, would require legislation, and clearly legislation has to pass through both Houses. If the House of Lords does not consent to that legislation, then the House of Commons can, if necessary, in the end push it through using the Parliament Act without the House of Lords' consent.

But I think Ministers need to tread very carefully. I published something just before Christmas saying that I think there are dangers here, not only for the Lords but also for the Government, because if the Government seek to proceed without the consent of the House of Lords, including via a Bill pushed through under the Parliament Act, there are all sorts of difficulties that the House of Lords could make down the line, in future, for Government. Bear in mind, for example, even supposing that you could get that Bill through, that delegated powers are delegated by somebody. They are delegated by Parliament in primary legislation. If the House of Lords was very unhappy with the settlement that had been imposed upon it, it could block the delegation of powers in future primary legislation.

The point that I made there was that whatever route is taken, the key players need to get around the table and agree the terms of engagement, whether it is legislation or whether it is done by convention and resolution. If the key players are around the table and if some agreement on the principles can be found—and the key players here are the Government on the one hand, the Labour Opposition leadership in the Lords and key Cross Benchers as well, several of whom spoke in the debate last week—then why not just do it straight away via resolution without recourse to legislation? It is the agreement that matters, really.

Q12 Mrs Cheryl Gillan: Do you think, as an objective observer, that such an agreement is possible?

Professor Russell: I am not sure that I am in a position to comment on that definitively.

Mrs Cheryl Gillan: In your opinion?

Professor Russell: I think it is worth a try, yes. There has always been an understanding on this, although it has broken down a little bit from time to time, between the Government Front Bench and the Opposition Front Bench on these kinds of matters. That was the case under Labour and I think it could be the case now. The Opposition always wants to see itself as a future Government and wants to behave as a future Government. There is a “do as you would be done to” kind of principle between the main Opposition and the Government. I do not see any evidence that that is absent at this moment with the Labour Opposition in the Lords.

I think the difficulty comes from two sources. One is Ministers talking up conflict; I think that is not helpful. The other one is that the Liberal Democrats in the House of Lords have always been much more aggressive in their attitude towards statutory instruments in particular and conventions in general. I am sorry to keep referring to the newspapers, but there was a story in *The Guardian* last week that the Liberal Democrat leader, Tim Farron, is calling the Labour leadership “pathetic” for not standing up to the Government more in the House of Lords. In a sense, the Opposition is being goaded by others to be more aggressive, but I think that the Opposition still sees itself as a Government in waiting, and I suspect certainly the Labour leadership in the Lords would be open to sitting down around the table, and I think it is worth a try.

Q13 Mrs Cheryl Gillan: And for the Liberal Democrats, the Lords is really the last vestige of any semblance of power at the moment.

Professor Russell: I have published on this for years, and I remember in the past having quite heated discussions on this matter with Lord Strathclyde, who did not like the fact that I said the Liberal Democrats were powerful in the House of Lords. They have been what I would refer to as the pivotal vote—the swing voters—in the House of Lords ever since 1999. If they vote with the Opposition, the Government are likely to lose; if they vote with the Government, or indeed if they abstain, the Government are likely to win. They are very important players in the House of Lords, and that remains the case now. Lord Strathclyde’s objection to what I said, which is perfectly correct, is that the swing vote cannot do anything without the main Opposition. The Liberal Democrats under Labour were only powerful in partnership with the Conservatives and they are only powerful now in partnership with Labour. If there is an agreement with Labour, the swing voters do not really come into it.

Q14 Chair: When you say that Ministers talk up confrontation, can you give an example of that?

Professor Russell: I have not come burnished with examples from the newspapers on this, but there was certainly fighting talk in the run-up to the tax credits vote, and it is fair to say it was not the House of Lords that put that conflict in the news in advance of the vote. It was not briefing from figures in the House of Lords that made that such big news; it was briefing from the Government in the hopes that somehow that fighting talk would make people in the Lords think again and back down.

Q15 Oliver Dowden: We have touched on this a bit already, but turning back to the votes in the Lords on the Government’s tax credit regulations, how constitutionally significant, if at

all, do you think that vote was? Specifically, which precise conventions do you think were breached, those relating to financial privilege or to the Lords' role in statutory instruments?

Professor Russell: I do not think it was terribly constitutionally significant. We have covered, in my responses to Cheryl Gillan, the fact that I do not think that the Lords did anything unprecedented there except, as I commented at the time, 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.

My own view—and I read through a number of things yesterday in preparation for this—is that the Government themselves are rather unclear which convention was breached here. The Strathclyde report seems to suggest that the convention is that the veto should never be used. There is a phrase in there that, “We should revert to a position where the veto is left unused”. That is what I think Philip Norton is saying is wrong. There is no such convention because clearly it was used, and we have gone through the occasions when it was used.

Lord Strathclyde commented in the debate on the innovative nature of the particular motions that were moved. He said last Wednesday, “I absolve completely, if any absolution is required, the two noble Baronesses”—that is Baroness Hollis and Baroness Meacher, who moved the motions on which the defeats took place—“in their motions. I do not think for one moment that they were seeking to undermine the conventions that existed. In fact, they had rather cleverly and innovatively found a frame of words that technically did not break the convention.” That is Lord Strathclyde himself. Winding up the debate, Baroness Stowell, speaking for the Government, seemed to suggest—and she was questioned by somebody, I think it was Baroness Hayman, the former Lords Speaker, on what exactly it was she was trying to say—that the breach of convention was in the innovative nature of these motions and that somehow if it had been a straight defeat that would not have been a breach of convention. I find the Government rather confused on this.

The other question is about financial privilege. While there is a sense in the Strathclyde report that financial privilege ought to apply to statutory instruments, there is no evidence presented that there has ever been an understanding that it does, and I do not believe there has ever been an understanding that it does.

Q16 Oliver Dowden: Just specifically on this point about the convention, you said there had been five occasions in the past 50 years where the Lords has voted against statutory instruments. Out of how many votes is that? Presumably that is out of thousands of votes, and so if it is only five times, doesn't that in effect amount to a convention that the Lords does not vote against? Supplementary to that, if that does not amount to a convention, how is a convention actually established? You said earlier that if there is disagreement then the convention does not exist. Presumably at any point there can be a disagreement, so I would be interested in your thoughts on how a convention is established.

Professor Russell: To go back to Lord Norton again, the point that he makes is that a convention is something that is accepted by all. We have various conventions in the constitution that clearly are absolutely accepted by all. Conventions develop as well. We

accept that the monarch acts on the advice of the Prime Minister, for example. We accept, although now that we have the Fixed-term Parliaments Act this is more written down than it used to be, that the Government depends on the confidence of the House of Commons; it does not depend on the confidence of the House of Lords. Arguably, centuries ago, maybe it did depend on the confidence of the House of Lords—this became an issue under Pitt at one point—but that has become the convention. It is a pretty accepted convention now that a Prime Minister could not be drawn from the House of Lords, that Prime Ministers are drawn from the House of Commons. These are universally accepted things. Lord Norton's point is that once you have disagreement it is not really a convention anymore.

On your point about the numbers, I freely admit that I am not the person who has researched delegated legislation in detail. There is a really important and useful report by the Hansard Society, which was published in December 2014, called “The Devil is in the Detail”, which is full of figures. But it is not so much about how many votes because, of course, there are thousands of statutory instruments. Most of them are not prayed against; motions are not put down to object to them in any way. So it is not so much about how many votes are lost as how many instruments objections are raised to. But I think I am broadly in agreement with you that these are pretty unusual occasions among a sea of statutory instruments. Of course, the Lords has sifting procedures so that the Secondary Legislation Scrutiny Committee looks at all these instruments and brings instruments to the attention of the House when it thinks they deserve some sort of questioning, and it did bring the tax credits regulations to the attention of the House.

Q17 Oliver Dowden: So the fact that it is highly unusual does not, in itself, amount to a convention—it requires agreement on an ongoing basis between the parties?

Professor Russell: As I said previously, our best source on what the conventions are and how to interpret the whole concept of a convention is the Joint Committee on Conventions report. Their view was that the convention was that in exceptional circumstances the House of Lords could defeat an instrument but that it would not do so routinely, and I do not think there has been a breach of that convention, if indeed that is the convention.

Q18 Oliver Dowden: Just one more question on the financial privilege point. You do not think there is evidence of a financial privilege convention being breached here either?

Professor Russell: There are lots of conventions around financial privilege, which is something that I have published on, that are complicated and not well understood, but there never has been any kind of a clear convention of financial privilege applying to secondary legislation. We have it with respect to Bills, money Bills—obviously it is in law—and other types of financial primary legislation. We have it with respect to House of Lords amendments. But I have never been aware of a convention on financial privilege on statutory instruments. This is a new issue that has come to the agenda in this context.

Q19 Oliver Dowden: How proportionate to the defeats suffered on tax credits do you think was the Government's decision to appoint Lord Strathclyde to conduct his review?

Professor Russell: I think I have answered that question. I do not have any difficulty with the Government having appointed Lord Strathclyde, and I think that the review that he has done is useful and interesting. The question would be, how proportionate would it be, for example, to proceed with Lord Strathclyde's option 1, which is to remove the House of

Lords from this process altogether? I would say that would be entirely disproportionate, but that is a different question.

Q20 Oliver Dowden: Is it fair to summarise that you do not feel that this was a constitutional crisis? Do you feel that it was somewhat irregular, and that it was a proportionate response to have a review from Lord Strathclyde?

Professor Russell: I think “crisis” is an overused word, and “constitutional crisis” is an overused term. If it was a something—if it was a crisis of any kind or an important moment of some kind—I think it was a political moment. I am not sure I would even call it a political crisis, but I think it was political in nature, not constitutional in nature.

Q21 Chair: Perhaps you agree with Lord Lisvane’s comment that the navigation of this particular legislation constituted what he called “a pilot error”.

Professor Russell: Are you referring to Lord Lisvane’s speech last week?

Chair: No, he gave evidence to the Committee very shortly after the vote.

Professor Russell: Previously, yes, of course. That goes back to my point about the business managers and how Ministers are advised. One of interesting things in the maintenance of this convention—if indeed it is a convention—that the House of Lords does not defeat the Government regularly on such matters, is that that convention is kept by the Lords but also by the Government. I have referred to, and Lord Lisvane in his speech last week spoke about, the different kinds of steps that can be taken to navigate this process, the fact that the Government can withdraw things, amend them, relay them, and so on, and the fact that this has happened and does happen.

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. There were occasions under the Labour Government; there was one that I was made very well aware of on trial by jury. There was a long-running dispute between the Labour Government and the House of Lords on restrictions on trial by jury. At one point, the Government tried to act using delegated legislation to restrict trial by jury. It became known in the House of Lords that this was liable to be defeated, and the Government withdrew that instrument rather than face the defeat. The Government were there seeking to maintain the convention, because they realised that if they pushed that to a vote, the likelihood was that there would be a defeat, and every defeat probably makes future defeats more likely. The Government can pull back as well, not just the Lords.

Q22 Chair: I understand that the Joint Committee on Conventions has noted that exceptional circumstances could include statutory instruments where special attention is drawn to the instrument by the Lords Select Committee on the Merits of SIs, as the tax credit regulations were. To that extent, was this rather an exceptional statutory instrument?

Professor Russell: Yes. It is not that exceptional for the Committee to draw things to the attention of the House, but it was in the Joint Committee on Conventions report that that was the kind of circumstance that might cause the Lords to vote. They also indicated that instruments that were a result of skeleton Bills or instruments that contained policy that

was sufficiently significant that it might normally be expected to be in primary legislation would be exceptional as well and could be subjected to the Lords veto.

There has been, as the front page of *The Independent* indicates, a lot of controversy recently about whether statutory instruments are being used for bigger and bigger policy, and this was one of the things that the Hansard Society report drew attention to. In fact, the Hansard Society report, which was concerned about the growth in scope and complexity of secondary legislation and which called for a major review of the entire process, said, “Ministers sometimes use powers in ways that were not originally intended by Parliament” and went so far as to say that, “The House of Lords should make greater, albeit judicious, use of its power of veto in response to this growth”. What you are saying backs up that there was nothing particularly contrary to previous understandings going on here.

Q23 Chair: To what extent do you believe that the tax credits SI was in fact amending primary legislation?

Professor Russell: Do you mean, was it a Henry VIII power?

Chair: Yes.

Professor Russell: I am not sure I am necessarily qualified to comment on that. I have not heard that suggestion before, so I have no reason to think that that is the case.

Q24 Chair: But it would not be in that category?

Professor Russell: I do not believe it would be in that category.

Q25 Chair: But it would be in the category that it was a very large piece of legislation?

Professor Russell: It was a major change. The context for that piece of delegated power is, I think, that it was delegated in the Tax Credits Act 2008. It is a fairly standard kind of delegated power within a piece of welfare legislation that allows that the rates and the entitlements and so on can be amended without having to come back to Parliament every time with a new piece of primary legislation. Parliament would be completely clogged up with this if every time a benefit was uprated there had to be a new piece of primary legislation.

The understanding when that power was delegated would have been that this was to be for fairly standard, regular uprating, whereas what that regulation did was change quite fundamentally the entitlements. That is what the Secondary Legislation Scrutiny Committee and the House of Lords were expressing concern about—that it was being used to make quite a major change. It is completely within the Government’s legal power to do so, but it deserved drawing to the attention of the House so that people could recognise that this was not just a standard uprating.

Q26 Mrs Cheryl Gillan: You would agree with Lord Jopling, who of course used to be a business manager, who was of the opinion, in his contribution to the debate in the House of Lords, that the tax credits SI should never have been there in the first place?

Professor Russell: I do not wish to say yes or no to that question. There was a comment also by Lord Higgins—

Mrs Cheryl Gillan: It is the conclusion that your comments have been leading us to, so—

Professor Russell: There is a big question here that I am not qualified to comment on, and you might wish to hear from the Hansard Society, who have done this detailed study—I am not sure to what extent even they have done this study; you would need to ask them—as to whether, if there is a growth in delegated legislation, you might be able to see it in terms of numbers—are there more SIs being put? But what really matters is not the numbers, it is the scope of those SIs and the size of the policy that they contain. That is a much harder thing to study. You have to somehow code the size of them, and you would have to trace back for years. How unprecedented was it to have such a major change in a piece of delegated legislation? I would not want to answer a question like that unless I had done the research on the nature of the scope of SIs in the preceding years.

There was a comment from Lord Higgins that I thought was interesting, because he is a Conservative peer and a former Chair of the Treasury Committee in this House, I believe. He refers to “the extraordinary fact that this statutory instrument involved financial privilege to such a massive extent. I find it totally puzzling that the Treasury ever allowed this to happen. It looked like it was trying to pull a fast one.” That might be unfair on the part of Lord Higgins, but he was also a member of the Joint Committee on Conventions. There are clearly quite a lot of people out there, including on the Government side, who think that maybe this was going too far.

Q27 Chair: To what extent do you think, in assessing the significance of a statutory instrument, that it is in fact a political consideration rather than a legal consideration or one that can be categorised in terms of legalities? It is actually a matter of what it feels like politically.

Professor Russell: What it feels like politically is always very important, yes. That chimes with what I was saying about the ultimate way out of this situation, which is going to be not about what is laid down in the letter of the law but about what is negotiated politically. I thought that Alistair Darling’s speech in the debate last week was very interesting. He talked about what it is like to be a Minister—and this something that I speak about all the time as a result of my research—and said that Ministers have to constantly ask what is Parliament going to be prepared to accept. Your political antennae need to be good on where you are pushing Parliament too far, because if you push Parliament too far you are likely to end up with egg on your face. That is how the relationship between Parliament and Government is usually a fairly calm one, not because Parliament is powerless but because Ministers are aware of Parliament’s power and they do not push Parliament too far.

Chair: Moving on to the recommendations in the Strathclyde review, Ronnie Cowan.

Q28 Ronnie Cowan: Do you share the sentiment of the Shadow Leader of the House, Chris Bryant, that this report is just “utter tosh”?

Professor Russell: No.

Q29 Ronnie Cowan: Between utter tosh and earth-shattering, where do you lie?

Professor Russell: As I have said, I think there is some interesting and useful analysis in the report. I said in the blog post that I published after it was published that those who are

unfamiliar with this area could educate themselves very well on the background: what are statutory instruments, what are the conventions, what did the Joint Committee on Conventions say, and so on. There is a lot of useful stuff in the report. Also, the recommendations are quite measured, and they are not out of line with the recommendations that have been made by other groups, such as the Wakeham commission and the Goodlad group. I do have some concerns about the detail of the preferred option 3—you may be wanting to come on to this—and I would not suggest that that option was implemented without some safeguards, but I cannot object en masse to the report at all.

Q30 Ronnie Cowan: Are we not just going over old ground here? These things have already been discussed in the past. We are not going anywhere new with this, are we?

Professor Russell: It has reached the agenda again, and it is valid to speak about it.

Q31 Ronnie Cowan: The key word is “again.” Here we are again. We are not going any further forward.

Professor Russell: I suspect that you and I may not agree on what the ultimate solution is, but I may be driving in your direction if I say that I think this is something of a distraction from the bigger questions of what urgently needs doing about the Lords. I think the most urgent thing is the constitutional anomaly of untrammelled prime ministerial patronage power to put people into the Chamber. In that respect, maybe I agree with you. We should talk about these things, they are valid to talk about, but we must not lose sight of the bigger problem with the Lords.

Q32 Ronnie Cowan: But this review does not touch any of that.

Professor Russell: No, but that was not what Lord Strathclyde was asked to do.

Q33 Ronnie Cowan: Should he have been? Is that where we are going? Why are we tinkering around the edges, consistently going back? We had had 100 years of this and we have not actually changed that much at all, but we all know the bigger picture is that the House of Lords needs to be completely reformed if we are going to retain it as a second Chamber.

Professor Russell: I do not agree with you that very little has changed over the last 100 years. I think the 1911 and the 1949 Parliament Acts on the powers, the 1958 Act introducing life peerages and the 1999 Act removing the majority of hereditary peers were all enormously important. The House of Lords is transformed in that respect. But there is this glaring anomaly at the heart of the system that the Prime Minister acts in a completely uncontrolled way, aside from the power of the monarch—as I have already indicated, our conventions and constitution require that she acts only on the advice of the Prime Minister. The only person standing in the way of the Prime Minister putting as many Members into the House of Lords as he wants is the monarch, and if he tried to do so it would put the monarch in a very difficult position. I managed to find myself on the front page of *The Times* in the middle of the tax credits row, having said something like, “Don’t bring the monarch into the tax credits row”. That is a glaring anomaly in our Constitution and needs dealing with, I think.

Q34 Ronnie Cowan: Am I correct in saying that there were three proposals here? One was to remove the House of Lords from statutory instruments altogether, which we are not very

keen on. The second was to restrict their powers, and the third one was a new process that basically says, “Go back to the House of Commons and ask them to think again.” That pretty much covers all the bases, doesn’t it?

Professor Russell: Yes, it does, and I think that the second option and the third option are not unreasonable. With some safeguards, the third option is feasible; the second option might be the most preferable. I went back and had a look at the Goodlad report yesterday, and the proposals in the Goodlad report on working practices are very sensible. That is that the House of Lords passes a resolution indicating that it does not intend, when it vetoes a statutory instrument, that that should be a permanent veto. It indicates that it is, in effect, sending it back to the Commons, and that if the Commons votes again after a delay of a month, the House of Lords will back down. That could all be done without legislation. I do not think that would be an unreasonable thing to do, but I said in my post immediately after the report was published that I think we should be tying these two issues together. If the House of Lords is giving something on the powers, I would suggest the Prime Minister should give something on the appointments process, because the primary problem with the Lords is one of Prime Ministers—not just this Prime Minister, although his record is particularly bad—appointing too many.

Chair: We will come to the composition later, but on the recommendations, Paul.

Q35 Paul Flynn: Don’t you think it is strange that one of the most beneficial decisions ever taken by the House of Lords to help working people on low incomes is the cause of an attempt at reform by panic?

Professor Russell: There are various ironies here. I am sorry, I am not trying to constantly drag us back, and I appreciate that we are going to come back to the question, but I have made quite a lot of noise about appointments up until now. I published in September an analysis of media coverage of the House of Lords, showing very clearly that the image of the House of Lords in the media has been getting more and more negative. That is, to a large extent, because the stories have been dominated by size, cost and numbers of appointments and types of appointments.

When the House of Lords gets a good media, it tends to be on substance, and something like this tax credits defeat brought good media coverage to the Lords. It brought the Lords to people’s attention who might tend to dismiss the House of Lords—they might tend to think it is a conservative institution. It was a conservative institution for a long time; many people will assume that it still is. When it does something like this, a new set of people sit up and take notice. In the debate last week, several people, including Conservatives—I think Lord Cormack said this—commented that this had been a very good news story for the House of Lords.

Q36 Paul Flynn: All major parties, for years, have allowed people to buy places in the Lords by donations. A recent example was a complaint by Lord Ashcroft that, having given £14 million to the Conservative Party, all it bought him was a job as a Whip. He got the peerage but it did not buy him a place in the Cabinet. Do you think these are examples of our democracy being in need of repair?

Professor Russell: These are allegations, of course, about the connections between donations and peerages, although there is a correlation. I have appeared in front of your

predecessor Committee, PASC, and probably answered questions from you on this point. There is a correlation between donations and being appointed to the House of Lords. There is nothing entirely surprising about that, in that some of those who have reached the top of their professions and who potentially have money to donate to parties and are committed to parties, find themselves in the House of Lords, and they are exactly the kind of people you would expect to donate.

The way the causation goes is very much open to dispute, but fundamentally I agree with you that there should be greater oversight of appointments, there should be a bigger role for the House of Lords Appointments Commission and people should be put in the House of Lords because of the skills that they can bring and the qualifications that they have.

Q37 Paul Flynn: Do you think there is a need for a review of the standards of conduct in the Lords and recent decisions taken by the Standards Committee, which until recently was chaired by Lord Sewel, who presumably applied his own standards to conduct in the Lords?

Professor Russell: I am not sure that there are any burning questions about standards in the Lords. What I am concerned about is standards in appointments to the Lords.

Q38 Paul Flynn: Could I urge you to look at the case of the decision by Lord Sewel's Committee on Lord Blencathra, and perhaps you might have a little concern there? But don't you agree that the situation of the Lords is a constitutional joke? There are only two Parliaments in the world that have hereditary chieftains sitting in their legislature; the other one is Lesotho, I gather. When do you think we are going to have a rational reform of the Lords instead of these piecemeal decisions because the Conservative Party has panicked?

Professor Russell: I gather from your Chairman that we may get on to questions of composition and whether the removal of the hereditaries should be one of the next steps. Your other predecessor Committee, the Political and Constitutional Reform Committee, did a very good inquiry on Lords reform next steps and considered issues such as that, and returning to those sorts of issues might be appropriate in this Parliament.

Paul Flynn: That is probably one of the reasons why they were abolished by this Government; that Committee does not exist anymore. I am grateful to you. Thank you.

Q39 Chair: If we went for the legislative route so that Parliament could legally assert its primacy over any regulation, how do you think that would change the behaviour of each House?

Professor Russell: You are talking about option 3, and I think that option 3 would only be acceptable with certain safeguards. There was quite a lot of debate—and this is something that I said in my post before Christmas, that I think—

Q40 Chair: Sorry to cut you off. Lord Strathclyde has not recommended any safeguards. What would happen if option 3 was just implemented?

Professor Russell: There are some things that are unclear about option 3, and that is why I am saying safeguards. One thing that was raised time and again in the debate last week, and is a concern that I expressed before Christmas, is that it is not clear whether there would have to be a debate on the Floor of the House of Commons if an instrument was rejected by the Lords. There is a parallel drawn in the report between secondary legislation

and primary legislation, and an indication that maybe the mechanisms for secondary legislation should be brought more closely into line with those for primary legislation. If that is what you are doing, if you are comparing it to a Lords amendment coming back on a Bill, that of course triggers a debate on the Floor of the House of Commons on that amendment and a vote in the Division Lobbies. It does not trigger a meeting of a statutory instrument Committee on a corridor and a deferred division. I think that the devil is in the detail, to borrow the phrase from the Hansard Society, in how option 3 would be implemented. I think it would not be acceptable unless there was a guarantee of a debate on the Floor of the House of Commons on the thing that the Lords had objected to and a conventional vote through the division lobbies.

Q41 Chair: But if in principle the House of Lords could pretty well vote with impunity against any instrument, knowing that the elected House could assert its will if it chose to do so, how much more often do you think the House of Lords would be likely to reject statutory instruments?

Professor Russell: That is a very interesting and fundamentally unknowable question. One of the things that the Wakeham report and the Goodlad report both commented upon was how the power of veto is so significant that it results in it being very rarely used, and that they would have liked to see a power that could be used more frequently. If there was a move to option 3, maybe the expectation would be that the Lords would more often reject statutory instruments and that they would more often be brought to the attention of the House of Commons. There is again a sort of political balancing act here though, because it is like crying wolf. If the House of Lords rejected too many, the House of Commons would cease to take those objections very seriously. If it remained something that happened maybe once or twice a year, rather than once or twice a Parliament, you would hope that the Commons would look very carefully at the reasons for that and consider whether it wanted a change.

Q42 Chair: I have been in Opposition on the Front Bench, and I know what it is like. When you are powerless in the House of Commons, you want to encourage your increasingly politicised peers in the Upper House to help you manufacture a row more often than not. If peers continue to become more partisan and party-loyal, as opposed to how they used to be, how would you prevent an escalation in the use of the mechanism simply in order to make party political points about particular pieces of legislation rather than to improve the scrutiny of legislation, which is the whole point of the House of Lords?

Professor Russell: I think it is a delicate balance, and in the end so many of these questions come back to politics. If the House of Lords started defeating things three times a week then the House of Commons would stop listening, and you would hope that Members of the House of Lords would hold back from doing that.

Q43 Chair: But the point is that it could become just a mechanistic ritual, which is how so much of the House of Commons already is.

Professor Russell: It could. Of course, what often happens when there is a defeat in the House of Lords is that something does not come back to the Floor of the House of Commons. Ministers do not bring it back because they know that they are in difficulty on the Floor of the House of Commons, which is exactly what happened with tax credits. It happens on amendments to Bills as well. It is the fact that Ministers would have to face a

debate on the House of Commons. If that would be a difficult debate for Ministers to face, they will back down.

Chair: As they did on tax credits.

Professor Russell: Exactly as they did on tax credits.

Q44 Chair: How much do you think it explains the manufacturing of a constitutional crisis to divert attention from the fact that there was no support in the House of Commons for a measure that might have already been approved but which, having thought about it, the House of Commons would not approve?

Professor Russell: Yes. I said in advance of the vote that when the House of Lords is prepared to make such a big fuss about something it is not normally acting completely unilaterally. The House of Lords is very good at receiving signals of the kind that you have just referred to from the House of Commons, particularly from Government Back Benchers in the House of Commons, that they are uneasy about something. Very often the House of Lords will fix on something where it knows there is unease on the Government Back Benches.

I often say that a key piece of context for all of this is: what is the fundamental role of the House of Lords in the legislative process? It is usually to turn around to the House of Commons and say, "Are you sure?" If the House of Commons is sure, the House of Lords will normally back away. But it is often on these occasions when people in the Lords know that there is disquiet in the Commons that they want to put that debate on to the Floor of the House of Commons for Ministers to defend it to their own Back Benches, and if Ministers know they cannot defend it to their own Back Benches they will not ask the Commons to overturn the Lords' defeat. That is how the dynamic works most of the time.

Q45 Chair: How much do you think the House of Lords might change their attitude towards certain types of legislation if they knew the instruments that might emanate from that legislation could be forced through by a single vote in the House of Commons?

Professor Russell: There are various things. On your question about what could the implications of option 3 be, I think that the House of Lords probably would not want to sign up to option 3 unless it was convinced that there were better scrutiny standards in the House of Commons for secondary legislation. I think that if option 3 went through, the House of Lords would want to look more carefully in future at what powers were being delegated. In fact, I think that one of the difficulties with option 3 as phrased is that it would amend the Statutory Instruments Act 1946, which would presumably apply retrospectively to all powers that have been delegated to date. I would argue that those powers have been delegated on the understanding that the House of Lords in extremis has a veto. I think that is a problem with option 3, and if I was in the House of Lords I think I would be proposing an amendment to remove the retrospectivity on the basis that those powers were delegated on an understanding, and you are changing the understanding, you are moving the goalpost. There is a retrospective problem; there is also a prospective problem that Members of the House of Lords might be less keen to delegate power in future if that ultimate veto is removed.

Q46 Chair: What could be the case for allowing what used to be, even in my political lifetime, quite an exceptional character of primary legislation but has now become all too common, the so-called Henry VIII clauses, whereby the Government can promulgate statutory instruments that amend not just the Act from which the regulation is promulgated but other Acts of Parliament too? How would the House of Lords be likely to view such Henry VIII clauses in future legislation if they thought they were going to have basically no control?

Professor Russell: They already view them very negatively, and I think their view would become more negative. There was a tremendously powerful speech in the debate by Lord Judge last week, the former Lord Chief Justice, about Henry VIII powers. As I said before, one of the things that this row has done is put to the centre of debate the whole question of delegated powers, the nature of statutory instruments and the nature of the scrutiny process for statutory instruments. I think it would be healthy if one thing that came out was moving towards what the Hansard Society recommended, which was a wholesale review of this system.

Q47 Chair: But if the option 3 went through without the safeguards and the respective safeguards that you described, how possible is it that in fact the Government would be forced to produce much more primary legislation because the recourse to secondary legislation would be much more restricted?

Professor Russell: You could find yourself making a case for option 3 on the basis of how difficult it would be for the Government—that the Government would have to write more things into primary legislation, and maybe that would be a good thing. The trouble is, I think modern government is so complicated that if every detail had to be put on the face of Bills, the system would grind to a halt. The Lords' veto, in a sense, is a safety valve to ensure that Ministers do not go too far, but if that safety valve is no longer there—I don't know, pressure builds up or whatever the analogy would be.

Chair: But the pressure would build up against the primary legislation that created those opportunities.

Professor Russell: Yes.

Q48 Chair: Thank you. Just one other thing. Of course the European Communities Act 1972 provides that any EU obligation can be put through under a statutory instrument. Theoretically, the House of Lords can veto those statutory instruments and make the Government think again. How significant is the European angle in this?

Professor Russell: I am not sure, to be honest, but I think that there are all sorts of categories of statutory instrument that would need to be looked at if there were to be a change to the procedure. This applies to the retrospectivity point—decisions on all of these matters to date have been taken on the basis that the House of Lords has a veto. If you are going to remove the House of Lords veto, you need to do a retrospective sweep and ask whether there are particular kinds of secondary legislation that the veto should be maintained on. But in the end, at the heart of this, as we have said several times, is politics, and the way that the relationship between the Government and Parliament ultimately works, which is that it is not the use of parliamentary power that constrains Governments. It is Governments' knowledge that that power could potentially be used and their desire to

avoid getting into these kinds of difficulties. The veto is quite useful for that. It is good for keeping Ministers honest, because they realise they can get into difficulty if they push things too far.

Q49 Kelvin Hopkins: I was the solitary Labour MP speaking in the debate last Thursday on reform of the House of Lords brought by the Scottish Nationalists, and I recall that 150-ish Labour MPs had voted for abolition—for unicameralism—when the Jack Straw votes took place some 10 years or so ago. But I said at the end that at the very least the prime ministerial patronage should be removed and the Prime Minister should not be able to appoint people to the House of Lords, not just because of the point that my colleague Paul Flynn has mentioned but also because of the effect on the House of Commons. Older Labour MPs in safe Labour seats behave themselves because they might be put in the House of Lords in return for giving their seat to some loyal party member who will be slotted in by the leadership. That sort of thing affects the House of Commons. You make a very strong point about prime ministerial patronage. What would you do as an alternative?

Professor Russell: I hope that your Committee will look at this, because I think that both of your predecessor Committees have a very good record on this. The Political and Constitutional Reform Committee said that getting a grip on the appointments process was the most important outstanding issue. The Public Administration Committee reported on this, going back to about 2008, saying that there should be more constraints on the patronage. One of the other things that this row has done inadvertently is put that patronage centre-stage, because we have these extraordinary claimed briefings from the Government side that the House of Lords would be “flooded” with Conservative peers if the Lords did not back down. I hope that is a bit of political fantasy, but it does demonstrate what the Prime Minister in extremis could do. The fact that a Prime Minister could flood a Chamber of Parliament in order to get his legislation through is fundamentally wrong.

I have published on this for years, and I have said that we need a cap on the size of the House. Back in 2011 I authored a report with a very stellar list of co-authors across the political spectrum, from both Chambers of Parliament and from outside, saying that there should be a moratorium on House of Lords appointments until there was an agreement on principles for appointment and how seats should be shared out. I wish that had happened, because if there had been a moratorium back in 2011 I think we would be at 720, 750, something like that; now we are at 820 to 850 in the House of Lords. Under this Prime Minister the size of the House of Lords has grown by about 130 Members, and that cannot be right. I think one thing that we need is a cap on the size of the House. We need an agreement that there will either be no appointments or a very restricted flow of appointments until that cap is reached. Then we need an agreement on how new appointments should be shared out between the parties, using some kind of a logical formula that would be in some way, I think, related to general election vote share, and I can go into more detail on what my preferred option would be.

But the key thing is to get the size of the House down and, once the size of the House is down, put only as many people in there as leave. The House of Lords is very unusual, perhaps even unique around the world, in not having a cap on its size. The Canadian Senate, for example, which is the closest comparator to the House of Lords, which is

appointed, has a fixed size. When vacancies occur, the Prime Minister appoints. We do not have a sense here of vacancies; we just have no limit.

Q50 Kelvin Hopkins: But we still have the problem of appointment—people getting into the House of Lords by appointment by somebody. You implied, and I agree strongly, that that is the fundamental problem. I want abolition—a unicameral Parliament—and indeed the majority of legislatures across the world are unicameral, and some European nations have abolished their second Chambers without damaging their democracies too much. I would still prefer that, but we still have the problem of appointment. When the reforms were coming through under Jack Straw, we had six votes. Some of them were on part election, part appointment. It is the appointment bit that is the problem, because that is where the control mechanism for our extremely centralised form of Government operates.

Professor Russell: There are different layers to this. I think there is a problem with the way that appointments are done. Some people think there is a problem with there being appointments at all. Some people think we should move to an elected Chamber or a partially elected Chamber. Some people think that we should abolish the House of Lords. The abolition of the House of Lords and the establishment of an elected Chamber have been on the agenda consistently for the time that I have been watching the House of Lords, and prior to that, but there has not been agreement yet. What we are left with is a default status quo option where nothing happens.

My point is that for as long as we have that default option, appointments need to be better. That is not to say that you should not move in the future to an elected system; that is a separate debate. But over the 18 years that I have been watching the House of Lords—how many years are we now? We are into year 17 following the 1999 reform. After the 1999 reform there were 666 members of the House of Lords. We now have, when I looked yesterday, 821 members of the House of Lords, plus about another 50 members who are on leave of absence and so on. Until we take the big decision about moving to an elected Chamber, let us at least get a grip on the appointments process that we have. That is my point.

Q51 Kelvin Hopkins: I agree with much of what you said.

One final point. Some of us on the left have been suggesting that the hereditaries are preferred to the appointed people, because appointed people are the placemen and placemen of political leaders. At least the hereditaries have the advantage of being genuinely independent minds.

Professor Russell: I think there are things that you could do about the appointments process. There are things about the numbers; there are things about the process and the quality. Your predecessor Committee, PASC, back in 2008 suggested that the House of Lords Appointments Commission should have a much more central role in managing this process, that it should announce how many vacancies there were and how many seats each of the parties were due to have, according to a formula, which would of course be agreed between the parties, but that parties should put up longlists of candidates from which the Appointments Commission should be able to choose. I see Cheryl Gillan pulling a face. There are questions of things like regional balance, gender balance and professional balance that you might want to build into the system. You seemed to be with me when I was talking about the size of the House and getting a grip, but as soon as I even start

talking about these issues there are differences in the Committee. This is why I think we need to move on the simple things that we can all agree on, and then keep arguing about the things that we are not agreed on yet. But there are things that you could do on the quality of appointments as well as the quantity, if you wished to.

Q52 Kelvin Hopkins: I thought I had finished, but one more question. If you had these lists provided by the parties, they would still be effectively controlled by the party machine and the leaders of those parties. They would not be independent minds, which is what we want in politics.

Professor Russell: Under the current system, that is up to the parties, and I am not endorsing what a particular outcome would be. The Green Party has held internal elections to choose its candidates. The Liberal Democrats ran a system like that for some time. It is a question of whether you should regulate how the parties choose their members, but as long as it is not regulated, the parties can make choices to democratise, if you like.

Q53 Gerald Jones: You have touched on composition and why you think it is important for it to be addressed. Do you have any other thoughts on composition, and particularly how would you envisage the legislation being carried by both Houses? Where do you think would be a starting point, whether House of Lords, House of Commons, Government or Back Benches? Where do you think that conversation should start?

Professor Russell: This is a very difficult issue, because of course, the prime source of legislation is the Government, and asking the Government and the Prime Minister to rein back their own patronage powers is pretty difficult. I was thinking about this. I have been trying to urge people in the House of Lords that the House of Lords should pass a resolution saying that there should be a size cap and that there should be limits on appointments. There is a lot of concern in the House of Lords about these issues. Their reputation is declining, as I have already said. The place is becoming more unworkable, and it is also becoming more expensive. If 130 Members arrive and claim a daily allowance, that is £39,000 in one day, and this is doing reputational damage.

There are things that the House of Lords can do. It could propose and agree a resolution. We could have Private Members' Bills, like the Steel Bill that ultimately became the House of Lords Reform Act 2014, which allowed retirement. I was thinking about this, and I do not know whether you think this a very cheeky suggestion, but on the question of prime ministerial power and prerogative powers, something that the Public Administration Committee was always very interested in, we have seen a lot of constraints on prerogative powers in recent years—the reining back of the war power, the treaty-making power, and civil service reform. If you ask yourselves where the proposals for civil service reform came from, they came from the Public Administration Committee. The Public Administration Committee published a Bill suggesting how the civil service should be put on to a statutory basis. I am not sure that you necessarily need to look to other people to do the work. I often use that as an example. It is a fairly unique example of a Committee coming up with a Bill that in the end was adopted by the Government. It could be adopted by a Private Member, of course, but one of the things that I have said is that we cannot look to Government for this.

I drew an analogy a few months ago. The Government are in control of this process, but the consequences of the process are for Parliament. My analogy was that when the bus

driver is sending the bus careering off the edge of a cliff, maybe it is time for the passengers to seize the wheel. I think Parliament needs to get hold of this, and Parliament needs to, one way or another—through resolutions, through Bills, through Committee reports—politically force the Government to do this. You do not necessarily need legislation. The Prime Minister could stand up and say, “I am going to adopt these principles from here on in”. When the House of Lords Appointments Commission was established back in 1999 to 2000, there was no legislation. It has chosen peers all of these years, and its choices have generally been respected, its processes are respected and it has been seen as a good thing. That commission was set up by a letter from the Prime Minister. The Prime Minister could at any time relinquish his patronage power. He could make a statement to the House, or he could stand on the steps of Downing Street and make a statement. What he needs is political pressure to do so, and you could be part of that.

Chair: There is a challenge. There are one or two supplementary questions.

Q54 Mr Turner: Do you believe the Prime Minister is able—I don’t mean able technically, I mean able personally—to look at this business of appointments?

Professor Russell: What do you mean, “able”?

Mr Turner: I am talking about whether he is able in terms of thinking of himself.

Professor Russell: I suspect there are some people around this table who know the Prime Minister better than I do, and maybe your next witness would be a good person to answer that question.

Q55 Mr Turner: But what are the pressures on him that would discourage him from having these thoughts?

Professor Russell: I think there is media pressure, but that is not working very effectively. Indeed, I have even come to be suspicious that the Government quite like the declining reputation of the House of Lords because it limits an institution that could put limits on the Government. Maybe a declining reputation is rather convenient for the Government. Maybe people like me standing up and saying that the House of Lords is being brought into disrepute is an encouragement rather than a discouragement to the Prime Minister. I think what he needs is pressure from his colleagues.

Mr Turner: But his colleagues want to be peers.

Professor Russell: Some of them are peers, and those who are peers have nothing further to gain. I think there is a high degree of concern among peers in general, but Conservative peers included, in the House of Lords. I would like to see some action by Conservative peers to bring pressure behind the scenes and publicly on the Prime Minister to get control of this situation. But I think there are mechanisms that you can use. If there were votes in this House or the other House to say, “We want a principle”, for example, there are some completely uncontroversial things that could be agreed. The House of Lords should be no larger than the House of Commons. Could we have a vote on that in the House of Commons? Could we have a vote on that in the House of Lords? That would send a fairly clear message to the Prime Minister. It would not be enforceable, but for him to continue appointing after such a decision had been made would be somewhat awkward. I think there is political pressure that can be applied.

Q56 Oliver Dowden: I should declare an interest—I previously advised the Prime Minister on appointments, including appointments to the Lords. I think it is relevant in this context, and I am not in any way seeking to speak for the Prime Minister.

In my experience of these appointments, the overriding drive was less to find individuals to go into the Lords. In fact, it was quite a difficult thing to choose individuals. The concern was the balance of the Lords in terms of the composition of numbers, and trying to address the relative under-reflection of Conservative peers. In particular you have the situation now where there is a very large number of Liberal Democrat peers in the Lords but very few Liberal Democrats in the Commons. In any reform of composition, how do you think you can address that problem? If you impose a cap, you are effectively keeping a balance that reflects elections going back a number of decades in some cases. Often the Prime Minister is trying to—

Chair: Sorry, it is a long question. Could you ask the question?

Oliver Dowden: Yes. Forgive me, Chair. I was trying to get to the point of the question, which is: how do you address this problem? How do you make sure it reflects the composition of the Commons at any given point and not the composition of the Commons many generations previously?

Professor Russell: A natural thing to do at this point would be to refer you to my report “Enough is Enough”, which was published in February last year, which explores the different options for formulae that could be applied to decide what the party balance should be. I think discussion about party balance is absolutely key. One of the key reasons why the House of Lords has got bigger and bigger is because there is no agreed formula for how the seats should be shared out between the parties and, indeed, the Cross Benches. This is about Prime Ministers historically—this is not just a point about David Cameron but also about his predecessors. There is a table in there that takes you back to Macmillan in 1958. Of course, for the record, it is worth recording that David Cameron has appointed to the House of Lords at a faster rate than any Prime Minister since 1958, when the Life Peerages Act was passed. I have a table of figures for all those Prime Ministers; everybody except Heath appointed more from their own side than from the other side.

What you get that way is a ratcheting up, because every time there is a change of Government, the incoming Government want to appoint more from their side to counteract the appointments made by the previous Government, and therefore we get bigger and bigger. David Cameron is the first Prime Minister in history to have to make appointments to his own side to counteract his own previous appointments, because he appointed rather too many Liberal Democrats. He signed up to a rather foolish formula that the balance in the House of Lords should be proportionate to the vote share in the country, which is what the Liberal Democrats wanted. We now have 111 Liberal Democrat peers. If you were to implement that principle now, I worked out yesterday you would need 1,300 political peers in order that the Liberal Democrats were at 8%, and if you add in Cross Benchers you get up to about 1,700. So that formula does not work.

The formula that I proposed is one where each new batch of appointments is proportionate. You would have to find some sort of starting point. Another calculation that I have done is on one-off retirement, because retirement comes into this as well. I tend not to talk about retirement, because appointment is more important than retirement, but there

are a lot of people in the Lords talking about retirement. By the next general election there will be approximately 250 peers who will be over 80. If all of those peers agreed to retire, you would be down to the size of the House of Commons in one fell swoop.

Q57 Oliver Dowden: But isn't the problem with that that most of those due to retire would be Conservatives, and you are trying to redress the Conservative balance?

Professor Russell: There is a problem with balance.

Oliver Dowden: So unless you start removing peers, you are never going to get any sort of balance, and that obviously is very problematic.

Professor Russell: Yes.

Q58 Chair: In any case, an age bar is not a mark of diligence or capability.

Professor Russell: That is quite right. There are problems with it. But the figure is interesting. This is worthy of an inquiry, if you want to do it properly.

Chair: We try to.

Professor Russell: The formula that I have proposed is that each new batch of peers should be proportional to the last election. That is, in effect, what you would get if you had elections. You would not get a great deal of variation that way, because votes do not move around vastly between elections. If you are looking at appointing 10 peers a year, it is going to be a matter of, is it, four Conservatives, three Labour, two Liberal Democrats and one other, or is it three Conservatives and four Labour? The differences are going to be small.

Q59 Oliver Dowden: But that would take you, say, 50 or 100 years until you got to a balance of the parties.

Professor Russell: I think what you need to do is forget about aiming at proportionality across the House, because that is the thing that sends the numbers through the roof. You need to have a principle that applies to people coming in. You need to balance the appointments coming in.

Q60 Chair: Our next witness has been waiting very patiently and, indeed, listening to everything you are saying.

Professor Russell: I am very sorry that we have kept him waiting.

Chair: I am extremely grateful to him, because you have been in front of us for an hour and 20 minutes now.

Professor Russell: It has felt like a long time.

Chair: It has been very interesting, and we are very grateful to you. There are one or two sweep-up questions.

Q61 Ronnie Cowan: Earlier on you said a new Member should only be put into the House of Lords when one leaves. Should they not be there for a set term rather than waiting for someone to die?

Professor Russell: Set terms are another option, yes. They raise questions as well. Bernard Jenkin is correct that there is a problem with fixed age, because there are some very important people in there who make good contributions who are over 80. If you have a fixed term, what should the fixed term be? 15 years is rather short. There are a lot of people who have been in the House of Commons for a lot longer than 15 years.

Q62 Ronnie Cowan: They have been re-elected to that position. The idea of a job for life in the House of Lords goes against most other walks of life.

Professor Russell: Again, we are back to the fact that once you get down to the detail, people start disagreeing on the detail. I think there is a principle that no more people should be put in than leave. Put that in your motion: no larger than the House of Commons; no more people should be put in than leave.

Q63 Tom Tugendhat: So when the Chief of the Defence Staff, General Sir Nick Houghton, resigns in a few months' time, he should not be put into the House of Lords?

Professor Russell: Not until there is a vacancy. People die all the time and people retire quite often.

Q64 Paul Flynn: I feel quite distressed by the image of what would have to be 35 buses, with their ermine-clad passengers, being driven over a cliff somewhere. To avoid that, Jeremy Corbyn said—in your reading of *The Independent* you must have seen it a few days ago—"I have no plans to. I'm making no nominations to the House of Lords as of now". Isn't this a very effective way of exposing the ridiculous nature of the Lords if the party leaders do not follow the advice of my friend and stop appointing people to the Lords and let it crumble?

Professor Russell: I think from the point of view of a political party leader, that is an admirable statement, but what he needs is a pact, because if he is the only one to say that it could prove counterproductive for his party.

Paul Flynn: He will lead by example.

Ronnie Cowan: The example is set by the Scottish National Party, who do not have any Members in the House of Lords in the first place.

Paul Flynn: Splendid organisation.

Q65 Mrs Cheryl Gillan: Isn't it true that this is all in the box marked "too difficult"? For as long as I have had the discussion with the Prime Minister, I believe he believes in an elected House of Lords and was not able to achieve that. The powers of the House of Lords have been gradually eroded anyway, because devolution to Scotland and Wales and Northern Ireland removed the revising capability on the legislation in those devolved Administrations. Indeed, that has led to anomalies, for example in the Welsh sense, because I think had there been a revising Chamber you would not have had the problems over the lack of separation of powers between the Executive and the judiciary.

In the greater scheme of things, isn't this something that is always going to be on the back burner, because there are always going to be more important things for the Government to deal with, and for the leaders of the parties to deal with? This row over tax credits has escalated it up the agenda again, and it would be rather better if it went back down the

agenda, because there are other ways of diminishing the powers of the House of Lords and eventually making it redundant.

Professor Russell: I think large-scale Lords reform is undoubtedly difficult, but small-scale Lords reform is possible, and has happened historically.

Mrs Cheryl Gillan: In my time as a parliamentarian.

Professor Russell: The various things that I referred to before, the 1911, 1949, 1958 and 1999 Acts, were each, at the time that they were passed, seen as small, incremental measures that in no way dealt with the breadth of the problem but were simply legislating on the simple, single most burning issue of the moment. Those are the kinds of reforms that have historically worked. I think the burning question now is about the size of the Chamber and prime ministerial patronage, and that is what needs to be done next. There is a danger if you just allow drift. I am certain that there are some people who have an agenda of destroying the House of Lords by attrition, by making it bigger and bigger and making it look more and more ridiculous. The danger there is that there is no guarantee that something better is going to come next.

Q66 Mrs Cheryl Gillan: The efficacy of the revising capability of the House of Lords has to be of paramount importance in our legislative system, and it is true that the effective way to keep modernising our system is incrementally rather than by a cataclysmic attempt at something, for example electing the whole House.

Professor Russell: Yes. If you sit around waiting for large-scale Lords reform the likelihood is that nothing will happen. But you can get to grips with the small burning issues that everyone can agree on. I disagree with the person who said that nothing had happened during the 20th century. I think each of those reforms was fundamentally important, and the question is, what is the fundamentally important next incremental step? I think it is fairly clear for most of us to see what it is. Interestingly enough, I think—and I confess I did not go back to the report—that the Political and Constitutional Reform Committee report “House of Lords reform: what next?”, which was a very interesting and useful report, looked at various of these issues that we have been discussing in this last part of the session—the moratorium, the term limits, the hereditary peers and so on. I do not believe it looked at the House of Lords powers on statutory instruments. I do not think they thought that was the next burning issue, but it is, nonetheless, a completely valid one to discuss.

Chair: Thank you very much indeed. You leave us with the image of a bus full of ermine-clad noble Lords teetering on the edge of a cliff. I recall at the end of “The Italian Job” what song they were singing. May I thank you very much for coming before this Committee, and may we have our next witness?

Professor Russell: Thank you for putting up with me for so long.

Examination of Witness

Witness: **Lord Strathclyde** gave evidence.

Q67 Chair: May I welcome our second witness this morning, and could you please identify yourself for the record?

Lord Strathclyde: Good morning. I am Lord Strathclyde, and I conducted the review on secondary legislation that you are discussing today,

Q68 Chair: Did you, in fact, do it on your own?

Lord Strathclyde: It was a committee of one, which made organising the diary extremely straightforward. But I was supported by three eminent people with practically unrivalled parliamentary experience. Would you like me to name them?

Chair: Yes, please.

Lord Strathclyde: A former clerk in the House of Commons, whose name has suddenly gone out of my mind.

Chair: Jacqy Sharpe.

Lord Strathclyde: Jacqy Sharpe, who was excellent, Michael Pownall, who is a former Clerk of the Parliaments, and Sir Stephen Laws, who is the former First Parliamentary Counsel. So between them, my experts were House of Commons, House of Lords and chief legislator, drafting and writing legislation. I hasten to add that it was my report, it was not their report, and I do not suppose that they all agreed with every bit of it. What they did was to provide background as to how these things would work in practice. I think one of the reasons why your previous witness said it was a useful report was because it explained very clearly how secondary legislation passes both the House of Commons and the House of Lords, and what its primary purpose is.

Q69 Mrs Cheryl Gillan: Lord Strathclyde, what is your precise interpretation of the conventions that regulate the House of Lords' ability to reject statutory instruments?

Lord Strathclyde: Between 1968 and 2000 I think it was very clear that the House of Lords did not reject secondary legislation, and they created in the House of Lords a system of what became known as a "regret motion", sort of "not in my name". Although the secondary legislation would still go through, the order would still go through, the House of Lords would have made a very clear statement that they disapproved or disagreed with it. In 2000, with the new House, which we were told was stronger, by defeating a particular order to do with the London mayoral elections we re-established that convention, and that position continued until Jack Cunningham's report on conventions. In a way, by laying it out in the way that he did, he brought in this phrase about "exceptional circumstances", and we never entirely described what those would mean. That did introduce an uncertainty going from "the House of Lords should never do this" into something else, and then that is what happened. Then there were some pretty minor defeats, one on the super-casinos in 2007 and then the one in the coalition Parliament on legal aid, which again I think was a coalition issue. Until October 2015 that was it.

My view of why the Government wanted me to review it is because they felt, as I felt, that something different happened on tax credits that had not happened before. This was not a pure rejection. The motion that was passed in the House of Lords was a delay motion, but by taking it hostage for three years it was in practice and in effect a reject motion. That was when there was a disagreement between those who believed it had not broken the convention and those who believed that it had, and trying to sort out that complexity was what I was trying to do.

Q70 Mrs Cheryl Gillan: In the Lords Companion it affirms—and I think I am quoting directly from it—the House’s “unfettered freedom to vote on any subordinate legislation submitted for its consideration”. Would you say that that is really the situation in the House of Lords and how it should be? Is that able to coexist alongside the “conventions”?

Lord Strathclyde: There is no doubt in my mind that under the law the House of Lords has an unfettered right to vote on, debate, discuss and vote down secondary legislation. But since 1968 when the House of Lords unwisely rejected Harold Wilson’s Rhodesia sanctions order, the convention was created not to do this ever again. The conventions are voluntary agreements. They should be binding on those who come to agreement and their successors. In fact, it is remarkable that here we are, nearly 50 years after 1968 and still debating this convention. But as I said in my report, for some years it had been fraying at the edges; people were beginning to try to find what the boundaries were, disagreeing on their impact and so on. In October last year that fraying stretched the convention to breaking point.

Q71 Mr David Jones: Lord Strathclyde, we have heard from Professor Russell, who has said that the convention in fact was not routinely to reject a statutory instrument that comes from the Commons. Is it not possibly the case, so far as the tax credit SI was concerned, that what has prompted your appointment is a fit of pique by the Government, whose predecessors had previous experience of the Lords rejecting statutory instruments?

Lord Strathclyde: What the Straw Committee also said was that the parties of Opposition should not use their political numbers to vote down a Government order simply because they could. When you looked at the political breakdown of the votes, it was all Labour and Liberals on one side and Conservatives on the other. This was clearly a political expression of the House of Lords. The House of Commons had voted on these matters two or three times. There had been no members of the Government in the Opposition lobby. In fact, what was unusual in the House of Lords is that there were some very senior Labour peers who voted with the Government, not because they had any affection for what the Government was doing on tax credits but because they understood the constitutional position and the possible implications of the House of Lords voting down something that was clearly financial in scope, went to the heart of the Government’s financial strategy, and was from a Government that had only been elected for six months. This was high-risk stuff, and it was doing something that we had not done in that way before. That is why it created the response from the Government that it did.

Q72 Mr David Jones: You said that the convention had been stretched to breaking point, but isn’t it the fact that there had been, as you have just outlined, previous cases where that had happened?

Lord Strathclyde: Yes, there had. But on every other occasion it had been a straight rejection, and this was not a rejection. It might be quite useful just to go back to the quote that Professor Russell gave, when I absolved the two noble baronesses of deliberately trying to undermine the convention—I don’t think that is what they were trying to do; I think they were trying to do something that was within the rules. What I went on to say was, “My view is that, in practice, whatever the technicalities, they, the motions, proved fatal because they took the orders hostage and would not pass it unless certain conditions were met”. That is the thing that changed in October. Suddenly we have discovered a new procedure that on one side people said, “This is entirely in accordance with the

convention” and others said, “No, it isn’t”. Once you have a convention of people who disagree on what it means, you have to then have a debate, which is what we have had, about what to do next.

Q73 Mr David Jones: You mentioned the previous practice of passing regret motions, and in fact I think it was the Bishop of Portsmouth who put down something that looked a bit like a regret motion on this occasion. Would you think that there is any merit in considering the reintroduction of regret motions as a process of salving the conscience of the Lords in such cases?

Lord Strathclyde: The House of Lords already has that power and has done it very regularly, and in fact there is no reason why they shouldn’t keep doing regret motions. I think regret motions are a very good way of the House of Lords expressing its view. Sometimes in opposition it is hard to get your party to come and support it, because they think it doesn’t matter and it has no bearing on the Government, which is half true. But on the other hand, in terms of publicity and exposing what the Government is trying to do and demonstrating that the House of Lords is against it, I think it is quite a good form of motion to use.

Q74 Chair: You explained that something different happened and, as we heard from Professor Russell, the rather lame argument was presented that what was different was that this was not a straight rejection, it was less than a rejection. How is this something different, and therefore more significant, from any other previous occasion and a breach of the convention?

Lord Strathclyde: The clever wording of the motion was not to simply reject it. There was a reject motion on the order paper from a Liberal Democrat, which was voted on and overwhelmingly rejected by the House of Lords, which then assumed that it was okay to vote for the motions of Lady Hollis and Lady Meacher. I can see exactly how they got into that, but the effects of those motions were pretty much exactly the same as a full rejection. What the Government did was to wake up to the idea that there was this procedural innovation in the House of Lords on these motions, and they wanted to find out whether or not this was going to become more permanent practice.

Q75 Chair: You remark about the words “exceptional circumstances”, and of course the definition of exceptional circumstances, or the use of those words, is deliberately ill defined, is it not? It is real Sir Humphrey-speak, is it not?

Lord Strathclyde: Yes.

Chair: I am just looking at my thesaurus—“extraordinary, phenomenal, special, unique, notable, rare, strange, unprecedented”, but that does not provide any useful definition of what “exceptional” is. Doesn’t all this add up to the fact that there isn’t really a convention? There is the law and there is a convention that is proved only by the breaking of it.

Lord Strathclyde: Yes. There is the law, there is no disagreement about what the law says. I think that the convention from 1968 was that the House of Lords simply did not do this sort of thing.

Chair: But you led the rebellion on the casinos yourself.

Lord Strathclyde: No, not on casinos. It was on the London mayoral audits, and I did so quite deliberately, first of all, warning the Government that this is—

Chair: I accept that correction, which usefully makes the same point I was making.

Lord Strathclyde: Yes, but it was a different issue, for reasons that I will come to. I laid out in a speech, after the removal of hereditary peers, that now these conventions presumably were no longer necessary and we would find an opportunity to reject a statutory instrument, which is what we did.

Chair: So the convention doesn't exist, as Lord Norton points out.

Lord Strathclyde: There are constitutional conventions, which are rare, and then there are conventions of the House that, after all, Jack Cunningham and his Committee examined and made various proposals for. I humbly and respectfully disagree with Professor Lord Norton. I think that there are conventions of the House that are useful in parliamentary process.

Q76 Oliver Dowden: We have covered a number of these points already, so forgive me if we are going over old ground. Could you clarify how constitutionally significant, if at all, you think the Lords' behaviour was in relation to tax credits?

Lord Strathclyde: I don't think it was a constitutional crisis. It could have become a constitutional crisis; these things could do if they continued, but I don't think it was at the time. Everyone behaved within the law. The House of Lords was entitled to vote in the way that they did, even though it was a bit of an innovation to do so in the way that they did. Equally, the Government were entitled to believe that the conventions would stick. Also, to those who criticised the Government for not having brought it under primary legislation, that option was open to the Government, but on the other hand Parliament had already agreed under the Tax Credits Act 2002 that powers should be given to Ministers to make these changes under secondary legislation. Everybody behaved with constitutional propriety but then created a muddle on which I like to think I have tried to provide a little bit of clarity in my report.

Q77 Chair: Sorry, I will just make the point that Parliament also agreed that those delegated powers should exist in that legislation against the background that the House of Lords might use its powers to reject the regulations. I don't see how—

Lord Strathclyde: In theory, Mr Chairman, yes. In practice, I don't think any of these powers have ever been passed by the House of Commons, I venture to suggest, with the idea that the House of Lords is going to use a veto power that it has only used five times since the Second World War.

Q78 Oliver Dowden: What about the previous witness's point that this delegated legislation was intended to vary the rate rather than to abolish the benefit altogether, and that is what amounted to exceeding the powers intended by the primary legislation?

Lord Strathclyde: 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 regulations was entirely intra vires with the founding Act and there was no problem with that issue. Whether they were politically wise to do so, in retrospect, is another question, but under law they were totally within their correct powers.

Q79 Oliver Dowden: Do you believe that this amounted to a breach of a constitutional convention, and if so which constitutional convention—one in relation to statutory instruments or one in relation to financial privilege of the Lords?

Lord Strathclyde: For “constitutional convention”, can I say a convention of the House of Lords on statutory instruments? Yes, I think it did ultimately break that in practice because of what it did, even though some people said that the motions were neither fatal nor non-fatal, but in practice I think they were fatal. It was that disagreement that created the problem. Your second point was—

Oliver Dowden: It sounds like you are saying it was in relation to the convention in relation to statutory instruments rather than a convention in relation to financial privilege.

Lord Strathclyde: Yes, I think it was more about the House of Lords using its veto to block the statutory instrument in practice rather than it simply being about finance. But the whole financial question became more pertinent, and in my review I suggested some ways that the Government, in drafting legislation—in consultation with the House of Commons, the Procedure Committee and perhaps the Joint Committee on Statutory Instruments—should look again at what should be Commons-only powers in respect of financial matters.

Q80 Oliver Dowden: Do you think a Lords convention exists in relation to financial privilege vis-à-vis statutory instruments?

Lord Strathclyde: It is a very difficult question, because there is generally an understanding that goes back many years—depending on who you ask, the 17th century, the 15th century or the 14th century—about the House of Commons’ monopoly on powers over supply, which essentially means that the House of Lords should not have any say in these matters. Post-1911, when the practice continued and has become what we see today in terms of financial privilege on money Bills, that works and is understood, and financial privilege is prayed in aid on amendments made by the House of Lords. But there is no equivalent process for secondary legislation—for statutory instruments. I don’t think you want to create a new bureaucracy that then looks at each statutory instrument, whether or not it affects financial privilege. Far better in the original language for the Government to state, “We think this should be Commons-only, because it deals with vast amounts of money” and for the House of Commons to agree to that or to disagree with it.

Oliver Dowden: This should be applied prospectively; you would not seek to apply it to legislation in the past.

Lord Strathclyde: On new Bills being drafted from now on.

Q81 Chair: Lord Lisvane said that this constitutional crisis was “entirely hyperbolic”. In view of the fact that we cannot even agree on what the crisis was about—at least there is a lot of argument about it—how much would you agree with him?

Lord Strathclyde: As I said a few minutes ago, I don’t think it was a constitutional crisis, but it could have become a constitutional crisis. One way to stop it would have been the

Labour Party and the House of Lords saying, “We did this, but we won’t do it again”. That would have fitted in with a defeat being once every Parliament. But they have studiously not said that, and they have waited for the results of my review. Remember, there is one thing that we should all bear in mind. The very next day after the motion on tax credits, there was another one to do with elections and the electoral register, which also had fatal motions done on it. On that occasion the Government won, but the Opposition parties were still trying very hard to defeat it. If that had been defeated then you would have seen the start of a far greater constitutional crisis than in fact was the case.

Q82 Gerald Jones: Lord Strathclyde, why do you think it was a proportionate step for the Government to task you with a review of secondary legislation in the Lords after the tax credit vote?

Lord Strathclyde: Immediately after the tax credits there was a muddle, and the muddle was: what is this convention? What are the rules that the House of Lords is going to apply to these statutory instruments? There may have been different ways of doing it, but the Government asking me to investigate it and to tell them what I thought was not a bad thing to do. Between 1994 and 2013 I was either Government Chief Whip or Leader of the House of Lords in government and in opposition, so I lived and breathed and slept these conventions over a very long period of time, and I do understand how they work. I am not entirely surprised that the Government came and asked me to do that. My report is, I hope, relatively short, fairly straightforward and very clear. I think it is that clarity about how statutory instruments work in Parliament that is important, and my solutions are pretty clear as well.

Chair: We were not surprised either.

Q83 Paul Flynn: What originally qualifies you to sit in the Lords?

Lord Strathclyde: Originally, I inherited a seat from my grandfather.

Q84 Paul Flynn: Okay, and what did your ancestors do to give them the right to have a seat in the Lords in perpetuity?

Lord Strathclyde: They were like you, they were Members of Parliament. In 1999, of course, I was then elected to sit in the House of Lords under the legislation, which you—

Paul Flynn: I am aware of this. You were elected by the unelected, though.

Lord Strathclyde: I am unelected, yes.

Paul Flynn: Yes, but you were elected by the unelected.

Lord Strathclyde: Yes, I am elected by them, but that is true of everybody in the House of Lords.

Q85 Paul Flynn: But the rights for you and your successors to sit in perpetuity is because of what? Was it royal patronage or prime ministerial patronage?

Lord Strathclyde: It was prime ministerial patronage, yes.

Paul Flynn: When was that? It was—

Lord Strathclyde: It was very firmly 20th century, in the early 1950s.

Q86 Paul Flynn: Okay. Are you proud of the fact that you have been asked to do a job to make sure that the Government can continue to pass a law that deprived 3 million poorly paid people of a part of their income, and to ensure that they could do that again?

Lord Strathclyde: I took great care not to involve myself too much in the background of the tax credits legislation, because that was an argument that was already being had within Parliament. What I was interested in was the process by which statutory instruments should be passed between the two Houses to bring greater clarity to what has become a muddle. I thought that would provide a service to both the House of Commons and the House of Lords and, therefore, to the people of this country.

Q87 Paul Flynn: We have a grossly unequal society, and it is getting worse by the year with the distribution of wealth in the country. Do you think the fact that you, with an inherited place in the Lords—you have not been elected by a popular vote—will bring the process of the Lords into disrepute, and it will eventually collapse of its own absurdity?

Lord Strathclyde: I, for one, have for many years been in favour of an elected House on the basis that political power in the 21st century should be carried by people who are directly elected by those who are governed, by the people.

Q88 Paul Flynn: Why do you continue to sit—you don't believe in leading by example, just by exhortation?

Lord Strathclyde: What I believe is that the Clegg Act in 2012 was a way forward, but the House of Commons, having voted in overwhelming numbers to pass that at Second Reading, then could not agree between Government and Opposition on the process of going forward. All the political parties are in favour of an elected House, apart from the Scottish Nationalist Party who want to abolish it entirely. I am hopeful of it at some stage—and one of the reasons why I am in the House of Lords is to try to bring that end about.

Q89 Paul Flynn: The effect of your work has been to allow the Government to further impoverish the already poor. Is this your proudest moment?

Lord Strathclyde: I disagree with that. I think this Government is bringing greater wealth and greater prosperity.

Chair: I am going to stop you. Lord Strathclyde, I am afraid we are straying from the subject about the recommendations of your review. Mr Flynn, if you want to ask—

Q90 Paul Flynn: Can you tell us what the rationale was behind your three options? The first one is a joke. I presume you did not expect anyone to support that.

Lord Strathclyde: I thought it would be unlikely, but there were people who said we should remove the ability of the House of Lords to deal with secondary legislation in its entirety by removing it from the scope of the 1946 Act. There are a whole bunch of reasons why I don't think that is the right thing to do, not least of all that we would not get the scrutiny that Parliament demands. But it is quite a good way of looking at one very unattractive option to see the attraction of the other two.

Q91 Paul Flynn: In your long period in the Lords, there have been very few worthwhile reforms. Do you think that reform by Government panic is an effective way of changing this ridiculous institution?

Lord Strathclyde: Are you talking about the 1999 Act?

Paul Flynn: The 1999 Act was about the only one.

Lord Strathclyde: That was an act of panic.

Paul Flynn: No, I am talking about the proposal to change the—

Lord Strathclyde: No, I don't think this was panic at all. This was a wholly orderly examination of the process by which we pass secondary legislation. What was interesting in it was to discover how highly regarded the House of Lords is in terms of scrutiny of secondary legislation, and how many former Members of the House of Commons in the House of Lords said that scrutiny of secondary legislation in the House of Commons was a waste of time.

Q92 Paul Flynn: But the institution is widely derided because of it being unelected; it is grotesquely undemocratic; it is bloated and unworkable. With all these things in mind, of course this is an act of panic by a Government in order to save their political skin.

Lord Strathclyde: I don't agree with any of that, any aspect. I don't recognise the description of the House of Commons or indeed of the House of Lords.

Q93 Mr Turner: Do you think you have given service to the House of Lords?

Lord Strathclyde: It is a difficult question to answer, in some respects. I have been there a long time. I have held some very senior positions in the House of Lords and in the Government and on its Committees. I like to think that I have done some good in terms of the work that the House of Lords does, vis-à-vis the parliamentary process and the long-term governance of the country, both in opposition and in government.

Mr Turner: And on this particular issue?

Lord Strathclyde: Yes. If you read the debate, I have lost count of the number of peers who spoke who praised the report. They did not necessarily agree with every aspect of it, but they were certainly grateful to receive it. They got it before Christmas and they were able to spend some time reading it before we had our debate. We debated it for seven hours in the House of Lords.

Q94 Mr David Jones: Your report recommended a review of the circumstances in which SI powers should be subject to Commons-only procedures. In what circumstances would you envisage an expansion of Commons-only stages for statutory instruments?

Lord Strathclyde: There needs to be a discussion between the Government and the House of Commons, with the Procedure Committee but also the Joint Committee on Statutory Instruments, to see where Commons-only procedures could be used where there are substantial amounts of money being spent, which would include some proposals on welfare, which would have included the matter of tax credits. There are very few people who would disagree that the issue underlying tax credits, as Mr Flynn has pointed out, was

large amounts of taxpayers' money being spent through tax credits and whether or not that should be changed. That might have been something in 2002 that could usefully have been reserved purely for the House of Commons.

Q95 Mr David Jones: What safeguards would you say would be needed to ensure that the use of Commons-only procedures was tightly prescribed and not exploited?

Lord Strathclyde: Already for money Bills there are clear provisions for Commons-only statutory instruments. There is no reason why you shouldn't follow that model to see where the boundary between financial and non-financial matters has become sufficiently blurred, so that more statutory instruments are dealt with by both Houses rather than one only. But the way I would begin is to take a Bill, perhaps a welfare Bill where there are large amounts of money being spent, and agree with the House of Commons that this is a way forward. It may be that the House of Commons rejects that and suggests that the current way forward is the right one, particularly if both Houses accept my option 3, which ultimately gives the House of Commons a final say.

Q96 Mr David Jones: Your review also recommended that Government should rely less on statutory instruments and put more detail on the face of the Bill. We have heard from Professor Russell that that might be rather a tall order, as it could clog up the processes in both Houses of Parliament.

Lord Strathclyde: In the House of Lords last Wednesday there were several important speeches, one from Lord Judge, the former Lord Chief Justice, about the growth in the importance of statutory instruments. The other was from Michael Jopling, a former Member of the House of Commons, who said that he had seen, many times, Ministers coming to various legislative committees and saying, "We will deal with the details later on in statutory instruments". Both Houses of Parliament should beware of that approach. We should demand more detail on the Bill where that is possible and feasible—I am not opposed to the use of statutory instruments, far from it— and also, where possible, ask for and see draft regulations during the passage of the primary legislation. I see no reason why Ministers who have thought through the policy should not be able to provide that, but also understanding that, as the years unfold, they need the powers to change details on them.

Q97 Mr David Jones: Is it not perhaps the case that your proposals in option 3 could in fact encourage the Government to do precisely the opposite—to rely even more heavily on statutory instruments?

Lord Strathclyde: That would have been the case on option 1. Option 1 is a clear indication for the Government to pass more and more by secondary legislation. I don't think that is true in option 3, because the opportunity for the House of Lords to send something back to the House of Commons and for there to be a debate and a vote, which I am in favour of, is quite a powerful disincentive on something that is politically controversial, within the party of government as well as within the Opposition, and I think is quite a big deal. Used well, this is a substantial new power in exchange for an old power that is rarely used.

Mr David Jones: In fact, the tax credits issue might be a prime example of—

Lord Strathclyde: Exactly. Imagine if my option 3 had been in existence, and the House of Lords had rejected it and sent it back to the House of Commons. We know what happened, but that might have been quite a difficult debate for the Government.

Q98 Chair: Two brief supplementaries. What about the Henry VIII clauses? If the House of Commons had simple primacy and could overturn a rejection of a statutory instrument on the same day as the Lords rejected it, could the House of Lords possibly allow through Henry VIII clauses that allow amendment of primary legislation by secondary legislation in future?

Lord Strathclyde: I think the one weakness in my option 3 is that by removing by law the fall-back position of ultimate rejection, you could envisage a Government doing something by secondary legislation that it knew it would have. But I find it very hard to think what this truly appalling and irreversible thing could be; the slaughter of the firstborn perhaps.

Chair: Or the abolition of tax credits.

Lord Strathclyde: No, I don't think the abolition of tax credits would fall into that at all. The whole tax credits regulation was part of the ebb and flow of Government. Before 2002, these things did not exist and they were entirely reversible. After the next election, if the Labour Party were in Government, they could reverse all of this. That is why I think that the House of Lords got it wrong on tax credits. It should not have used its practical veto powers in the way that it did.

Q99 Chair: How much is this all about that—that the Government thought the House of Lords got it wrong on tax credits, and that is why we have this review?

Lord Strathclyde: We have this review because the Government thought that the House of Lords got it wrong on tax credits, there is no doubt about that. If they had been passed there would not have been a review; that is utterly clear to me.

Q100 Chair: How do you respond to the argument recently made by Professor Mark Elliott that your proposals amount to “a triple-whammy that would permit the Government, just as it can at present, to shield parts of its legislative proposals from the full scrutiny that primary legislation attracts; it would substantially undermine the already lesser scrutiny to which statutory instruments are subject; and it would incentivise greater reliance upon statutory instruments as distinct from primary legislation in order to exploit the significantly weaker scrutiny regime applicable to the former”?

Lord Strathclyde: I can imagine that that is exactly the sort of speech that the crusty old peers made in 1909 and 1910 with the introduction of the Parliament Act, and again on the extension of the Parliament Act in 1949. They would say, “Life will never be the same again. The prerogatives of the House of Lords will no longer be there, the great safeguards” and so on. People argued in 1911 that the Parliament Act would be used far more, but in fact it has not been. I see no reason, under my option 3, why scrutiny of secondary legislation could not be improved, both in the House of Commons and in the House of Lords, by the House of Lords asking the House of Commons to think again or, as Professor Russell put it rather neatly, saying to the House of Commons, “Are you sure?” This is an important new power and a new influence on the House of Commons and on the Government that would be worth having.

Q101 Ronnie Cowan: You took a little over a month to complete this work. Is that a timescale put on you by the Government or one of your own choosing?

Lord Strathclyde: No, it is one of my own choosing. The Government suggested that I could report in the new year, but I saw no reason why I shouldn't deliver this before Christmas, which is what I did. The issues are relatively well understood. In the last 15 years there has been a Royal Commission under Lord Wakeham in 2001; there was the Committee on Conventions of Jack Cunningham; there was a report by Lord Goodlad on these things. There was not a great deal new to understand. The main thing was to try to see as many people as possible in the House of Commons and the House of Lords. That was the time factor.

Q102 Ronnie Cowan: As you say, there have been reports. We keep on doing this, we keep on reviewing and keep on reporting and keep on doing very little. Would it not have been better to have a longer, more thorough examination of the expanding size of the House of Lords?

Lord Strathclyde: Yes; I was not asked to do that and I would not volunteer to do that. I have spent a lot of the time on reform of the House of Lords and trying to create an elected House. As you heard from Professor Russell, there are lots of different ways of creating an appointed House, and of dealing with the House that we currently have and the different formula that you could use if you had an appointed House, which is why it was confirmed to me again today that the best way is to let people choose their representatives rather than politicians.

Q103 Ronnie Cowan: How would you have an elected second Chamber?

Lord Strathclyde: The basic model outlined in the Bill in 2012 is the right approach, to have 80% elected among larger constituencies—I am broadly in favour of single Member constituencies, such as the old European constituencies—and for the 20% to be appointed by an appointments commission for independent Cross Benchers; the politicians elected and the Cross Benchers appointed.

Q104 Ronnie Cowan: What is your response to Professor Meg Russell's claim that an opportunity exists for a deal to be struck between the Government and the Lords on a balanced package, strengthening the use of the Lords' powers in return for restraint in appointments?

Lord Strathclyde: I doubt very much that that is going to happen. I think it is muddling two issues of powers and composition.

Q105 Ronnie Cowan: What would you rather do?

Lord Strathclyde: I don't think there is any great incentive for Government or Opposition to create a deal of that nature. If the House of Lords wants to go down a consensus road and rebuild a convention, which is my option 2, then it would be open for them to do so. But Governments can't impose conventions, any more than I can or anybody else; they have to come as an agreement between Opposition and Government. But if my option 3 laid the grounds for what a convention could look like without the statutory backing, then I think that that would be an important way forward.

Q106 Chair: I do recall somebody saying that it is very difficult to discuss the powers of the House of Lords without discussing its composition, and I think it may have been you. How much did you discuss this matter with the Prime Minister when he asked you to undertake this task?

Lord Strathclyde: I don't think I discussed this with the Prime Minister at all in terms of my options. I did see him when I was appointed. I had not yet done the work to see which way I would go. That quotation may have been the other way around—you shouldn't discuss composition without looking at the powers—but, equally, it may have been as you said it.

What is interesting is that over the last 20 years, as Professor Russell said, we have spent a great deal of time talking about composition; we have not talked about powers. The House of Lords has great powers that it does not use or uses very rarely. In the debate that we had on composition, there was no parallel debate on how you might want to circumscribe some of these. I thought it was interesting, as I did the work in my review, that this was the first time that we could realistically look at the powers of the House of Lords. Some have argued that this is a substantial reduction in the powers of the House of Lords. I don't think it is. I think it is an exchange of one power for another power. Although it stops this once-a-decade use of the veto since the Second World War, it does provide for something else that I think would be of practical use to Government, to the Commons and to the House of Lords.

Q107 Chair: Just returning to the Henry VIII question, in clause 68 of the Scotland Bill there is a Henry VIII clause, a power to make regulations under that Bill that could amend or repeal or revoke or otherwise modify any enactment relating to the powers of the Scottish Parliament. Should that be subject to no restraint at all by the House of Lords, just a gesture?

Lord Strathclyde: I don't think that asking the House of Commons to think again and to check whether they are absolutely certain is a loss of a check.

Q108 Chair: We used to say that constitutional Bills—and that would be the equivalent of a constitutional Bill—should be debated on the Floor of the House, including the Committee stage, and then debated on the Floor of your House, including the Committee stage. Are we now reduced to changing the constitution by statutory instrument without any power of veto in the House of Lords whatsoever?

Lord Strathclyde: Yes, but it is a power of veto that has been so rarely used that it is not a practical power, in a way. That is my point. Remember, between 1968 and 2000 the powers—

Chair: If they had used it a bit more often it might be more difficult to abolish.

Lord Strathclyde: Yes, but it was a power that was never used. In fact, between the Second World War and 2000 it was only used once, which was on those very—

Q109 Chair: How much are you saying that if they had used it more often, it would be more difficult to abolish?

Lord Strathclyde: It is too hypothetical. If the House of Lords had used those powers more often, the House of Commons would have lost patience with it a long time ago and we

would have dealt with these issues. Perhaps that is what they were expecting in 1968 when they made the original convention. They perhaps assumed that at some stage the House of Commons would want to regularise the use of these powers, particularly given that the Parliament Acts were used for primary legislation. This was a remnant power, a veto power that had been largely unused.

Q110 Chair: Lord Strathclyde, thank you very much indeed for undertaking the review and being so open in your answers with us. We are very grateful to you. I dare say you will hear more from our Committee on this subject.

Lord Strathclyde: Thank you very much indeed, first of all, for taking an interest in all of this. I do feel, and quite rightly, that I was a savoury dish after the main course of Professor Russell. It was an outstanding and very interesting discussion that you had with her, much of which I agree with. But I do think that statutory instruments are an important part of what we do, and it is equally important that both Houses of Parliament understand their respective powers.

Chair: Between the two of you, our appetite has certainly been sated. Thank you very much.