



HOUSE OF LORDS

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The Select Committee on Secondary Legislation Scrutiny
Inquiry on

RESPONSE TO THE STRATHCLYDE REVIEW

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3.55 pm

Witnesses: Rt Hon the Earl Howe

Rt Hon the Lord Strathclyde CH

Members present

Lord Trefgarne (Chairman)
Baroness Andrews
Baroness Fookes
Lord Haskel
Lord Hodgson of Astley Abbotts
Baroness Humphreys
Baroness O'Loan
Lord Woolmer of Leeds

Examination of Witness

Rt Hon the Earl Howe, Deputy Leader of the House of Lords

Q75 The Chairman: Good afternoon, Lord Howe. Before we start, I am obliged to read out that we are on the record and are being webcast live and recorded by BBC Parliament, which is on both audio and video. A verbatim note is being taken, which will be put on the public record in printed form and on the parliamentary website. We will send you a copy of the transcript so that you may revise any errors. Thank you very much for coming to help us with our work, which is following up on Lord Strathclyde's review, as I am sure you know. I will start by asking you what you think the problem was which the Strathclyde review was intended to address?

Earl Howe: The essence of the problem is, I think, twofold: the primacy of the House of Commons; and, directly related to that, the absence of a mechanism for dialogue between the two Houses on SIs. I hope you will not mind if I give a fairly detailed answer to flesh that out. You have heard from more than one witness that the commissioning of the Strathclyde review represented a giant overreaction to the loss of a single vote in the House of Lords. I do not believe that that is a fair criticism at all. The Government's concern ran very deep in the aftermath of that vote, and it arose for a combination of reasons. I promise that I will not rehash the debate, but the vote related to a major plank of the Government's economic and fiscal strategy under which a reshaping of tax credits would contribute swiftly and substantially to a reduction in the public sector deficit. That strategy was one on which the Government were elected to office, and the measures to deliver it had been laid out in the Budget, so the issues had not just cropped up in the ordinary course of a Parliament; they were absolutely central to fulfilling the manifesto.

Secondly, the tax credit element had already been approved explicitly, twice, by the elected House. There is a long-standing convention as to the primacy of the House of Commons on

financial matters. In those circumstances, I believe that the House should have asked itself more searchingly whether the supposed exceptionality of the SI was of a kind that they wished to pray seriously in aid. Here it is relevant to mention the Joint Committee on Statutory Instruments, because we all know that one of the grounds on which the JCSI is entitled to draw the special attention of House to a given instrument is that the SI appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made. The JCSI had cleared the tax credits SI without comment. It cleared them in the self-same report as the one in which it drew the House's attention to the public contracts regulations on precisely those grounds. I therefore submit that it was not unreasonable for the Government to believe that they were proceeding with total propriety in bringing the tax credits proposals before the House in the form of an SI, and to expect that SI to be approved.

Thirdly, there is the convention on SIs. We can perhaps talk later about what the convention is or is not, but if it has in practice been reasonable for a Government to expect one Lords defeat on an SI during the course of a Parliament, which has been the pattern, a serious attempt to defeat an SI on the very next day after the tax credits defeat undoubtedly called that expectation into serious question. That Motion was not rejected for want of trying. In other words, the question arose in our minds: were we suddenly in a free-for-all where the Lords convention on only rarely rejecting SIs had in effect been put to one side?

Finally, the nature of the two Motions passed by the House on tax credits took us on to entirely new ground. This was the first time that the House had approved Motions declining to consider an SI unless and until the Government took certain actions. If one accepts that hitherto the choice open to the House when considering an SI has been binary—that is to say, to approve, or not, in the case of affirmative instruments; and to annul, or not, in the case of negative instruments—the Meacher and Hollis amendments broke new ground in withholding approval while also seeking to prevent the Government from putting the matter to the House again until a set of conditions had been met. Their effect was to take the Government and the policy hostage and to place the SI procedurally into a state of limbo. Whether one cares to call that fatal or non-fatal is a somewhat sterile question, in my opinion.

The practical effect of the vote was to stymie the policy, but, almost as important, its other effect was to cast a serious question mark over a previously shared understanding of what it was open to the House to do within the scope of the convention on SIs. Whether you believe that the Lords should never defeat SIs, or should do so only rarely, this was quite different: it really did call into question the terms of the Lords convention. “If we do not know that”, as the Government said to themselves, “how can we ever be sure that the Lords will in future

accept the primacy of the Commons on any matter, especially financial matters central to the Government's agenda, or whether indeed there are any no-go areas that the Lords will in future respect when exercising its scrutiny function?" The combination of those factors, but perhaps especially the need to ensure the primacy of the democratically elected Chamber, is the reason why I do not think, in the wake of the defeat and the near defeat the next day, it was in any way disproportionate on the Government's part to commission the Strathclyde review.

That is a long answer, but I hope it is helpful.

Q76 Baroness O'Loan: Thank you very much, Lord Howe. You talked about whether or not one believes that the House of Lords should ever refuse to accept a statutory instrument, but actually the wording of the primary legislation under which these regulations were presented to the House said that the House of Lords could either approve or reject a statutory instrument. I would like to be very clear about what you are saying. You have described it in emotive terms as a major plank of economic and fiscal policy, and things like that, yet it was withdrawn by the Government; they did not attempt to do anything else. I just want to know: do you not accept that, in the primary legislation, the House of Lords had a duty to consider and then had the right to do what it did?

Earl Howe: I absolutely accept that the House of Lords had a right to look at this instrument and to scrutinise it, but I also think that the dispute was not about the use of an SI pursuant to a governing Act; the debate was about the policy. That was the disagreement in the House. One can be side-tracked a little by pointing the finger either at the use of the SI or at the governing Act, when actually the argument was about the acceptability or not of the policy.

Baroness O'Loan: But the reality is that the decisions made in the House of Commons, to which you have referred at length, were made without the information the House of Lords had when it came to make its decision. When the matter was referred back to the House of Commons after the House of Lords decision, it was said in the House of Commons that the Commons had not had the information. Where the House of Commons has not been provided with sufficient information to make an informed decision, are you telling us that the House of Lords should not exercise the power which legislation gives it simply to ask—and that is all the final vote was—the Government to think again?

Earl Howe: As you draw me, I would have regarded it as a great shame, from the Government's point of view, but consistent with the convention as we previously understood it, for the House to have voted on the Manzoor amendment, which was a straightforward veto. What took us into new territory, as I have explained, was the nature of the Meacher and Hollis

amendments, which were unprecedented—certainly in so far as the House accepting such Motions.

Lord Haskel: In view of what you have said, do you think then that the clerk or officials of the House should not have allowed the Hollis and Meacher Motions to appear on the Order Paper?

Earl Howe: The clerks were perfectly correct in their advice, because there is wide discretion for noble Lords to table Motions in almost any form they wish. There is no prohibition. I would not wish to criticise Baroness Hollis or Baroness Meacher for having tabled those Motions; they were allowed to do so, and the clerk gave them the green light. However, the House should have been more circumspect before voting for those Motions.

Q77 Baroness Andrews: Can I pursue the notion of this innovation? As Lord Strathclyde described it, the Motions were cleverly worded and constituted a bit of an innovation. When he appeared before the Public Administration and Constitutional Affairs Committee, the Chair probed on this. She was not quite clear what the significance was, because she asked him whether this was slightly less than a rejection. As you say, the House could have voted on the Manzoor amendment, which would have been straightforward, but in fact it chose to vote on the other two Motions. On the notion that it was slightly less than a rejection but created the opportunity to think again, do you think there was any scope for the Government to accept the proposition that it was another tool in our toolbox—we were offering the Government the opportunity to think again—rather than what Lord Strathclyde said when he spoke in the debate? He said that he had come to the conclusion that the House should not retain its veto, which was one of the questions that he considered.

Earl Howe: Clearly you must ask Lord Strathclyde about his report. I was and I remain very troubled by the terms of the Hollis and Meacher amendments, because they did something that the House has never done before: they threw a challenge down to the Government to change their policy in a quite radical way, certainly in the case of the Hollis amendment. I would argue that that is not the role of the House. The House has always had a binary choice, as I mentioned, in what it can do with an affirmative instrument. This was different, and it cast a grave doubt over what the convention actually is.

Q78 Lord Woolmer of Leeds: I am sure that we will return to this point later on, because you have set out a number of important views that resonate throughout the issues that we are going to raise with you. Could I flag up that I shall certainly want to come back to the question of this novelty and ask for your views on the way forward on it? However, you made quite a new point that no one else has made: you implied that there is a convention in the

Government's mind that they are defeated only once on a statutory instrument. You actually said that, and that is new, so would you stand by it if the existing convention is moderated or otherwise modified by an understanding on this important point of the Hollis amendment? Would you stand by the view that a Government could expect, as a convention, to be defeated only once on a statutory instrument in a Parliament?

Earl Howe: I do not think that I used "convention" in that context. I said "expectation", on the basis of what we have seen over the last few Parliaments since 2000. That has been the pattern. What was striking to the Government was that for two days in a row the House either defeated or made a very good attempt to defeat the Government on statutory instruments. That in itself threw a question mark up in the air as to whether we were now in a new era and whether the pattern we had previously seen was going to be broken regularly.

Lord Woolmer of Leeds: But this raises a second point that you made: you introduced the notion that Motions to reject that are defeated somehow fall within an understanding of the convention. Is that what you are saying?

Earl Howe: No, it is not. I said that the second Motion, which was defeated, was not rejected for want of trying. The House went all out to defeat the Government. It happened to fail, but it was clear that strenuous efforts were made to succeed.

Lord Woolmer of Leeds: In previous years, I believe there were something in the order of 60 or 80 Motions to reject instruments, as opposed to the five that have been passed. Does that not indicate that opposition to instruments has frequently been voiced and voted on but not passed? Nobody suggested in the past, however close or not it was, that the House should not move Motions to reject.

Earl Howe: I am certainly not making that case. It is perfectly open to the House, in my judgment, to table Motions in order to debate a statutory instrument. I would not seek to extend the point that I have made to those cases.

Baroness O'Loan: Lord Chairman, can I ask one final question? It is quite important.

The Chairman: Quickly.

Baroness O'Loan: Lord Howe, you have talked about the amendment trying to force the Government to change their policy, but my understanding was that government policy was to remove tax credits and to introduce a minimum wage to compensate the loss that lower-paid people had suffered. Therefore, was it about a change in policy, or about the timetabling? That is profoundly important. Was it about the timetabling of the two issues to make sure that people in the lowest income levels did not lose significant sums of money as a consequence of the regulations? The change demanded was not about policy but about timetabling.

Earl Howe: I hope, Lord Chairman, that you would not wish me to rehash that debate all over again. Clearly the terms of Baroness Hollis's amendment were such as to urge the Government to do something other than what they were intending to do in relation to those on lowest incomes. To my mind, that is a change of policy. That is all I would say.

Q79 Baroness Fookes: I want to go back a stage. Traditionally, statutory instruments have been used to flesh out details, usually of a fairly minor nature, with which it would not be wise to trouble the Houses of Parliament. The quid pro quo was that an important matter of policy should appear in primary legislation. Yet you have admitted that this was a major policy change for the Government in their manifesto. How can that be suitable for a statutory instrument?

Earl Howe: I mentioned the role of the Joint Committee on Statutory Instruments. That Committee could, if it had chosen to, have flagged up the tax credits SI as one that made inappropriate use of a delegated power. It made no comment at all. In exactly the same report, it drew the House's attention to a different statutory instrument on exactly those grounds: that it was an inappropriate use of a delegated power. This is something that the JCSI does regularly. What I sought to convey to your Lordships was that, given that no comment was made by the JCSI, the Government were entitled to believe that what they were doing was entirely proper and within the framework of the governing Act of 2002.

Baroness Fookes: So they were relying on the Joint Committee rather than on their major thoughts as a Government.

Earl Howe: No, not at all. The governing Act did not contain any restrictions on how the delegated power should be used. There are checks and balances in the system in Parliament to flag up to the Government that they may have got such a judgment wrong. No red lights appeared.

Baroness Fookes: There will certainly be red lights in the Committee that I chair in future on that basis.

Q80 Lord Haskel: In your reply to the first question, you spoke of the absence of dialogue on delegated legislation between the two Houses. Given that, would it be wrong to characterise the current debate as more a debate about the relationship between the Minister who was handling the delegated legislation and Parliament rather than a debate about the relationship between the two Houses? Is it not between Government and Parliament rather than between the two Houses?

Earl Howe: The moment the Lords decided not to approve the tax credits SI, it issued a challenge to the Executive on what to do with the policy. I hope that is agreed. The debate

therefore became in part about the relationship between the Executive and I would say not Parliament but certainly one House of Parliament. As I said, what happened on tax credits really was not about the quality of the legislation; it was about the policy. At the same time, it remained, I would submit, a debate about whether or in what circumstances the House of Lords accepts the primacy of the House of Commons and hence a debate about the relationship between the two Houses. In other words, there was no mechanism to resolve the disagreement between the two Houses akin to that for primary legislation. Lord Strathclyde's report implicitly draws attention to both elements of that debate, so his option 3, which we will come on to, provides a mechanism for the Lords to invite the Commons to think again.

Lord Hodgson of Astley Abbotts: So your view is that if the other place had been given the Explanatory Memorandum with all the facts in it, it would have approved the statutory instrument in the light of what happened subsequently and everything else that we now know happened.

Earl Howe: I am sorry, but I do not think that I can speculate on that, because it is hypothetical. I do not know what the House of Commons would have done. All I know is that it had explicitly approved the statutory instrument twice before it came to our House.

Q81 Baroness Humphreys: You have had long experience as a Minister. What do you think the purpose of secondary legislation is? Do you think that purpose has changed over time?

Earl Howe: The purpose of secondary legislation is to have a timely and efficient parliamentary mechanism for bringing government policy into legal effect. That core purpose, it seems to me, has not changed, but it sometimes means that a governing piece of primary legislation needs to be framed in a way that allows for considerable granularity in the delegated instrument. There are all sorts of circumstances where that can be appropriate and proportionate. I suggest that each case needs to be looked at separately. I do not think that those circumstances have changed over time. You have heard several witnesses state that there has been an increase in the use of framework Bills by Government in recent years. That proposition may need testing, as it seems to rest on assertion more than on evidence.

However, whether or not we are seeing more framework Bills than in the past is surely not the key question. The key question is whether Government are making inappropriate use of framework Bills. We discover the answer to that every time a Bill appears before us, with the report that we receive from the Delegated Powers and Regulatory Reform Committee on whether a Bill inappropriately delegates legislative power or whether it subjects the exercise of legislative power to an inappropriate degree of scrutiny. Governments, as we know, have traditionally implemented the recommendations contained in the DPRRC's reports. We also

have a mechanism to reassure us about each SI that is laid, because the JCSI and this Committee are there precisely to advise Parliament when they think there is “something wrong” with the way in which a power has been exercised. Parliament is not slow in responding to those findings. If the case being argued is simply that the Government are making greater use of secondary legislation than in the past, I think we can disprove that proposition fairly easily by reference to the statistics, because on average the number of SIs laid before Parliament since 1997 has remained pretty steady. The trend is certainly not upward.

Baroness Humphreys: As a follow-up to that, is there a case for saying, as some witnesses have, that statutory instruments are being used increasingly to make significant policy changes?

Earl Howe: I think that proposition needs testing. I do not see any evidence of that. It presupposes that there is a pre-ordained and appropriate level of detail in a statutory instrument. Surely, that will vary from Bill to Bill and case to case. Some Bills are framework Bills for a very good reason. For example, the delegated powers in the cities Bill provided local authorities with the ability to seek a deal with the Government for local devolution, without needing to wait for a separate Bill to wind its way through Parliament. The powers also allowed for future city deals to be tailored to the needs of each city, which seems an eminently sensible approach. So I am not sure that one can generalise, but as a general point you should be wary of pointing the finger at framework Bills that encourage a lot of detail in the SIs that follow. They are not inherently undesirable, and some people sometimes criticise process when, as I have already said, they are in fact criticising the policy.

The Chairman: After the vote on Baroness Hollis’s amendment it would have been possible, I suppose, for the Government to relay the order in identical form and hope that it would then get through. Indeed, as I recall, that was what happened in 1968 on the Rhodesian sanctions order. Was that considered?

Earl Howe: I am not aware that that was considered, but I come back to what some Members of the House thought they were doing by approving the Hollis and Meacher amendments. If you read the debate, a number of Peers said words to the effect that: “If we carry this Motion, we place the matter back into the hands of the elected House to reconsider”. Of course, the Motions did nothing of the kind. They wanted a mechanism to do that, but we do not have it. The alternative of the Government relaying some slightly different order seems a much more cumbersome process, and not an ideal one. The advantage of option 3 in Lord Strathclyde’s

report, which we can talk about, is that it allows for the dialogue between the two Houses that the House seemed to be wanting.

Q82 Baroness O'Loan: I want to allow you to develop your thoughts a little more. Lord Strathclyde proposes that steps should be taken “to ensure that Bills contain an appropriate level of detail and that too much is not left for implementation by statutory instrument”. Are there grounds for saying that the Bills that have gone through Parliament in recent years have not contained an appropriate level of detail?

Earl Howe: I would just repeat the answer that I gave to Lady Humphreys about what an appropriate level of detail is. I simply do not think that we can generalise about that. It would require a research project to investigate, first, whether there has been a trend towards SIs containing more detail. I do not know. We have heard some witnesses say things to that effect, but it needs to be tested. Secondly, we should question the assumption that it is inherently bad for SIs to contain detail, because that can sometimes be the most efficient, timely and sensible way of setting about things.

Baroness O'Loan: Of course the consequence of putting it into statutory instruments is that the House does not get the opportunity to discuss it. I was going to ask what you might regard as a bad example, but from the responses you have given thus far I do not think you are going to give me a bad example.

If I may, I will take you to the Public Bodies Bill. I served on the Delegated Powers and Regulatory Reform Committee at that stage. There were many other instances when the Delegated Powers Committee looked at the delegation of powers and said, “This is too wide. It should be in primary instruments”. Would you not accept that there are situations in which legislation is drafted and, because the detail has not been sorted out and the statutory instrument is not yet drafted, Parliament is therefore being asked to approve something that is such a framework that how it will work is unknown to government, let alone to those who might seek to debate what government intends to do?

Earl Howe: I do accept that. That is precisely why the super-affirmative procedure was invented. Correct me if I am wrong, but under the Public Bodies Bill the super-affirmative procedure was inserted, which I think we all feel provides an added level of assurance to Parliament, in the sense that it is possible for the prior scrutiny process to say to government, “This SI is not acceptable”. The Government must have regard to that recommendation, so I suggest that we have mechanisms to cope with that kind of situation.

I would just come back at you on your first sentence in which you said that it does not give the House an opportunity to consider a matter. I do not think you will find anybody in

government who wants to curtail scrutiny in the House of Lords. It is what we do, par excellence, and the scrutiny of SIs is not in contention here.

Baroness O'Loan: But if I may say so, Lord Howe, it is scrutiny within defined and restricted terms. Anyway, I want to take you on.

The Chairman: Will this be a new point?

Baroness O'Loan: I have two more elements to this question, Lord Chairman, if you do not mind.

The Chairman: But some of them we have covered already.

Baroness O'Loan: No, I would like to ask Lord Howe about the steps Lord Strathclyde said need to be taken, so what steps are the Government considering or could they consider?

Earl Howe: On that question, my initial answer would be to refer you back to the evidence given by Chris Grayling, who spoke in general terms about what might be looked at in the Commons. But one also needs to bear in mind that checks and balances against inappropriately framed Bills already exist in the system. I have referred to some of them, but another example is that the department sponsoring a Bill must submit delegated powers memoranda to the PBL Committee, which then formally assesses the appropriateness of a Bill's order-making powers and its substantive provisions prior to introduction. We have the DPRRC, which I mentioned, a key part of the role of which is to report on whether a Bill inappropriately delegates legislative power.

I could also point to the Government's record since 2010 on pre-legislative scrutiny. More Bills are published for pre-legislative scrutiny nowadays, and in recent years we have seen more pre-legislative Joint Committees. Again, there is always scope for departments and government as a whole to do better—I would not argue the opposite for a moment—but there is probably no need to invent wholly new mechanisms to deal with this.

Q83 Lord Hodgson of Astley Abbotts: If we accept that modern government is such that we are going to have framework Bills with some important infill from statutory instruments, would there be an argument, in your view, for statutory instruments that carry critical functions to be marked as amendable in order to get away from the difficult binary situation that we are in now?

Earl Howe: I hesitate to agree with you on that proposition. As I said, one of the great advantages of statutory instruments is that they provide a timely and efficient means of putting a policy into practical effect. If one goes down the road of making SIs amendable, you might as well have primary legislation, it seems to me. I do not think that would be a welcome

change to Parliament as a whole—I am not talking necessarily about the House of Lords. It would make the passing of legislation in all its forms very cumbersome indeed.

Q84 Lord Haskell: You have more or less answered my point, which was about the fact that there is scrutiny within government. You are an experienced Minister who has had to put your Bills to LegCo and to Cabinet committees. Do you think that can be improved? Should there be more of that scrutiny within government? Should that be part of our proposals?

Earl Howe: I am sure that you could fruitfully look at that area. As I say, there are mechanisms in place. In my experience, the PBL Committee does an effective job, but you might come to the conclusion that it could do better. You might also conclude that the guidance to civil servants, which is apparently quite general in nature, when drafting legislation and helping parliamentary counsel to draft should be beefed up. These things could all be looked at, in my view, because I do not think that we live in a perfect world.

Baroness Andrews: On that basis, are you suggesting that there is a case for some sort of more general review of the way in which we can, as Lord Butler would put it, improve governance and legislation in general, and in particular look at the balance between primary and secondary legislation? Would there be a case for that?

Earl Howe: I think it would be an interesting exercise, but I come back to the real issue: even if such an exercise were to find that the balance between primary and secondary legislation had indeed changed over time, what would that tell us in itself? I do not think it would necessarily point the way to any actions. We need to know whether the exercise and the creation of delegated powers have been appropriate in all the circumstances. One comes back to looking at each Bill and asking, “If you were doing this again, would you do it in the same way, and is there a good case for doing it in the same way?” Whether that would lead to the need for increased checks and balances in this system, I am not convinced, because I think that those checks and balances are there.

Q85 Lord Hodgson of Astley Abbotts: On the options, option 1 is the “off with their heads” option, in which the House of Lords is removed from the process of scrutiny of secondary legislation. Is this a viable option, given your stated view that the Government want scrutiny? If it were to be a viable option, what do you think, from your experience, is happening at the other end of the corridor with the quality of scrutiny?

Earl Howe: I have no experience of the quality of scrutiny down the corridor. You must forgive me, as I do not think that I can give an authoritative reply on that element of the question. You should perhaps take your cue from other witnesses on that. In theory at least, option 1 is technically doable, in my view. There are, after all, already certain categories of

financial instruments that are not subject to scrutiny in the Lords, so it can be done. That is a rather basic point, but whether it is desirable is a different point.

Lord Woolmer of Leeds: In option 2, Lord Strathclyde “seeks to codify the convention”, in his words. Can I ask you a number of questions on that? First, prior to the occasion in October last year, what was your understanding of the convention?

Earl Howe: I am glad that you put the question in that way—prior to 26 October. Lord Cunningham’s commission of 10 or so years ago stated that for the Lords to defeat SIs regularly would be a breach of convention and would create a serious problem. I take my initial cue from that. He then laid out a non-exhaustive list of circumstances in which he thought that it would be consistent with the role of the Lords to threaten to defeat an SI, but he also said that in the absence of such circumstances and where no other special circumstance applied, “opposition parties should not use their numbers in the Lords to defeat an SI simply because they disagree with it”. I explained at the start of my evidence why I feel that the continued existence of the convention as set out by Lord Cunningham is now in serious doubt. There is no agreement about whether on 26 October exceptional circumstances pertained, and no agreement about whether the House did or did not reject the tax credits SI. As the previous Government said in evidence to Lord Cunningham’s Committee, a disputed convention is no convention at all. That is the point that I fear we have reached. In answering your question, I have brought the timeline forward in a way that you did not ask me to, but I hope that it helps you to understand why I said what I did.

Q86 Lord Woolmer of Leeds: I was expecting you to develop it in that way. Can I ask you one or two questions that follow on from that? The two amendments that deferred consideration of the statutory instrument were novel, as we all agree. The effect of those amendments, as I think you have said—certainly of the Hollis amendment—was to prevent the statutory instrument from proceeding. If there were discussions within the usual channels to explore the implications of that particular device and to bring an understanding of it, so that, for example, effective vetoes or objections should be considered properly as part of the convention—that is, they should be used only exceptionally—would that satisfy or overcome one of the problems with the stretching of the convention? In other words, do you think that it is possible in the traditions of the House for the usual channels—the parties—to discuss that novel use and perhaps agree, on reflection, that it is tantamount to a rejection and therefore should fall within the ambit of a convention that that can be done only exceptionally?

Earl Howe: I am afraid that I see no prospect of that, as I have explained. I am all in favour of cross-party discussions about the convention; it would be wonderful if we could come to a

common position on what the convention is and then stick to it. I can perhaps come on to whether I think that is practicable or not. As for as the Hollis/Meacher-type Motions, one of the problems is that they bring us perilously close to the idea that Lord Hodgson was suggesting of an amendable SI. You could have a situation—and we almost did with Baroness Hollis's amendment—of a whole string of conditions being attached to the House agreeing to consider the SI further and, again, holding the Government hostage on detailed matters. I do not think that is within the spirit of the convention as we know it.

Lord Woolmer of Leeds: What if that view were agreed on reflection by the major parties? It was novel. The issue had not arisen in the Cunningham Committee considerations; it was never considered. Is it not sensible for parties, when faced by a novel situation, to get together to discuss that and to bring it sensibly within the spirit and intention of the convention?

Earl Howe: I am sure that my own party would be open to any discussion. I have no authority to say otherwise, but I can say that as far as the Leader of the House is concerned, the door is open to discuss the convention in any terms that may be proposed.

Lord Woolmer of Leeds: Lord Strathclyde's report is a little ambiguous on whether option 2, if achievable, should continue to permit the House of Lords exceptionally to reject statutory instruments. He talks in his executive summary of going back to not having a veto. If option 2 led to some discussions along the lines we have just talked about, would you want them also to include the House of Lords agreeing never to use its power to reject a statutory instrument?

Earl Howe: The problem with that idea is that the House could not relinquish its power of veto other than by legislative means. So if we were to imagine a new convention, whatever it was it could not contain a binding agreement never to use the veto.

Lord Woolmer of Leeds: I am greatly relieved. Finally, if that could be overcome, in the constructive spirit in which we have discussed trying to deal with this novel experience, and if there was good will, as historically there has been—we all want the House to work—would your doubts or concern about the possibility of achieving agreement be somewhat reduced?

Earl Howe: The issue with option 2 is not simply the need for agreement on what the terms of a refreshed convention should comprise. It is a difficult task, especially, if I may say so, given the evidence given by Lord Hunt, who seemed to be reluctant to accept that a convention currently exists at all and reluctant to reach agreement about a new convention. That is not the only problem. With good will, as you say, we could perhaps get over that difficulty and start talking in a constructive way. The other main problem, it seems to me, is that any changes that we made in that way could not be made watertight. As David Beamish and others have said, there are various ways in which we could set out in more detail how we might like things

to operate—in resolutions, in standing orders and so on—but we are, in the end, a self-regulating House. Those changes would therefore hold only so long as they commanded the support of a majority of the House.

In the abstract, as I said earlier, I am sure that many of us would choose to see a refreshed convention agreed by the parties across the House. It is obviously far preferable to do things by agreement, but even if such agreement were reached it would not stand up to serious challenge, I submit, if relations between the parties were to break down on a matter of highly contentious policy, for example. That is my worry and it is the argument that Lord Strathclyde makes in his report. He sets out that if the aim is for certainty and clarity about the role that we play on secondary legislation, in a way that secures the primacy of the other place, then option 2 is not the avenue through which to secure it. That is why he argues that only option 3 could deliver a secure settlement. I do not want to imply that the Government have come to a settled view on any of the options; I should have drawn your Lordships' attention to that from the start. We are still in listening mode and considering the report. Nevertheless, it is true that we absolutely need to bear in mind the security of any arrangement that we put in place.

Baroness Andrews: In that case, Lord Chair, I think we could now move on to option 2.

The Chairman: Yes, but we need to move on a bit now as we are running out of time.

Q87 Baroness Andrews: Absolutely. I think we can be fairly swift about this, because, Lord Howe, you clearly implied that option 3 gives greater clarity and certainty, in Lord Strathclyde's terms. We have had a procession of witnesses pointing out the risks and disadvantages. What would you say those risks and disadvantages are in legislation?

Earl Howe: The advantages would be certainty, clarity and the creation of a genuine mechanism for dialogue between the two Houses, analogous to ping-pong. It would mirror the process that we already have for primary legislation, which has stood the test of time. It would also be a more useable power for the Lords than its current power to defeat a statutory instrument. There would be no loss of scrutiny; in fact, I think you could argue that it would add to scrutiny. It could also deliver something that a number of Peers in the tax credits debate thought they were getting by voting for the Hollis and Meacher Motions. As I said, both Baroness Hollis and Baroness Meacher spoke of their Motions as a means of leaving the matter in the hands of the elected House. A number of Peers said exactly the same. Of course, the Motions did not do that at all, but there was a clearly expressed desire for some kind of mechanism.

If one imagines a reasonably regular use of the new procedure, which I reckon would be likely as it could substantially displace the use of Regret Motions, the disadvantages for

government would be a slowing-down of government business. I am now postulating on something that it would be for the House of Commons to determine. We do not know what changes, if any, would be made to its procedures, but the scrutiny and debating time of the House of Commons could be eaten up to a greater extent than it is at the moment. So the thought that option 3 would be cost-free for government is not, in my judgment, correct. Option 3, if pursued, would not at all be a case of the Executive carving out a smooth legislative path for themselves.

Baroness Andrews: What about the questions that were raised by our present Clerk, who talked about the grave constitutional implications of such legislation, and the ex-Clerk of the House of Commons, Lord Lisvane, who spoke about the implications for the Bill of Rights and the involvement of the courts? He raised some grave concerns about whether the House would actually want to go down that route. My supplementary question is: since this is offered to us by Lord Strathclyde as an opportunity for the House of Lords to push the House of Commons into thinking again, how can it think again, given that there is no fixed period of delay and that, in his report, Lord Strathclyde raises a lot of questions about delay and the implications that it would have for government business? He does not suggest that government would particularly want to see this outcome.

Earl Howe: First, I did not read Lord Strathclyde's report as proposing a power of delay. What he proposes is a power for the Lords to invite the House of Commons to think again. A number of people have suggested that there should be a fixed period of delay. I see no need for that; there is no fixed period of delay in ordinary ping-pong, but ping-pong has worked for primary legislation for a long time.

You mentioned the Bill of Rights. I do not think there is a particular issue with that. Legislation states simply the effects of the Lords or the Commons taking certain action and what the consequences of that action would be. That is no different from what is currently done in the Statutory Instruments Act 1946 or in the Parliament Acts. In any case, amending or expanding the procedures set out in the 1946 Act, if that were the means chosen to legislate for option 3, would not necessarily lead to an encroachment of statute on to the executive cognisance of Parliament nor, indeed, a diminution of Article 9 in the Bill of Rights. There has been no evidence that the courts have unduly interfered with Parliament's procedures in breach of Article 9 as a result of the enactment of the 1946 Act.

Baroness Andrews: I think you would agree that this would be a slightly complex piece of legislation. It would have to not only specify the notion of rejection and approval but deal, as

has been said, with these rather complex issues that were raised by the Hollis and Meacher Motions on this power. Do you see difficulties in the framing of legislation?

Earl Howe: I am sure there would be considerable difficulties in the framing of legislation, if that were the Government's decision. I have not been party to any discussions about that, but your Committee here has heard what a number of those difficulties might be, including the issues raised by the Bill of Rights. I have told you only my view, but I am perhaps not the most authoritative source.

Q88 The Chairman: You have touched on this already, but is there any mileage in perhaps more carefully defining financial instruments, and giving a protected procedure to them, while being more relaxed about other kinds of instruments?

Earl Howe: I do not think there is serious mileage in that, because the primacy of the House of Commons is not restricted to financial matters. By the same token, in my view the role of the House as a revising and scrutinising Chamber should apply across the piece, apart from when the Speaker certifies a Bill as a money Bill—we would have to put that sort of case aside. It would be wrong, in other words, to create a special category of SI in that sense.

The Chairman: There is already a category of SI that only goes before the Commons, such as on taxation.

Earl Howe: Yes indeed, but almost any SI will have financial implications. If you wanted to carve out a special category, the difficulty is deciding where the line should be drawn. I do not think that we need to go there. It was entirely proper for the House of Lords to look at the tax credits statutory instrument, even though it contained provisions that had huge financial implications. I would not for a minute have wished the House to be denied the opportunity of reviewing that. Indeed, in defence of the way the Government presented those proposals to Parliament, they enabled that scrutiny to take place.

The Chairman: Finally, and thank you very much for the extra time that you have given us, where do we go from here? Do the Government have a timetable on a way forward for this?

Earl Howe: I do not think I can answer that question, because I cannot pre-empt the Government's response to Lord Strathclyde's recommendations. All I can say is that the Government will respond to his recommendations some time after Easter.

The Chairman: Thank you for that. I am afraid that it will be towards the end of the Recess when we finalise our report. We were hoping to report right at the beginning of the Recess, but I do not think that will be possible now. I am keeping in touch with Baroness Stowell on that.

Earl Howe: Thank you, Lord Chairman.

The Chairman: Lord Howe, thank you very much indeed. We are all enormously grateful to you.

Examination of Witness

Rt Hon the Lord Strathclyde CH, Former Leader of the House of Lords, May 2010 to Jan 2013

Q89 The Chairman: First, our sincere apologies for keeping you waiting. We have just had Lord Howe in front of us, as you may have heard. He was very fulsome and helpful in his replies, although I am not sure that we agreed with all of them.

Lord Strathclyde: Am I the very last person who you are seeing before you report?

The Chairman: You are indeed. Can I start by asking how you respond to those who suggest that the issues your inquiry has raised have more to do with the relationship between the Executive and Parliament, rather than between the two Houses?

Lord Strathclyde: Lord Chairman, would it be okay, as a sort of preface to answering that question, if I just gave a brief overview of my motivations for coming up with the conclusions in my review?

The Chairman: That might address some of the questions that we are going to put to you, so please do that if you like.

Lord Strathclyde: It should pick up on them. It is important to understand the motivations, because it will make it all a little clearer. Inevitably, there is a bit of ancient history in all this. In the latter part of the 20th century, for all the reasons that we know, after 1968 the House stopped rejecting secondary legislation—for reasons that I did not know very much about until I became Government Chief Whip in 1994. These are issues that Chief Whips take very seriously, because they are continually under the potential threat of losing on one of these things, and it was explained to me that there was this very convention. That stuck throughout the time that the Conservative Party was in government and briefly for the time that the Labour Party was in government, before the 1999 Act, which removed the hereditary Peers. This is an important point in the argument, because there came an assertion within the House of Lords—asserted by no lesser an authority than Baroness Jay, who was then the Leader of the House—which became the Jay doctrine. I suspect that many of you will not know of the Jay doctrine but some of you will remember it. The Jay doctrine was very simple. After all the reasons that were given to remove the hereditary Peers—I am just doing this in shorthand—it was said: “The result will be that we will have a more assertive House, which the Government

will be obliged to listen to more than they have in the past because of the illegitimacy of the hereditary Peers”, and so on. The question was then raised: in that case, what happens to all these great conventions, most importantly the convention on secondary legislation?

That is why a month after the demise of the hereditary Peers, I made a speech where I called into question the convention on secondary legislation. In fact, I declared it dead. There was a purpose to all this: to test whether the Jay doctrine was in fact correct and to see what would happen afterwards. A month after that, in January 2000, one of my Front-Benchers found something suitable. It was something to do with the London mayoral elections—not a hugely important issue, I hasten to add, but it was quite live at the time. We threw it out, for the first time since 1968, and there was, inevitably, a row. We also knew that there was a legislative vehicle before the House that could put this issue right, if we wanted to, which is ultimately what we did because of course the Government were very keen to re-establish the convention, which we then did.

That lays the background as to why I knocked down and then resurrected the convention, which takes us to Lord Cunningham’s committee in 2006. Lord Cunningham’s committee was perfectly fair enough in the way he dealt with all this, but he left a vagueness to it that required the House to use the veto to reject in exceptional circumstances. Nobody at that time sought to define “exceptional circumstances”, but we all thought that we would recognise them when we saw them. So life continued, as far as the Opposition were concerned, very much in the way it had always done until 2007. The next time was on casinos in 2007, and then there was an issue in the last Parliament. That brings us to 26 October.

Throughout this period, I had begun to feel that the convention was not working quite as well as it had. People did not understand the reasons for it and more people were willing to break it. The alternative to voting something down—the Regret Motions, which had been invented in the 1970s—had also rather lost their force. I recognised this when I was Leader of the Opposition. When we wanted to win a Regret Motion at 8.30 pm on a Wednesday, it was quite hard to get our people to come in and vote on it through something that they said, or felt, did not really count.

When I talked about this to the current Leader of the Opposition, Baroness Smith, what she said had an echo for me as one of her predecessors. She said that the Labour Party did not really like these Regret Motions because they did not really count. It was that realisation, and that conversation at the back end of last year, which made me question the alternatives that there might be for us to deal with secondary legislation in a far clearer manner—by having

clearer rules, more impact and effect—while being part of the traditional way in which the House of Lords deals with legislation. That is how I got to my options.

So, Lord Chairman, coming now to your question, when you said that this was more to do with the Government and the House of Lords than the House of Commons and the House of Lords, I do not really see a division between the two Houses. The Government control the House of Commons; that is why they are in government. They put forward a proposal, which is passed in the House of Commons, and then we decide whether to reject or accept it. That is a perfectly good constitutional application, so when I looked at this I looked at the relationship between the two Houses, obviously anticipating or accepting that the House of Commons is controlled by the Government.

Q90 Baroness Andrews: Thank you very much for that explanation, which is very interesting historically and in where it leads us. At the end of the debate in the House on the report, you said that you had asked yourself three questions. One was whether there was a problem that now needed to be solved, but it was the second one that interested me: should the Lords retain its veto power? You said, “I concluded that the answer was no”. So running through the whole discourse that we are having when we come to look at the viability of the different options, does it remain your position that the House of Lords should not retain its veto?

Lord Strathclyde: Yes.

Baroness Andrews: My supplementary question is this. We have not used that power to veto, we have used the power to reject or annul. If we do not retain that power, does that not weaken the whole ability of Parliament to do a really thorough job of scrutiny?

Lord Strathclyde: No. Absolutely not. Let me try to explain why. Over the last 50 years, we have used our power of veto on—whatever it is—five occasions. That does not sound to me like a very strong power that is used very much by the House of Lords. And for probably 90% of that time, maybe even more, no Government have advanced on the basis that the House of Lords would reject their secondary legislation. It has never been part of the equation. Does that help?

Baroness Andrews: Yes, except that we have had Ministers before us who have said that the real discipline that has impacted on their decisions on how to deal with legislation—whether to put things into primary or secondary legislation and what to do about secondary legislation—has been the threat that the House of Lords, in the last analysis, would have the power to say no.

Lord Strathclyde: I cannot think of a time, until 26 October, when the House of Lords ever used that power in a way that was politically motivated or expedient. It is worth looking at all these issues. Since 1968, we did it once in 2000, for reasons that I explained, on a very unserious issue, quite deliberately, to decide whether the convention existed or not. The second time was on the issue of casinos. The casinos question was completely apolitical. Fifteen Labour Members voted against the Government. Why did they do so? Because the next Prime Minister, Gordon Brown, had already declared that he was opposed to casinos. So, again, it made absolutely no difference to what was going on. Incidentally, if your assertion is correct, Labour Ministers would never have brought it forward if they thought that the House of Lords was going to reject it.. There is an added point. The Conservative Opposition played no great part in all that. It was not a whipped vote for the Conservative Party.

The next time was in the coalition Parliament on an issue to do with legal aid—which sort of passed by with no great interest, and very few of us can remember exactly what it was about. So the only time in the last 50 years when this has counted was on a crudely political issue that went to the heart of the Government's financial strategy and that dealt with an enormous amount of money. I still do not understand what on earth the opposition parties—incidentally, this was not a cross-party vote across the House of Lords but was very much led by the opposition parties—thought they were playing at, thinking that the Government would sit back and let that pass.

Baroness Andrews: Thank you.

Q91 Lord Hodgson of Astley Abbotts: You gave a very interesting example of how the Regret Motion had died away.

Lord Strathclyde: Withered.

Lord Hodgson of Astley Abbotts: You said that in the 1970s the Regret Motion had some impact, but that over the period since it had gradually dwindled in effectiveness because people would not turn up to vote for it because they knew that it would have no effect anyway. So why is what you are describing about removing the veto different? The veto remains there currently as a possibility. Why would anybody wish to take any action? As you say, Regret Motions have died away. It would have the same effect on the use of statutory instruments if there was not even just a possibility that you might press the nuclear button.

Lord Strathclyde: If, since 1968, there had been any realistic, long period of time where the House of Lords was threatening to use its veto, it would have been abolished a long time ago. It was purely because there was this self-denying ordinance that it has not been. This was a little bit of tidying up that was never actually done because the system worked perfectly well.

On the substantive point about Regret Motions, they worked perfectly well for quite a long time. When we were in opposition, at the start we used them quite well. You get a bit of publicity: “Lords Defeats Government” on such-and-such a matter. But, gradually, perhaps due to overuse and the Government explaining to the media that they had no impact at all because it was just a Regret Motion that they would ignore, the press and Back-Benchers became less interested. Then came the start of the new Government—and I was impressed by what Lady Smith said, because it echoed my own experience. I get the point; you vote to make a difference. Lord Hodgson, you then made a leap of logic that if Regret Motions did not work, perhaps my proposal of thinking again would not work. Did I get that right?

Lord Hodgson of Astley Abbotts: Yes. I was suggesting that the structure that you envisage seems to me not very dissimilar from that which surrounds Regret Motions, probably without even mentioning “regret”.

Lord Strathclyde: Okay. This goes very much to the heart of my proposed new procedure and new process. For the first time, the House of Lords, if it disagrees with secondary legislation, would demand that the House of Commons should convene, and that a Minister should present himself or herself at the Dispatch Box on the government side and explain why the Government’s view was correct, why the House of Lords was wrong, and why the Commons should now have a vote to confirm that view. Only then would the statutory instrument become law.

There is all the difference in the world between a late-night debate in the House of Lords on a Regret Motion and a vote, and what I have just said the House of Commons should do. It goes to the heart of the relationship between the two Houses that the House of Commons chooses not to take the advice of the House of Lords but does it in the Chamber of the House of Commons on the persuasion of another Minister.

Baroness O’Loan: May I clarify something? If you take away the right to reject, as we would prefer to describe it, the House of Lords would in effect have no power at all over secondary legislation and any power on statutory instruments would have to be in primary legislation, so wherein would lie the balancing and the proper scrutiny that now occurs and that is so important a part of the function of the House of Lords?

Lord Strathclyde: We have a gentle disagreement between us. You assert that this is a great power of the House of Lords. I say that it is no such thing. It is a theoretical power of the House of Lords that is used so rarely, as I explained a moment ago. The only one in the last 50 years that had any serious impact was the one we did in October.

Lord Woolmer of Leeds: What about the Rhodesia sanctions vote?

Lord Strathclyde: As we know, with Rhodesia the position of the Lords was changed overnight.

Lord Woolmer of Leeds: It was a serious vote on a serious issue.

Lord Strathclyde: All right, let us look at Rhodesia. Lord Carrington, who was then Leader of the Opposition, said—I paraphrase—that if the House of Commons relays its order and it comes back to the House, we will accept it because we will have fulfilled our traditional role of a second Chamber, which is to ask the House of Commons to think again. That is exactly what I am proposing in option 3.

Lord Woolmer of Leeds: So you could have the right to reject, which we have now, and the Government could have the right to bring it back, which they have now of course.

Lord Strathclyde: This is such an important question that I would like to give it the fullest possible answer. Lord Woolmer's proposition is that we should leave the status quo—the veto. But in the absence of any statement of intention by the leaders of the Opposition or the Liberal Democrats, or the Convenor of the Cross Benches or anybody else, how do the Government know that this is what they would do without exception, so that every time secondary legislation was defeated by the House of Lords, this House would then accept it if it was re-presented to the House of Commons and then to the House of Lords? That, if I may say so, is not a million miles away from my option 3 and it does not answer Baroness O'Loan's question.

Lord Woolmer of Leeds: The only time it has happened, that was exactly what happened.

Lord Strathclyde: Yes, and if Lord Woolmer is saying that that would be a new possible option, it would be very hard for me to argue against it, because it is very similar to option 3. But how would you know that this is what the Opposition would accept?

Lord Woolmer of Leeds: Because there has never been a case where the Opposition have defeated a statutory instrument on a second occasion, so to argue hypothetically that if it was brought back the House might reject it a second time, when it has never happened—

Lord Strathclyde: I do not think that is good enough. You have to say that this would be an absolute certainty. That is my point about option 3: you have to give clarity and certainty. If Lord Woolmer is saying, "It's never happened before, so it's unlikely to happen, but it could", I would find that very difficult to justify.

A few weeks ago you had evidence from Lord Hunt of Kings Heath, who is enormously experienced in these matters as deputy leader of the Opposition, and so on. It was very interesting that at no point did he say that he would find this sort of thing the right way to go. In fact, as he expressed himself, he did not think that there was ever much of a convention or

that there should be one. His point of view was to leave things exactly the way they are, which is clearly not acceptable to the Government. It would not be acceptable to me, and would not be acceptable if the Labour Party were in government.

Q92 Lord Woolmer of Leeds: In your discussions with the opposition parties, did you ask whether in the event of a statutory instrument being rejected, which happens very rarely, they would accept within the conventions that, should it come back to the House, they would not defeat it?

Lord Strathclyde: No, I did not, because I thought I would come up with something that was, if I may say so, rather better and simpler, and more like what we do with primary legislation and amendments: we send it back to the House of Commons.

Baroness O'Loan: Just to be clear, as I am struggling a little, Lord Strathclyde is essentially saying that the Government have a majority in the Commons and therefore that the business should be done only in the Commons so that the Government can get their way.

Lord Strathclyde: No. Let us take the tax credits example again. How many of us really believe that if that issue had gone back to the House of Commons under my option 3, as a “Think again”, it would have got through the House of Commons? Let us look at another example: casinos. Do we think that—

Baroness O'Loan: But would it have got through? I do not know.

Lord Strathclyde: You said that the Government control the House of Commons.

Baroness O'Loan: Yes.

Lord Strathclyde: Yes, of course they do because that is how they become a Government, but it does not mean that the Government win every vote every single time. On some of these issues they would not and, I contend, they would not have done on tax credits—

Baroness O'Loan: Because extra information had been secured by the House of Lords, which would then have informed the debate in a way in which the previous debates were not informed.

Lord Strathclyde: Another part of Baroness O'Loan's question, which I did not answer at all, was about effective scrutiny. The most effective scrutiny that takes place in the House of Lords takes place in this Committee, not on the Floor of the House or in Grand Committee. It takes place because of the work you do. Nothing that I have proposed weakens this Committee's ability to scrutinise secondary legislation as it has done over the course of the last few years, not just on behalf of the House of Lords but in fact on behalf of the whole of Parliament.

The Chairman: Thank you. I am going to suggest, as I think Lord Hodgson has to leave us about now, and as some of us have been sitting around this table since—

Lord Strathclyde: I am sorry if I have been too lengthy in my replies.

The Chairman: No, I am sorry that we kept you waiting so much, but I suggest that we adjourn for a few moments while we wash our hands, as necessary, and then resume. Lord Hodgson, you can leave us at this moment if you wish to do so.

The Committee adjourned for 4 minutes.

Q93 Baroness Andrews: As you can imagine, we pored over your exchanges with PACAC, in particular with the chair. The review was originally conceived in terms of the role of the House of Lords with regard to both secondary legislation—with what you described as “a bit of an innovation” in that Committee—and financial matters. But it seems that as time has gone on you have concentrated more on the nature of the innovation rather than on the financial aspect. Is that fair?

Lord Strathclyde: Yes. I found it increasingly difficult to divide these instruments between the purely financial and non-financial ones. The broad description of financial privilege, which might have seemed attractive on day one, became less attractive as time went by—not least because of the pure bureaucratic burden. Can you imagine parliamentary authorities having to examine every piece of secondary legislation and taking a view as to whether it attracted financial privilege? It just was not helpful to go down that route, and much better to treat all statutory instruments the same.

Baroness Andrews: That is helpful to the Committee, but we have gone in a circle with lots of witnesses about the difficulties of definition with the parent Act, and so on. On the second point of what you described as a bit of an innovation, after your exchanges with Mrs Gillan the chair described it as “less than a rejection”. I had a sense that she was a bit baffled as to what all the fuss was about. If the innovation was actually not a rejection—a fatal Motion—why were we so concerned?

Lord Strathclyde: That would be right if that were the case. My personal view, which is all it can be, was that de facto it was a rejection. It basically said, “We’re not going to pass this unless a number of things, XYZ, happen”. It was held hostage and I do not think that the original convention ever allowed for that, so I thought that it was a rejection.

Baroness Andrews: But in a way you could see what those Motions identified as the absence of a tool in our toolbox, which is not a power to amend but a power to say, “Go away and

think again”. There are people in the House who positively think that a third choice should be available: regret, a power to reject, and that third power, a power of delay.

Lord Strathclyde: In some respects, what I think I am offering in option 3 is the opportunity to have a debate and say, “For these reasons, we call upon the House to reject these great issues”, and get the House of Commons to think again and examine them.

Baroness Andrews: But is not the logic of that that the House itself should be able to move a Motion of delay? They would not leave it to the House of Commons to take it up, not least because in your option 3 there is no power for a fixed period of delay. If this House were able to say, “We do not want to regret the Motion, as it is too serious, or to reject it, because that would be fatal and is not where we are at”. I suggest that Baroness Meacher and Baroness Hollis were saying, “We would like the Government to go away, think about this again and look at the implications”. Do you not think that we ought to be looking at that?

Lord Strathclyde: No, I really do not. I see where you are coming from, which is to avoid being able to amend secondary legislation, which is hugely complicated, and to try to find another way. The best way now is to reject, and explain why that is being done during the debate. It is then up to the Government to decide how to react to that when they make the case in front of the House of Commons, or indeed to dump the whole Motion and start again.

Baroness Andrews: But does that not really mean that we retain the power to reject?

Lord Strathclyde: My option 3 is a power to reject until the House of Commons reconfirms. It is not the veto power. The problem at the moment, which is where we have got out of kilter with normal House of Lords practice, is that once we have said no—I would argue that the Hollis and Meacher Motions were a form of saying no—that is it: the end of the conversation. There is no message back to the House of Commons saying that the House of Lords has rejected it. There is no opportunity for the House of Commons, or indeed for Ministers, to get into a discussion. It is done and it really is an awesome nuclear weapon, which is another very good reason why we should not do it.

Baroness Andrews: Lord Howe seemed to think that if we went down the legislation route, the House would exercise more of its power to reject because if we had legislation to as it were manage it, nothing would be lost by rejecting it.

Lord Strathclyde: I do not know. I really do not know the answer to that question. It strikes me that most secondary legislation is sometimes controversial and sometimes contentious but not very contentious, so I am talking about the few pieces of legislation that really raise the hackles of the House and indeed of this Committee. How many would there be? I do not

know. Four or five times a Parliament? Once a Session? Perhaps something like that. I do not think that would try the patience of the House of Commons too much.

In my report I did suggest that if this new power—and it is a new power—were to be used excessively, we might find that the House of Commons did not take it very seriously. The whole purpose of these things is that they should be used sparingly, but that when they are used it is for a very good reason and it is a stiletto in the side of the Government. That is how I imagine it should be used. If we suddenly started doing it every week, the House of Commons would wonder whether option 1 might have been better.

Q94 Lord Haskel: Returning to option 1, Earl Howe said that it was technically doable but not desirable. I presume that by that he meant that it was not desirable to remove us from scrutinising secondary legislation. You have said that there are a whole bunch of reasons why option 1 was not the right thing to do. Do you agree with Earl Howe, or do you have your own reasons?

Lord Strathclyde: Look, I put in option 1 because I knew that there was a market for it. It is a small market, but there are people who are interested in simply removing the House of Lords from dealing with secondary legislation. After all, some people argue that if you have already given up the right to reject it, what is the point of debating it at all? So the reasons not to have option 1 are that it would remove a level of scrutiny that is important and that works, and that it would be difficult to maintain the quality of this Committee if the House had no great role on it. It might encourage the Government to legislate more with secondary legislation. That would not be a positive move. But the main reason is that the whole purpose of Parliament is that we have two bites at the cherry in terms of scrutiny—apart from the ones that we are excluded from under the Parliament Act. And I think that the system works pretty well. In fact, reading some of the evidence that you have had, I think that you should celebrate more the work of this Committee and what you have achieved.

Lord Haskel: Some of the evidence that we have had has suggested that the only scrutiny that secondary legislation gets is in the House of Lords.

Lord Strathclyde: Clearly it is done differently in the House of Commons. I am always rather horrified by the number of ex-MPs now sitting in the House of Lords who say that scrutiny of secondary legislation in the House of Commons is a complete waste of time. When I talked to the Chairman of the Joint Committee, a Mr Derek Twigg, I was rather impressed by his personal commitment and interest in secondary legislation, although he did admit that he did not have the same powers and resources as this Committee. I would view this much more as a resource for the whole of Parliament—a sort of contracting out by the House of Commons to

the House of Lords. Actually, I do not think it is necessary for—and nor would you want—the House of Commons to set up a parallel Committee, because the work is done extremely well here.

Lord Haskel: If we are the ones to do it, do you not think that we should have a lot more teeth?

Lord Strathclyde: Well, I am giving the Lords new teeth. I think this Committee has plenty of teeth, but I would like to give the House of Lords more teeth in the form of an ability to demand that the House of Commons think again. Used skilfully, this would be an important new power, more powerful than the current unused power of veto.

Q95 Baroness O'Loan: Lord Strathclyde, I want to take you to the 2006 Joint Committee report on conventions. Does that report fail to embody the convention regarding the role of the House of Lords on secondary legislation? I have three supplementary questions, but they are specific, so perhaps you could talk about the 2006 report and the extent to which its recommendations do not embody the convention.

Lord Strathclyde: Sorry, I did not catch the last bit of that.

Baroness O'Loan: I want to know in what way the 2006 Joint Committee report on conventions fail to embody the convention regarding the role of the House of Lords in secondary legislation.

Lord Strathclyde: Yes. This is always the trouble with writing down conventions. Clearly this was, in old-fashioned terms, a gentleman's agreement from the 1960s that had withstood the test of time. Once you start trying to write them down, analyse them and discover the circumstances in which powers would or would not be used, you lose some of the magic. Lord Cunningham came up with a whole set of conditions that you might be able to trigger and tried to explain exceptional circumstances. It was not terribly helpful to me as Leader of the Opposition because we just carried on the way we always had done. I do not think it has been terribly helpful since 2010, either, in guiding the Opposition. The trouble with the phrase "exceptional circumstances" is that your exceptional circumstance could be my daily occurrence. So it has not really taken us anywhere. Perhaps that is the problem of writing down a convention by Committee.

The Chairman: A convention is only a convention—you know it when you see it.

Lord Strathclyde: If I may finish the other part of your sentence, a convention is only a convention if it obliges people to behave in a way in which they would rather not behave. And it was never written down in our handbook. A lot has been said about the great Lord Simon of Glaisdale and the unfettered right. Of course, yes, the House had an unfettered right, but the

two main parties had agreed never to use it. In a way, that is what also motivated me to say that actually it may be wonderfully romantic to have this arrangement, but would it not be better and fairer on the House and on the House of Commons and, dare I say, the Government to have it clearly laid out what we can and cannot do and what the conditions are?

Baroness O'Loan: It is not clear whether option 2 is envisaged as having the power to reject an instrument. Can you say categorically that it does or not?

Lord Strathclyde: Option 2 was an attempt to see whether the existing convention could be rebuilt using this new power. It would leave the statutory basis as it currently is—with the understanding, as I pointed out, that it would never be used.

Baroness O'Loan: I am sorry. Run that past me again. Would we keep the existing position?

Lord Strathclyde: The statutory position, yes. In other words, there would be no change in the law under option 2.

Baroness O'Loan: Yes. Right. Carry on.

Lord Strathclyde: But, by convention, we would agree not to use it.

Baroness O'Loan: So you are saying that option 2 does not include a power to reject an instrument, because the current convention or the current situation does.

Lord Strathclyde: Well, yes, it does, but it is never used.

Baroness O'Loan: It is used in exceptional circumstances.

Lord Strathclyde: Up until 2000, and I would argue 2007, it was not used at all after the Second World War.

Baroness O'Loan: We are talking about where we are now in the context of the framework legislation coming through. So it is an important debate, and I think you have made a contribution here. Are you saying that there should be no power to reject an instrument?

Lord Strathclyde: No practical power, but under option 2 there would be no change in the law. The law would be the same, but the Standing Orders would reflect in as strong and purposeful a manner as possible that the intention of the House would be not to reject ultimately, because we would have to find some new way of getting the House of Commons to think again.

Baroness O'Loan: Okay. Does option 2 include a formal delay mechanism?

Lord Strathclyde: No. I do not really understand this delay thing. A “power to delay” comes up every now and again, but nobody has been able to explain successfully what this delay is for, how long it would be for or what its purpose is, so I have been very un-keen on writing in any power of delay. The real problem with my option 2 now is that it requires all the different parties to say, “This is the way we want to go down”, when both Lord Hunt and Lord Wallace

of Tankerness made it pretty clear that they were not interested in having their powers subscribed by it.

Baroness O'Loan: So does option 3 does include a statutory power of delay?

Lord Strathclyde: No—well, it depends what you mean by delay.

Baroness O'Loan: Asking the Commons to think again.

Lord Strathclyde: Yes, it would be asking the House of Commons to think again, so it is delay from that point of view. But, in that case, let us re-examine what we mean. I suppose that by delay I mean asking the House of Commons to think again. I thought you meant what Lady Hollis meant by delay, which is a period of a month, three months, six months, a year or whatever. I see no purpose in that, but if your point is about a delay in the sense that the House of Commons would have to think again, then I am completely with you. Yes, that would be a very good thing. We may have been talking at cross purposes, and, yes, option 2 would include a “think again” option.

Baroness O'Loan: Ping-pong.

Lord Strathclyde: A ping without a pong.

Baroness O'Loan: What is the significance of “binding”?

Lord Strathclyde: Which word?

Baroness O'Loan: It is in the title of option 2, on page 17 of your report.

Lord Strathclyde: What was my context? Did I say “binary”?

Baroness O'Loan: The title of option 2 is “A non-statutory, binding resolution”—

Lord Strathclyde: Oh, binding. Yes, binding means that we stick to it and do not make it up as we go along. The status quo, incidentally, is that we make it up as we go along. It means whatever we want it to and we disagree between the parties as to what it means. We have introduced a new confusion into it, and “binding” means the opposite of confusion: it means that we have absolute clarity about what we are doing. That is a very important distinction. “Binding” in option 2 means that we would not use the power of the 1946 Act on statutory instruments to reject them absolutely—in other words, to use the veto.

Baroness O'Loan: I will just take you back a bit. You have just told me that there will be no power of veto. You described it, using those words, as having no power to reject in option 2.

Lord Strathclyde: The power would still exist in statute, but the House of Lords would agree not to use it.

Baroness O'Loan: But we are not going for a statute in option 2.

Lord Strathclyde: Exactly, so existing law would remain.

Baroness O'Loan: It says in your review that, “the House of Lords ... in a resolution”, would “set out and recognise, in a more precise way, the restrictions on how its powers to deny approval or to annul should be exercised”. That surely presumes that we still retain the right to deny approval, but you have just told me that it does not.

Lord Strathclyde: No, because you can deny approval in order to send it back to the House of Commons—in other words, you would accept the premise of option 3 without statute. It would be a convention on thinking again.

Baroness O'Loan: A new convention on thinking again.

Lord Strathclyde: It would be a new convention.

Baroness O'Loan: Because we do not have a convention on thinking again, it would be a completely new set of arrangements.

Lord Strathclyde: But you cannot impose a convention. Conventions have to come about because people agree to them, and I am sorry to say this, Lord Chairman, but I see absolutely no prospect of there being an agreement along those lines between the parties.

Baroness O'Loan: So you do not think that option 2 would work anyway.

Lord Strathclyde: No, sadly, I think not. It does not work.

Baroness O'Loan: Then we will not talk about it any more.

Q96 Lord Woolmer of Leeds: Witnesses have raised a number of issues relating to option 3, if we can turn to that. Given that instruments are laid before both Houses at the same time, what happens if an instrument is considered and rejected by the House of Lords before it has been considered by the Commons?

Lord Strathclyde: I accept that that is a good detailed point. As I said earlier, the overwhelming majority of statutory instruments are passed, although there is a debate as to whether they are passed and agreed. But I really do think that the ones where we think that this new power would be used ought to start off in the House of Commons. That would be the whole purpose of the “think again” process, and we would have a convention that that would be the case. It would not be very hard to make that stick and for the House of Commons to agree. It would make sense for the Government as well, because a statutory instrument that had already been passed in the House of Commons would carry greater force with the House of Lords than one that had not, so it is a good question.

Lord Woolmer of Leeds: You are very kind. How can a period of delay and reflection be secured if there is no fixed period of delay, and no clear and determined process under which reflection would occur?

Lord Strathclyde: If I may say so, that is another useful question, which I have thought about.

I came to the view that the precedent set by how we deal with amendments on primary legislation, particularly on ping-pong, should be what prevails. Having all sorts of statutory time limits before the House of Commons could look at it again would be a bit silly. Sometimes, incidentally, it would be in the interests of the House of Lords to send it back to the House of Commons to be dealt with as quickly as possible, when the issue was uppermost in people's minds—it would be fresh, and all the rest of it. I have been unable to work out exactly what a statutory period of delay would be for. Demanding that the House of Commons had another go at it but telling them that they cannot have a go at it for a certain amount of time just struck me as a bit preposterous.

Lord Woolmer of Leeds: But the proposal in option 3 is to induce into the law a relationship between the House of Commons and the House of Lords in relation to statutory instruments.

Lord Strathclyde: Yes.

Lord Woolmer of Leeds: And in so doing, that will qualify the current rights of the House of Lords.

Lord Strathclyde: Yes.

Lord Woolmer of Leeds: The argument is that it would ensure that the House of Lords has the power to reject but would be able to convey its reason to the House of Commons, which would result in—you do not use these words but I hope that they are implied—a serious consideration of it.

Lord Strathclyde: It is an omission that I did not use those words. They are very good.

Lord Woolmer of Leeds: The implication is that it would be serious. In the event that, as evidence given to us suggests often happens in ping-pong, the reasons for the House of Commons rejecting the House of Lords view are fairly peremptory and pro forma, you would ask the House of Lords, when considering draft legislation, to accept in good faith the willingness of the Government—in fact, their determination—to deliver on their commitment to ensure that the House of Commons seriously considers the legislation again. Given that you have been sceptical about the House of Lords' ability to stand by its agreements and conventions, what powers would this House have other than someone resorting to the law courts? The only right that anybody would have would be if the House of Commons or the Government, I am not sure which—

Lord Strathclyde: It would be a government Minister, but the House of Commons would be voting.

Lord Woolmer of Leeds: This would be about whether the House of Commons had duly considered the objections. At the moment, we do not have to resort to law. But the law would

presumably have to set out something that gave comfort to the House of Lords in agreeing that this was going to be meaningful consideration. Have you reflected on that? What was your view as to the way in which the House of Commons and the Government would give reassurances that consideration would be full and fair?

Lord Strathclyde: Again, this is an important point, which I rather skimmed over in my report. The Government have yet to respond to my review. I cannot imagine what is taking so much time. Maybe they are waiting for advice from this Committee. When they respond, if they were to choose option 3—I have no idea whether they will or not—they should lay out their intention on this question. I like your phrase “serious consideration”. This only works because the House of Commons sits in the Chamber and a Minister explains that the House of Lords has rejected an important piece of secondary legislation and invites the House of Commons to reaffirm its position. In that debate, they need to engage with the arguments that were made in the House of Lords. It would be foolhardy of the Government not to lay out how they intend to do so, and I would hope that they would do so more or less in the way that I have explained.

Lord Woolmer of Leeds: But the Government, of course, might not simply say “We’re going to reconfirm it”. They might say, “We’ve listened and we’re going to change some aspects”.

Lord Strathclyde: Yes, but then they would have to start again, in the event of that situation arising. The House of Commons passes an SI and it goes to the House of Lords. The House of Lords rejects it. The Government basically accept that. They would not need to bring it back to the House of Lords; they would simply need to bring back a new SI that would pass the House of Commons.

Lord Woolmer of Leeds: Which they could do now.

Lord Strathclyde: As they could do—in the little exchange that we had. But, as I said earlier, you would have to have the agreement of all the parties that they would respect the second vote.

Lord Woolmer of Leeds: So the only difference between option 3 and the current position on this point is not that the Government cannot think again if the SI is rejected, and not that they cannot bring it back very slightly changed, but that you do not trust the House of Lords not to reject it again, whereas in option 3 the House of Commons would have the right to insist.

Lord Strathclyde: It is not a matter of me not trusting the House of Lords. In the absence of any statement from the Leader of the Opposition on behalf of the Labour Party, and the leader of the Liberal Democrats, and indeed the Convenor of the Cross Benches, in so far as he is able to say that they would recognise the vote of the House of Commons on the second

occasion, without getting into the difficulties with this power proposed by Lady O'Loan, the power may exist but it would never be used.

Baroness Andrews: One final question on option 3. In the summary of your report, there is a sort of wistfulness about the convention. It is very clear that you do not really want to get rid of it. But legislation, as you say, carries risks, and those risks have been paraded before us by a variety of witnesses. They range from the risks of legislating for the relationship between the two Houses to raising constitutional questions.

The Chairman: That was Lady Humphreys' question.

Baroness Andrews: I beg your pardon.

Q97 Baroness Humphreys: This is a similar question, and it is the final question on option 3. What are the risks of implementing option 3 by Act of Parliament?

Lord Strathclyde: Well, the first risk is that the House of Commons might try to do something appalling in secondary legislation—I cannot imagine what it would be and certainly it has not happened since the Second World War—and the House of Lords would have surrendered its veto. In the modern era, I just do not know what on earth that would be. I suppose that there is a risk in all legislation. That leads me to Lady Andrews' point. This has to be a very short and tightly drafted Bill—an amendment to the SI Act of 1946. I do not think that it should include anything else to do with reforms of the House. I have spoken many times to Professor Russell, whose knowledge of the two Houses is virtually unparalleled, but I do not think that this is something that we should use as some kind of bargaining counter with the Government. This should be a very small, very simple and very clear-cut Bill. I would hope that, given the amount of time that we have all spent on this and the various Committee reports, the House of Lords would accept it and the forces of the Opposition would understand and see its purpose, not just for them in opposition but for them when they enter government in the future.

Q98 Baroness Andrews: You referred to the SI Act. We have had several witnesses, including Lord Lisvane, who said that we would need primary legislation. Once you go down that route, no matter how short the short title, it can always be opened up like a can of worms. That was one of the things that people raised as a risk, alongside the possibility that anything that needed interpretation would end up in the courts.

Lord Strathclyde: This is Article 9 of the Bill of Rights—yes, possibly, undesirably. On the Parliament Acts 1911 and 1949, you will remember that the 1949 Act was passed by the Labour Government using the Parliament Act. That was tested in the courts in 1999, when the Law Lords, in their infinite wisdom, agreed that there was absolutely no issue and no problem. I do not remove the ability of clever lawyers, once there is a law, to test it in the

courts. I think it is undesirable, obviously, but if the Bill is well-drafted, clear and simple enough and the intention of Parliament is there to see, a lot of people would spend a great deal of time and money to no great effect.

Q99 Baroness O'Loan: The context within which your proposed Bill would be passed, if it were passed, is the whole management of secondary legislation in its passage through the Houses of Parliament. You are suggesting that no other action would be necessary, as I understand it, but we have received extensive evidence articulating the inadequacy of current scrutiny, particularly in the House of Commons. Does it not occur to you that there might be a slight difficulty in getting the Bill through both Houses because of the wider change that would be required? As Baroness Andrews says, once you put a Bill on the Floor of the House, it is open.

Lord Strathclyde: All that my proposed Bill would do is enact option 3, in its most basic form. The process and procedure of how you would then do it and work on the relationship between the two Houses would be for the Procedure Committee of this House.

Baroness O'Loan: But it would remove the ability of this House to reject a statutory instrument.

Lord Strathclyde: To use its veto and to block.

Baroness O'Loan: To reject a statutory instrument.

Lord Strathclyde: I do not want to be boringly semantic, but under option 3 the House would reject an instrument, but when the House of Commons reaffirmed it it would become law. At present, when the House of Lords rejects, that is it. There is no conversation between the Houses for the House of Commons to think again. There is no Parliament Act prevention, which we have had since 1911, so that the House of Commons can eventually brush aside the view of the unelected House. That is why when the House of Lords voted down tax credits I was genuinely appalled, because I did not think that most Peers really understood what they were playing with and that this is a very important balance between the two Houses.

Baroness O'Loan: I think they understood very well that we were being asked to approve an instrument that would have had a very, very damaging effect on the incomes of the very poorest people in our country. That is what the issue was, as much as the convention.

The Chairman: We cannot rerun the debate that we had on 26 October.

Baroness O'Loan: I think it is important to place that on the record.

The Chairman: We do not all agree with you, Lady O'Loan.

Baroness O'Loan: I know that you do not. I have another question to ask, Lord Strathclyde, but just to close that one, I presume that you are bearing in mind the law of unintended consequences as you contemplate your Bill.

Lord Strathclyde: I suppose the whole point about the law of unintended consequences is that you are never quite sure what they might be. Again, we have to think carefully about all this. I did not come to this conclusion quickly. Let me pray in aid Lord Wakeham's royal commission in 2001, which was the genesis of my option 3, but that option was also born out of my experience over a long time in opposition and in government before then and the experience of the current Opposition. I was trying to come up with something that suits everybody—the House of Commons and the House of Lords—that is practical and clear and that works.

Q100 Baroness O'Loan: May I ask you three very brief questions? We were interested in any other options that you may have considered. Did you consider any other options?

Lord Strathclyde: No. There are different ways of skinning this particular cat, but I think that most groups of people and individuals who look at this, once they have accepted that the House of Lords should give up its veto—I accept that you have a different view of that, Lady O'Loan—would accept that there are not very many ways to go. If you think that there should be some sort of formal process between the two Houses, you get to where Lord Wakeham and his royal commission got to and to where I got to in my review.

Baroness O'Loan: Okay. Was doing nothing an option that you considered, having regard to the fact that, as you say, this power that the House has is not very strong, has never been part of the equation and was exercised once or twice in 60 years?

Lord Strathclyde: Well, I spend a lot of time thinking about doing nothing, but the trouble with doing nothing is that at the moment we are in a vacuum. Nobody knows how it would work. Suppose that another important issue came up next month and another Hollis/Meacher Motion was put down. I think that the House would genuinely be very confused. Is it fatal? Is it non-fatal? What does it all mean? What happens if we reject it? This is the problem: we have lost clarity now. I am sure that you will accept that, Lady O'Loan.

Baroness O'Loan: I do not think that clarity was the issue. Our conventions are flexible, creative and intuitive. Did you consider whether limiting the Lords' power could be confined to financial instruments only and how you would define financial instruments for that purpose?

Lord Strathclyde: In the end, as I said earlier, I did not go down the route of financial privilege, which I thought was difficult. There may be a case for the draftsmen to have clearer

guidelines as to when they use Commons-only procedures on secondary legislation on financial matters, as they currently do in Finance Bills, but that is slightly a matter for the House of Commons to look at.

Baroness O'Loan: Finally, you recommend that the Government should hold a review in consultation with the House of Commons Procedure Committee on when statutory instruments should be subject to Commons-only procedures. Should the Lords have a role in that discussion?

Lord Strathclyde: Inevitably the House of Lords would have a role in it when legislation came forward, but perhaps it was a minor omission of mine not to presume that the House of Lords and this Committee in particular may well have an interest in that. I do not think that putting this Committee's foot in the door of that discussion would be a bad thing at all.

Q101 The Chairman: There is only one point remaining that we would like to put to you briefly, which is the question of ensuring that Bills contain more detail than at present. Although, as you say, the numbers of statutory instruments have not increased, their size, complexity and importance have increased. Should that be addressed by government?

Lord Strathclyde: Parliament already has the power to reduce the number of SIs by refusing permission in the primary legislation. I do not think that it is purely a numbers game. Legislation has become more complicated for a whole variety of reasons that we do not need to go into.

The Chairman: But especially secondary legislation.

Lord Strathclyde: Yes, but it might be a very good idea for the House of Lords to use one of its ad hoc Committees to look specifically at the role of secondary legislation or the increase in secondary legislation and to make recommendations. I do not know the answer to that and it would be interesting to hear it. Legislation has got more complicated and secondary legislation has got more complicated. We need it—thousands of these things go through. Very rarely are they contentious, but when they are contentious we need to have very clear rules and procedures about how we deal with them.

The Chairman: Lord Strathclyde, thank you very much indeed. We have presumed on your time and your patience more than we should have done and we are most grateful.

Lord Strathclyde: Thank you very much. I hope that was helpful.