



House of Lords
House of Commons
Joint Committee on
Conventions

Conventions of the UK Parliament

Report of Session 2005-06

Volume II

Minutes of evidence and appendices

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The Joint Committee on Conventions

The Joint Committee was appointed with the following terms of reference:

That, accepting the primacy of the House of Commons, it is expedient that a Joint Committee of the Lords and Commons be appointed to consider the practicality of codifying the key conventions on the relationship between the two Houses of Parliament which affect the consideration of legislation, in particular:

(A) the Salisbury-Addison convention that the Lords does not vote against measures included in the governing party's Manifesto;

(B) conventions on secondary legislation;

(C) the convention that Government business in the Lords should be considered in reasonable time;

(D) conventions governing the exchange of amendments to legislation between the two Houses;

That the committee have leave to report from time to time;

That the committee have power to appoint specialist advisers;

That the committee have power to adjourn from place to place within the United Kingdom;

That the committee do report by 21 July 2006.

The House of Commons appointed its members of the Committee on 17 May 2006. The House of Lords appointed its members on 22 May 2006. The Committee held its first meeting on Tuesday 23 May 2006 and appointed Lord Cunningham of Felling as the Chairman.

The Lords and Commons agreed on 20 June and 4 July respectively to extend the Committee's life from 21 July to the end of this session of Parliament.

Membership

HOUSE OF LORDS	HOUSE OF COMMONS
Viscount Bledisloe	Mr Russell Brown
Lord Carter	Mr Wayne David
Lord Cunningham of Felling	Mr George Howarth
Lord Elton	Simon Hughes
Lord Fraser of Carmyllie	Sarah McCarthy-Fry
Lord Higgins	Andrew Miller
Lord McNally	Sir Malcolm Rifkind
Baroness Symons of Vernham Dean	Mr John Spellar
Lord Tomlinson	Ms Gisela Stuart
Lord Tyler	Mr Andrew Tyrie
Lord Wright of Richmond	Sir Nicholas Winterton

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at http://www.parliament.uk/parliamentary_committees/joint_committee_on_conventions.cfm

Staff

The staff of the Committee were: Andrew Makower (Lords Clerk), Ms Jacqy Sharpe (Commons Clerk), Miss Frances Allingham (Committee Assistant), Mrs Dawn Brown (Senior Office Clerk) and Mrs Jenny Gouge (Committee Secretary).

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on Tuesday 13 June 2006

Members present:

Cunningham of Felling, L, in the Chair

Bledisloe, V	Mr Russell Brown
Carter, L	Mr George Howarth
Elton, E	Simon Hughes
Fraser of Carmyllie, L	Sir Malcolm Rifkind
Higgins, L	Mr John Spellar
McNally, L	Ms Gisela Stuart
Symons of Vernham Dean, B	Mr Andrew Tyrie
Tomlinson, L	Sir Nicholas Winterton

Memorandum by Her Majesty's Government

JOINT COMMITTEE ON CONVENTIONS

1. The terms of reference of the Joint Committee are:

“Accepting the primacy of the House of Commons, it is expedient that a Joint Committee of the Lords and Commons be appointed to consider the practicality of codifying the key conventions on the relationship between the two Houses of Parliament which affect the consideration of legislation, in particular:

- the Salisbury/Addison convention that the Lords does not vote against measures included in the governing party's Manifesto;
- the conventions on secondary legislation;
- the convention that Government business in the Lords should be considered in reasonable time; and
- the conventions governing the exchange of amendments to legislation between the two Houses.”

2. The remit of the Committee is particularly to consider the practicality of codifying the key conventions identified. In order to do so, the Government believes that it will be necessary to have a clear idea of the scope of the conventions. This memorandum therefore sets out the Government's view on the proper interpretation of these conventions. Codification could mean anything from resolutions of both Houses to standing orders to statutory definition. Our view is that greater certainty about the conventions is desirable, but without losing essential flexibility.

THE ROLE OF PARLIAMENT

3. Parliament, consisting of the Monarch, the Lords and the Commons, is the sovereign body of the UK constitution. Government in the UK rests, broadly speaking, on the basis of the Crown in Parliament. The classic expression of parliamentary sovereignty is that by Professor Dicey, writing at the end of the nineteenth century:

“the principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”

4. It is generally accepted that Dicey's description of what he called the “English constitution” applies equally to the UK constitution. It remains a true description. Even if Parliament should agree to make itself subordinate to some other jurisdiction, it remains open to it to resume its sovereignty at any time. It therefore remains the sovereign body of the constitution.

5. It has been for centuries the convention in the UK that the Government is to be part of, and not separate from, Parliament. Since the eighteenth century, it has been the composition of the House of Commons which determines who forms the Government. The Sovereign's Ministers are expected to be

members of one or other House of Parliament. There are two main reasons for this convention. The most important is that it is Parliament that holds the Government directly to account. The second is that it enables Government to explain and defend its policies directly to Parliament.

6. In the UK system, the results of elections to the House of Commons determine not only the composition of the House, but who will form the Government. This is the bedrock of our constitution. Parliament is sovereign; the make up of the House of Commons determines who should form the Government; and retention of the confidence of the House of Commons is essential for the continuance of any Government.

7. The Government believes that the Westminster Parliament should continue to be bicameral. This is the context of the Joint Committee's enquiry. Most large Western democracies have bicameral Parliaments. It is only the smaller, and mostly homogenous states which have been able to dispense with their second chambers. Otherwise, both unitary states like France, Italy and Japan and federal states like Germany and the USA continue to have second chambers. Within any bicameral system, however, there must be clear rules for determining the respective powers of each chamber if there is not to be a constant danger of gridlock.

8. In the UK system, the pre-eminence belongs to the House of Commons. The Government does not believe there is any serious dispute that this should continue to be the case. For example, the Constitution Convention chaired by the former Conservative Lord Chancellor, Lord Mackay of Clashfern, at the request of the then Leader of the Conservative party, said:

“The House of Commons has in effect become our sovereign institution disposing of both legislative power, and of the decision as to who should wield the Crown prerogative. The time has long gone when the House of Lords possessed the constitutional power to affect the ultimate disposition of those powers. We consider that it is common ground that that settlement should not be changed in any scheme for the reformed second chamber.”¹

9. The process whereby the House of Commons has acquired its pre-eminence has been one of long and complex evolution. It rests, however, on two clear factors. First, the election of its members as the representatives of the people. It has always had that character, although its importance when determining the relative importance of the two Houses has been immeasurably increased over the past 170 years with the gradual introduction of universal adult suffrage. Second, and growing out of the representative role, is its unique power to grant or withhold supply, which has been asserted for over 300 years. This is at the root of its ability to uphold or dismiss the Government. Without the consent of the House of Commons the Government cannot function. Government expenditure must be approved by those who have the power not just to hold the Government to account, but to withdraw their support so that the Government cannot govern. Conversely, it is natural that the House of Lords, which does not have the power to grant or withhold supply, should have less power over the Government. The corollary is also natural; since the second chamber should not have the power to dismiss the Government, it cannot have any power over supply.

10. The House of Commons has thus long since been established as the pre-eminent constitutional authority within the UK. The party which secures a majority through a general election has the right to form a Government and, subject to sustaining the confidence of the House, to carry through the programme set out in its election manifesto. Ministers are continuously accountable to the House of Commons through debates and votes. Even during formal coalition Governments, the House of Commons has continued to perform its functions of legitimising the Government, enacting legislation and holding Ministers to account.

11. This constitutional framework, founded on the supremacy of the House of Commons, has provided Britain with effective democratic Government and accountability for more than a century. As the Royal Commission chaired by Lord Wakeham emphasised, “The House of Commons, as the principal political forum, should have the final say in respect of all major public policy issues” and “it would be wrong to restore the fully bicameral nature of the pre-1911 parliament” (Royal Commission Report, Cm 4534, January 2000, page 33).

12. The relationship between the House of Commons and the House of Lords is similar to many other bicameral systems in that there is one chamber which has a special relationship with the Government and one chamber which fulfils a different function and which defers to the other when there is a difference of opinion.

13. Dr Meg Russell's book on *Reforming the House of Lords: lessons from overseas*² shows how common this pattern is, regardless of the composition of the second chamber. For example, in none of Australia (where the Senate is directly elected), Spain (mixed direct and indirect election), Germany, Ireland, France (all indirectly elected) or Canada (appointed) does the second chamber have the power to sack the Government through a vote of no confidence. In all these countries, a Bill may be rejected in the second chamber with no suggestion that this should lead the Government to resign. Another common factor is a limited time for the second chamber to consider legislation. In Ireland (90 days), Spain (two months) and Germany (six weeks + three weeks) there are time limits within which the second chamber must consider

¹ The Report of the Constitutional Convention on options for a new Second Chamber, 1998.

² *Reforming the House of Lords: lessons from overseas* (OUP 2000, ISBN 0-19-829831-5).

legislation. In France, the Sénat is limited in its ability to scrutinise Bills classified as “urgent”. Finally, a survey of 20 second chambers shows that in 12 of them the main elected chamber can overrule the second chamber’s objections to a Bill.

14. The subordinate position of a second chamber appears from the overseas research therefore to be independent of its composition, and does not depend on the second chamber being wholly (or partially) appointed. On the other hand, the Government recognises that in respect of the particular constitutional and political environment in the UK that, as the Lords moved to becoming “more representative” new members especially those elected could well be more assertive about the powers of the Lords, and this in turn could appear to challenge the essential primacy of the Commons. The Leader of the House of Commons put it thus in the debate on the establishment of the Joint Committee:

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

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

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

17. The countries cited above all have written constitutions. The relationship of the two Houses and their respective powers are thus set out in statute. This is less true of the UK, with its less formal constitutional arrangements. The ultimate legislative supremacy of the House of Commons is, however, set out in statute, in the form of the provisions of the Parliament Acts. The Law Lords, in their judgment on *Jackson v the Attorney General* (the Hunting Act case), confirmed that the House of Commons, if it acted under the conditions set out in the Parliament Acts, could exercise the whole authority of Parliament and that the overall objective of the Parliament Acts was to restrict the powers of the Lords.³ The fact that the power of the Commons in the Parliament Acts has in practice been used only seven times since they were first enacted in 1911 does not diminish in any way the importance of the power. It and the Commons’ exclusive right of supply (see paragraphs 66–72) are the foundation of the relationship between Lords and Commons. The tiny number of occasions when the power of primacy has had to be exercised formally indicates how widely the relationship has been respected by successive Parliaments of very different complexions. The clear statutory delimitation of the Lords’ power laid down by the Parliament Acts is a necessary, indeed essential, part of the framework of the relationship between the two Houses, but it is by no means sufficient. Within this framework, the everyday business of Parliament has been regulated by convention. Sometimes those conventions have been translated into the standing orders of the two Houses. But in other cases, the convention, however important or powerful, cannot be found anywhere except in the collective memory of the institutions and in descriptions in text books.

18. Convention has many advantages over legislation. It enables a distinction to be drawn between what is acceptable in general circumstances and what may be necessary in exceptional circumstances. The legislation can regulate the exceptional circumstances, while convention can deal with the everyday, in a way that can adapt flexibly. The Government does not wish it to become necessary for convention to be replaced by legislation as the main way of regulating the relationship between the two Houses.

19. For convention to work properly, however, there must be a shared understanding of what it means. A contested convention is not a convention at all. To insist on a shared understanding of the meaning of a convention is not to insist that it is impossible to deviate from it, or to set it aside, if circumstances seem to demand that. The point of convention rather than legislation is precisely that it is possible to do this. It is to insist that all parties fully understand what behaviours are consistent with the convention, and that there should be no dispute about whether one party or another has adhered to it.

20. The Committee’s terms of reference set out the three main areas where there has long been agreement that there is a convention about how the House of Lords should conduct itself and also address in the fourth limb an issue which has become of increasing interest in recent years. As we move forward to the next stage of reform, it is important to seek a consensus on the understanding of these conventions.

³ *Jackson and others v the Attorney General*, [2005] UKHL 56.

 THE SALISBURY/ADDISON CONVENTION

21. The origins of the Salisbury/Addison convention lie in the nineteenth century and the definitive shift in authority from the Lords to the Commons.

22. Claims that the Lords represented the true feelings of the country, as successive Reform Acts widened the franchise to most men, became increasingly untenable during the course of the nineteenth century. By the beginning of the twentieth century it had become apparent that the Lords should not be able to force an election each time they disagreed with the Commons. The crisis of 1909–11 was so severe not just because the Lords had rejected the Budget, but because they then went on in late 1910 to vote against a specific package of proposals on which the Government had won an election.

23. The doctrine was next put fully to the test in 1945. The Labour Government of 1945–51 was in an even weaker position in the Lords than the Liberal Government of 1906–10 had been. They had, however, a significant majority in the Commons. They also had a distinctive and far-reaching programme of economic and social reform which was unlikely to find favour with the majority in the Lords but which had been clearly set out in the party's election manifesto.

24. Precisely because the convention has never been codified, evidence of the understanding of its meaning has to be drawn from statements made, normally in Parliament, by those who were applying it.

25. The classic formulation was first made by Viscount Cranborne, later the 5th Marquess of Salisbury, the Leader of the Opposition in the Lords, when he said in the debate on the King's Speech in 1945:

“we should frankly recognise that these proposals were put before the country at the recent General Election and that the people of this country, with full knowledge of these proposals, returned the Labour party to power. The Government may, therefore, I think fairly claim that they have a mandate to introduce these proposals. *I believe it would be constitutionally wrong, when the country has so recently expressed its view, for this House to oppose proposals which have been definitely put before the electorate.* [emphasis added]”⁴

26. Looking back on this period at a later date, he said:

“[Because of the large Labour majority in the Commons in 1945], it was therefore possible for us who belonged to the opposition to make it our broad guiding rule that *what had been on the Labour Party programme at the preceding General Election* should be regarded as having been approved by the British people. [emphasis added]”⁵

27. The Conservative party adhered to this widely held view of the Salisbury/Addison Convention throughout the period up to 1997. For example, in a speech to Politeia in 1996, the present Marquess of Salisbury (then, as Lord Cranborne, Leader of the Lords) said:

“The Salisbury Convention started as a compact between two parties, one of which enjoyed a commanding majority in the House of Lords. By extension we now recognise that the convention has become more than that at a time when the House of Lords no longer has a built in majority of any party . . . It has now become a further limitation on the powers of the House of Lords in its relationship with the House of Commons, whatever Government is in power.”

28. More recently, representatives of the Labour Government have expressed a similar view. For example, Baroness Jay of Paddington, the then Leader of the Lords, said in 1999:

“The Salisbury/Addison convention has nothing to do with the strength of the parties in either House of Parliament and everything to do with the relationship between the two Houses . . . It must remain the case that it would be constitutionally wrong, when the country has expressed its view, for this House to oppose proposals that have been definitely put before the electorate.”⁶

29. These quotations show a consistent agreement by Governments of different parties to the terms of the convention. Where the Government has made a commitment to the nation in the form of a pledge in its Manifesto, the House of Lords has no right to stand in the way of its fulfilment of that commitment.

30. Some of the most robust defences of the convention date from the period after the introduction of life peers. They recognise that the convention reflects the relationship between the two Houses, and not just between parties. The convention is not dependent on the composition of the House of Lords. It is a recognition of the place of the House of Lords in the constitution. Two cross-party bodies in recent years have drawn attention to the importance of the convention in this respect, and specifically in the context of further reform of the House. First, the Wakeham Commission said:

“There is a deeper philosophical underpinning for the Salisbury Convention, which remains valid. This arises from the status of the House of Commons as the United Kingdom's pre-eminent political forum and from the fact that general elections are the most significant expression of the will of the electorate.”⁷

⁴ *HL Hansard* 16 August 1945, vol 137 col 47.

⁵ *HL Hansard* 4 November 1964, vol 261 col 66.

⁶ *HL Hansard* 15 December 1999, col 214.

⁷ Report of the Royal Commission on House of Lords Reform, Cm4534, 2000, paragraph 4.21.

Recommendation 7 of the Commission's report said, *inter alia*:

"The principles underlying the "Salisbury Convention" remain valid and should be maintained. A version of the "mandate" doctrine should continue to be observed: where the electorate has chosen a party to form a Government, the elements of that party's general election manifesto should be respected by the second chamber. More generally, the second chamber should be cautious about challenging the clearly expressed views of the House of Commons on any public policy issue."

31. Second, the Joint Committee of 2002–03 said, in relation to the Salisbury/Addison Convention and that on consideration of Government business without undue delay, that:

"Taken together, these conventions govern the day-to-day relations between the Houses during a parliamentary session, contributing in a significant way to the overall effectiveness of Parliament as a place where business is transacted effectively . . . We therefore strongly support the continuation of the existing conventions."⁸

32. As set out in paragraphs 3–20 above, it is a clear tenet of the UK constitution that the House of Commons is the pre-eminent body within the sovereign parliament. That will remain the case whatever the composition of the House of Lords. Elections to the House of Commons will continue to select the people's primary representatives in Parliament, and they will continue to determine who forms the Government. The programme which a party puts before the people in its manifesto for a general election should therefore continue to enjoy the special status accorded to it by the Salisbury/Addison convention.

33. It has been argued that a Government's low popular vote reduces its legitimacy and justifies abrogating the Salisbury doctrine. For example, Lord McNally, the leader of the Liberal Democrats in the Lords, said in June 2005:

"Now to resurrect a 60 year old convention that was offered by a Conservative-dominated hereditary House to a Labour Government with 48% of the vote and then to say that that should still apply to a Labour party that is now the largest party in this House, but is a Government with 36% of the vote, is stretching the limits of the convention."⁹

With respect to Lord McNally, we think this assertion against the primacy of the Commons to be one with serious and adverse implications for our democratic system, and for all political parties. Under first-past-the-post it is rare for any Government to have achieved a majority of the votes cast—indeed no Government since the Second World War has done so. But other voting systems are open to equivalent challenge to the legitimacy of their outcome—typically that proportional representation systems give disproportionate power not to the largest minority (as with first-past-the-post), but to the smallest. We hope that the Committee does not allow itself to be diverted into a separate debate about the appropriate voting systems for Westminster. And it would be new constitutional territory to argue that Governments should be on a sliding scale of legitimacy depending upon their proportion of the popular vote, as it would be to argue that some MPs are more legitimate than others depending on the size of their majority. The Government endorses the point made by Lord Carter in the same debate, when he pointed out that:

"without such an agreement and understanding [on the relative powers of the two Houses] the House of Lords will have the considerable power of a House where the Government of the day is always in minority without the responsibility of accountability of an elected House where the majority party forms the Government"¹⁰

Unless Government is to be continually deadlocked there has to be some means of resolving disagreements on contentious issues. That seems to us to be the Parliament Acts and the Salisbury/Addison convention.

34. Even those who argue that the removal of the bulk of the hereditary peers from the House has cast doubt on the validity of the Salisbury/Addison Convention as originally formulated recognise that it addresses an issue that still needs to be dealt with. For example, Lord Strathclyde said, in a *Politeia* lecture published in April 2005, that:

"Of course it will remain the case that however constituted, even an elected House which is not fully elected, or one in which, because of the longer terms of its members, mandates are more decayed, a second Chamber in our modern Parliamentary tradition should normally defer to the first . . . So even if the Salisbury Convention evolves or withers, as the hereditary Tory-dominated House that it was created to deal with fades into memory, there will still be ways, with a will, to ensure that the Queen's business is carried on."¹¹

And, in response to the debate already cited, he said when winding up for the Opposition:

"I still accept the essence of Salisbury—namely, that the principle of Bills foreshadowed in the manifesto should be honoured."¹²

⁸ Joint Committee on House of Lords Reform: First Report, HL Paper 17, HC 171, 2002–03, December 2002, paragraphs 11–12.

⁹ *HL Hansard* 6 June 2005, cols 759–760.

¹⁰ *ibid* col 736.

¹¹ *Working in harness: Parliamentary Government and the House of Lords* pp 15–16.

¹² *HL Hansard* 6 June 2005, col 763.

35. The Government believes, as Baroness Jay of Paddington said, that the key point is the relationship between the two Houses and the primacy of the House of Commons. The Salisbury/Addison Convention gives effect to the requirements of that relationship. That it was formulated in other circumstances is less significant than the fact that it addresses, most effectively, a situation that remains. The Government therefore believes that the Salisbury/Addison Convention should continue to mean the following in respect of the behaviour of the Lords

- A manifesto Bill is accorded a second reading;
- A manifesto Bill is not subject to wrecking amendments which remove large parts of the Bill or change completely the effect of the Bill; and
- A manifesto Bill is accorded a third reading so that the House of Commons has the opportunity to consider any amendments the Lords wish to propose.

36. In considering the Salisbury/Addison Convention, the Wakeham Commission concluded: “More generally, the second chamber should be cautious about challenging the clearly expressed views of the House of Commons on any public policy issue” (recommendation 7). This conclusion is reinforced by the fact that since 1992, the House has voted down a Government Bill at second reading only three times. Once was on the second introduction of the European Parliamentary Elections Bill in 1998, when the Bill had been re-introduced with a view to passing it under the Parliament Acts and killing the Bill on second reading was necessary in order for it to receive Royal Assent in time to allow the necessary secondary legislation to be made. A second occasion was on the Sexual Offences Amendment Bill in 1999, which was a Bill to which a free vote had been applied. Only the third, the Mode of Trial (No 2) Bill in 2000 which was voted down on Second Reading after its predecessor Bill (which had started in the Lords) had been subject to wrecking amendments in Committee, was a Government flagship policy Bill, but was not a Manifesto Bill.

37. The Government would welcome the Committee’s view on the status of this long-established practice.

CONSIDERATION OF SECONDARY LEGISLATION

38. The Parliament Acts do not apply to secondary legislation. In 1911, secondary legislation was used less frequently than it is now, and it was not considered relevant to the disputes over the power of the Lords. The House of Lords therefore retains the same powers in relation to most secondary legislation as the House of Commons. Where the empowering legislation provides for the legislation to be subject to parliamentary proceedings, either House may approve or reject such legislation, but they may not—save in exceptional cases—amend it. The inability of either House to amend secondary legislation follows logically from the nature of such legislation. It is made by Ministers under powers which have already been debated and conferred on them by Parliament. Parliament has already decided that Ministers should be delegated to decide the detailed policy to which the secondary legislation will apply.

39. This part of the memorandum addresses the question of how the Lords responds to statutory instruments when they are asked to approve them on the floor of the House. Because of the unfettered nature of the Lords’ powers over secondary legislation, it is particularly important that there should be clear understandings of when and how it is appropriate for those to be exercised.

40. This part of the memorandum is not addressed to the Lords’ work on the scrutiny of secondary legislation before it is presented to Parliament for final approval. The Government is happy to confirm again the value it attaches to the work of the Lords’ Delegated Powers and Regulatory Reform Committee in scrutinising the delegated powers it is proposed to confer on Ministers in each Bill and to report on whether the provisions of any Bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate level of parliamentary scrutiny.

41. The Government has also accepted the establishment of the Merits Committee which has power to draw the “special attention of the House” to any of the instruments which it considers to be either politically or legally important or that gives rise to issues of public policy likely to be of interest to the House; or inappropriate in view of the changed circumstances since the passage of the parent Act; or inappropriately implementing European Union legislation; or imperfectly achieving its policy objectives. The Government also appreciates the work of the Joint Committee on Statutory Instruments in alerting the Houses to any doubts as to whether an SI falls within the *vires* of the parent legislation or is technically deficient in other ways. All of these are valuable contributions to the proper scrutiny in both Houses of Ministers’ use of their delegated powers.

42. There is no doubt that the Lords currently have the power to vote against secondary legislation. This could be removed or altered only by statute. There is, however, a long-standing convention that they do not exercise the right to defeat secondary legislation. As with the Salisbury/Addison convention, evidence of the existence of the convention has to be drawn from both the practice of the House, and the statements made in relevant debates by authoritative spokesmen.

43. So far as the practice of the House is concerned, the evidence is substantial. The only two occasions since 1945 on which the House has refused to approve an affirmative order were in 1968, where it rejected an order under the United Nations Act 1946 imposing sanctions on Southern Rhodesia, and in 2000 over elections to the Greater London Authority. Even in the Southern Rhodesia case, the Conservative

Opposition took good care to ascertain before inflicting the defeat that the Order could be re-laid in the same session of Parliament, when they duly approved it. The only occasion on which the House has annulled a negative resolution order was in 2000, over the election literature for the Greater London Assembly elections.

44. Instead, the House has developed a number of alternatives to outright rejection of secondary legislation. These include either a reasoned amendment to the motion for approval, or a separate motion. Either of these might:

- Call on the Government to take some specific action such as further consultation;
- Call for the postponement of implementation of the measure;
- Invite the Government to amend the measure; and
- Regret some element of the instrument while not requiring the Government to take any action.

45. All of these procedures allow the House to put on record specific concerns, without breaching the convention that the House should not reject secondary legislation. The Government agrees that all these are valid approaches for the House to adopt.

46. A trawl of evidence from 1990 to 2005 suggests that from 1990 to 1997 there were around 16 votes on non-fatal motions relating to Statutory Instruments, as set out above, and around 12 on fatal motions. From 1997 to 2005, there were about 15 votes on non-fatal motions and about 14 votes on fatal motions. Given the number of Statutory Instruments which are presented each year, there are a small proportion on which a fatal motion is tabled—an average of less than two a year, although they are almost bound to be on issues of significance. As previously noted, on only three occasions in the past half century have fatal motions been approved. The House has shown by its actions that it respects the convention that it should not usually vote down Statutory Instruments.

47. Somewhat different considerations may apply to secondary legislation which is subject to so-called super-affirmative procedure. In these cases, an additional stage of scrutiny has been provided for, in acknowledgement of the provision of powers to amend primary legislation by secondary legislation. It is appropriate that both Houses have a role in this scrutiny.

48. The House has debated its handling of delegated legislation on several occasions. For example, in a debate in 1993, the then Government Chief Whip, Lord Hesketh, said:

“It is the convention of the House that it does not seek to divide against delegated legislation . . . Some Noble Lords have questioned the continued validity of the convention against voting on Motions to approve or annul delegated legislation. The power to do so certainly exists. It would be open to your Lordships to use that power. However, I think that we should again be very wary of that. It would sit uneasily with the revising aspect of the work of the House. Indeed, it would run directly contrary to it . . . There is no mechanism available whereby the other place can be asked to think again. Were the House to reject a piece of delegated legislation, it would fall.”¹³

49. In June 1994, the present leader of the Opposition in the Lords said:

“The House need not depart from its convention that it does not divide on secondary legislation.”¹⁴

In October 1994, the then Leader of the House of Lords, the present Marquess of Salisbury said:

“We all know that the proceedings of the House depend in large part on a foundation of agreement as to what is and what is not an appropriate course to pursue. The House could not function so effectively without such consensus . . . that is without general agreement to observe the various conventions which regulate our activities . . . Most of our practices and conventions were developed for good reason and I believe serve the House well. They represent a great deal of accumulated wisdom which it would be rash for us to ignore. If that were so, there would have to be a very powerful reason for discarding it.”¹⁵

50. Lord McIntosh of Haringey said:

“This House must continue to preserve the unfettered right [to reject secondary legislation]. However, the use of that unfettered right must be a last resort.”¹⁶

51. In a debate in the House of Lords in March 2000, Lord Goodhart for the Liberal Democrats said:

“I believe that the right to reject secondary legislation is a very powerful weapon in the hands of your Lordships’ House. It is so powerful that it must be exercised with very great care and restraint. I shall not try to suggest any specific rules for this; it would take far too long in our debate this afternoon and others could do it much better than I. However, the power should not be used, in particular, to block the implementation of an Act if the principles being implemented were fully debated in Parliament during the passage of that Act.”¹⁷

¹³ *HL Hansard* 19 May 1993 vol 545 cols 1810–11.

¹⁴ *HL Hansard* 6 June 1994 vol 555 col 956.

¹⁵ *HL Hansard* 20 October 1994 vol 558 cols 360–1.

¹⁶ *ibid* col 367.

¹⁷ *HL Hansard* 29 March 2000 col 831.

52. In the same debate, the late Lord Mackay of Ardbrecknish said:

“We should retain our right to reject secondary legislation, perhaps doing so in a way which makes clear why we are rejecting it and what we should like to see changed; and the Government can then negotiate and come back with an amended regulation which your Lordships would then pass . . . I think that your Lordships should use that power—as my party would—very sparingly indeed.”¹⁸

53. Replying to the debate, Lord Falconer said:

“Nobody disputes that the power exists to vote against secondary legislation, just as nobody disputes that the power exists to vote against legislation in breach of the Salisbury Convention. The question is not: is the power there to vote against it? The question is: is there a convention that says constitutionally we should not do it? . . . should the House of Lords be able to prevent the elected Government from doing things they wish to do, and which the elected Commons agrees they should do as a matter of important policy, where that policy requires secondary legislation for its implementation? . . . The answer to the question must be and is, “No”. The unelected Chamber should not be able to prevent the elected Government and Chamber from doing, as a matter of principle, what the other place decided to do . . . The prime power of this Chamber is to make the Government think again. This it already has the means to do, even on secondary legislation, by various devices drawing attention to concerns about individual instruments which fall short of outright rejection.”¹⁹

54. The Government continues to endorse the view expressed in these previous debates. There is a long-standing convention that the House of Lords does not use its power to reject statutory instruments. Such rejection is incompatible with its role as a revising chamber. However, the convention should not be limited to these circumstances. As with the Salisbury/Addison convention, the convention is an expression of the relationship between the two Houses and the authority of the Commons as the direct representatives of the people and the source of the authority of the Government. Statutory instruments are made by Ministers and it is for the Commons, as the source of Ministers’ authority, to withhold or grant their endorsement of Ministers’ actions.

55. The Committee may however wish to be aware of the recommendation of the Wakeham Royal Commission—“The absolute (but unused) power of the House of Lords to veto secondary legislation should be adapted so that any vote against a Statutory Instrument in the new second chamber could be overridden by an affirmative vote in the House of Commons. While this would represent a diminution in the formal power of the second chamber, it would give it a mechanism which it could use in order to delay, and demonstrate its concern about, specific Statutory Instruments. The House of Commons should have the last word but would have to take full account of the second chamber’s concerns, Ministers’ responses and public concern” (Wakeham, recommendation 15).

THE HOUSE SHOULD CONSIDER GOVERNMENT BUSINESS WITHIN A REASONABLE TIME

56. The Government does not determine the scheduling of business in the House of Lords: it is determined by agreement between the Business Managers from all the parties. Nor is there provision for programming of debates on legislation. The Government respects the traditions of self-regulation in the House of Lords. The Lords is a revising Chamber and the scrutiny of legislation is one of its fundamental functions. Clearly the Lords must have enough time to consider Bills thoroughly. It is also important in the relationship between the two Houses that the Commons should have Bills sent from the Lords without unreasonable delay.

57. The convention that the House of Lords should consider business within a reasonable time was endorsed by the Wakeham Commission in its recommendation 6:

“The reformed second chamber should maintain the House of Lords’ convention that all Government business is considered within a reasonable time.”

58. We strongly support this convention, though it does of course beg the question what is “reasonable time”. The Government has proposed the introduction of a limit of 60 sitting days on the length of time for the Lords to consider most Bills. The Government is open to consideration of how a 60 day period could best be defined (whether, for example, it should start at first reading or second reading); and whether provision should be made for exemptions or extensions in particular cases. This proposal does not in any way undermine the principle of the Parliament Acts. The Government sees this proposal as being, like the Parliament Acts, a framework. The Parliament Acts are rarely actually invoked, and the normal discipline on the Lords is the Salisbury/Addison Convention and the respect due to the Commons as the representatives of the people. What makes the process work is the rules which are not statutory, rather than the ones which are. The Government sees the suggestion for a time limit in the same light. It is a backstop, not the thing which controls day to day business.

59. The Government’s proposal of a time-limit does not undermine the case for continuing to have regard to this convention. It would establish a framework for all sides of the House, including the Government, to

¹⁸ *ibid* col 836.

¹⁹ *ibid* cols 840–1.

deal with legislation in an efficient manner. There are inevitably criticisms of proposals of this kind. However, similar criticisms to those put forward against the proposed time limit were advanced in recent years when the House introduced target rising times, the annual announcement of recess dates, and the introduction of advisory speaking times for speakers in certain debates. In each case, it was argued that change would unnecessarily constrain debate or the ability of the House to work effectively, but in all cases the practices are now both accepted and popular, and have in no way reduced the effectiveness of the House.

60. The Government believes that the convention that Government business is considered in reasonable time still has great relevance, even in the context of a time limit. It recognises that, in combination with its proposal of a time limit, this may have implications for the demands made on Opposition spokesmen. The Committee may wish to consider this point.

CONVENTIONS ON THE EXCHANGE OF AMENDMENTS BETWEEN THE TWO HOUSES

61. The fourth convention to which specific attention is drawn in the terms of reference is that on the conventions governing the exchange of amendments to legislation between the two Houses.

62. The exchange of amendments between the two Houses is subject to rules and practices which have developed over time. The practices are broadly symmetrical, with the two Houses operating in a similar way, and the arrangements in place—subject to the rules relating to financial privilege—give neither House any priority over the other. The rules and practices are set down, and are from time to time the subject of examination.²⁰ They are not, in this sense, subject to conventions of the same kind as those discussed earlier in this paper, save that each House may be expected to have due respect for the other. Nonetheless they are important in providing the context within which those conventions (so far as they relate to primary legislation) operate.

63. In the Government's view, the significance for the Joint Committee of the principle of respect for the other House is that each House is entitled to expect the other to give due consideration to the amendments sent up to it. The Lords can therefore reasonably expect the Commons to provide time for consideration of Lords Amendments and subsequent proposals, and the Commons can expect the same. But, in both cases, this must be in the context of the right of each House to govern its own procedures. In the Commons for example, programming is now a standard part of the structures put in place in that House to ensure the orderly and effective consideration of legislation, and this applies to consideration of Lords Amendments as to other stages of Bills.

64. Both Houses can also expect the other to pay due regard to the conventions, including those discussed above, governing relations between them. Accordingly, for example, the Commons can expect the Lords to take into account the Commons' ultimate primacy in considering Commons proposals and not, in effect, simply to require the Commons to use the Parliament Acts whenever the Lords do not agree with a Commons proposal.

65. The particular rules governing the form in which amendments are made in each House and passed to the other, the scope for further amendment of such amendments, and the circumstances in which a Bill is regarded as "lost" are set out in *Erskine May*. These rules provide a significant degree of flexibility in allowing the two Houses to continue their exchanges without the loss of a Bill for so long as it remains possible, as a matter of political reality, for a solution to be found to the differences between the Houses. The rules are not always straightforward to apply, and the need to phrase amendments in a way which will avoid unintentionally losing a Bill through arriving at a "double insistence" can sometimes lead to a lack of clarity in what is taking place. There are also some situations in which there is insufficient flexibility, for example in the way in which the rules can sometimes allow one House to accept part of a "package" of amendments sent by the other—thereby removing them from further debate—while not accepting other parts of the package. The Committee may accordingly wish to give some consideration to these matters. But these are not strictly matters of convention, and the Government would not want the flexibility of the present arrangements, which broadly works to the advantage of all sides, to be lost.

COMMONS FINANCIAL PRIVILEGE

66. There is a fifth largely non-statutory rule which regulates the relationship between the two Houses: Commons financial privilege. This is not a convention of the House of Lords, it is a fundamental tenet of the parliamentary system.

67. Commons financial privilege considerably pre-dates the other distinctions between the powers and functions of the two Houses; even in the days when the Lords was at least as powerful as the Commons in relation to other legislation, it recognised that it had very limited authority over the grant of supply to the Crown. The Queen's Speech at the beginning of each session makes it clear that the request for financial provision will be laid before the Commons alone. The Parliament Acts also provide for a special procedure for "Money Bills", which the Lords may delay for only one month.

²⁰ See for example the Written Ministerial Statement of 21 July 2004 (HC Hansard col 36WS; HL Hansard col WS19), which clarified the handling in both Houses of the principle of "packaging" of amendments.

68. Practice in respect of financial privilege is based upon a resolution of 1671:

“that in all aids given to the King by the Commons, the rate or tax ought not to be altered by the Lords”

and a second resolution of 1678:

“that all aids and supplies, and aids to His Majesty in Parliament, are the sole gift of the Commons; and all bills for granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords”.

69. These resolutions were repeated and reinforced in 1860 and 1910, and these are still the principles which are applied in determining whether or not a Lords Amendment involves questions of privilege.

70. The Lords tacitly accepted these conditions when in 1702 they passed a resolution against “tacking” extraneous matter to Bills of aids and supplies, thus recognising that they were not entitled to amend the Bills to remove the additional material. Until 1911, they retained a right to reject such legislation outright; this was removed by the Parliament Act.

71. Commons financial privilege applies particularly to “Bills of aids and supplies”, such as the Consolidated Fund Bill and Finance Bills. It can also be invoked, however, in relation to the individual elements of legislation. All Bills which incur a charge on public funds to some extent involve this financial privilege even if they do not provide directly for the financing of the provisions. The Commons has accepted that the Lords may debate, and even amend, provisions of other Bills which would, as a consequence, change the demands made on public funds. It reserves the right, however, to reject any such amendments on the grounds of privilege and expects that rejection to be respected absolutely. It also reserves the right to waive its privilege where it chooses. The important point to note is that it is for the Commons to decide whether they find the Lords’ actions acceptable.

72. Commons financial privilege, as it has developed over the 20 century, does not refuse the Lords the right to discuss issues which relate to charges upon the people. The Lords holds a second reading debate on the Finance Bill each year. But the Lords has no right to block or delay financial provisions which the Commons approves of. That is, and remains, an absolute privilege of the Commons, regardless of the composition of the Lords. The Government accepted the establishment of an Economic Affairs Committee in 2001. It believes, however, that the appointment of a Finance Bill Sub-committee, albeit one which has so far been concerned only with tax clarification and administration, risks intruding on Commons financial privilege.²¹ The Government believes that there would be benefit in greater clarity about the extent of financial privilege and that there is an argument that it should encompass National Insurance. The Government would welcome a clear statement from the Joint Committee on the proper scope of financial privilege.

Leader of the House of Commons

8 June 2006

²¹ Lord McKenzie of Luton, *HL Hansard* 19 July 2005 col 1403.

Witnesses: **Rt Hon Jack Straw**, a Member of the House of Commons, Leader of the House of Commons, **Rt Hon Lord Falconer of Thoroton QC**, a Member of the House of Lords, Secretary of State for Constitutional Affairs and Lord Chancellor and **Rt Hon Lord Grocott**, a Member of the House of Lords, Chief Whip, House of Lords, examined.

Q1 Chairman: Gentlemen, good morning. Thank you for responding so promptly to the request of the Committee to come before us and thank you also for getting the memorandum you submitted to us in good time for the Committee to have the opportunity to study it thoroughly. We have given you an indication of how we as a Committee would like to deal with this session and we hope that we can conclude the business by noon. I know you, Mr Straw, have an important engagement that you have to leave for shortly after that. We may subsequently ask you to come back and answer further questions or give further evidence depending how the Committee’s proceedings fall out—I do not mean

fall out in the argumentative sense. Jack, I understand you would like to make an opening statement—it is very difficult for me to call you Mr Leader of the House of Commons.

Mr Straw: It is even more difficult for me to call you Lord Chairman, however since I learnt everything I know from you I will do my best, Chairman. On behalf of Lord Falconer, Lord Grocott and myself can I say we are very grateful to you and your Committee for this early invitation to give evidence. As I think you and your Committee know, Chairman, we have accepted the recommendation of your First Report that the deadline, which was to be the end of July, should be extended. The Leader of

the Lords has already tabled the relevant resolution here and I announced in the Commons yesterday that as soon as we receive it in the Commons we will table it and hopefully agree it, and seek to agree it in any event as quickly as possible. I hope too you found our memorandum helpful and we will be ready to submit a supplementary memorandum if necessary as well as obviously to appear before you again if the Committee wishes. Just one other thing by way of preliminary evidence: as you are aware, there is a manifesto commitment in respect of most legislation, to a time limit of 60 days. I would like to make it clear that we have no immediate plans to legislate in this way and we wish to await the proposals of this Committee before making any decisions. What we are seeking is the outcome that is behind the manifesto commitment, which is the consideration of Bills here as a revising chamber and their timely return to the Commons, but we are not necessarily wedded to the method which is specified in the manifesto. If I now may make the following general remarks. Discussion about the reform of the House of Lords has certainly been going on for the whole of my adult lifetime, indeed before that, and I am just old enough to remember the great arguments about the 1968 proposals and the—some would say holy, some would say unholy—alliance between Michael Foot and Enoch Powell which did those proposals to death. Of course it is the case that this has been an active political issue for getting on for the whole of the last decade. I am aware that within the great debates which have taken place in the last nine or 10 years there have obviously been a number of formal previous examinations including a Royal Commission in 2002, a Joint Committee, and many other responses and commentaries on those reports. However, and significantly, this Joint Committee is working in a key area which I suggest has been the subject of less examination than might have been expected. Indeed the 2002 Joint Committee said at paragraph 11, “Insufficient attention has been paid to the conventions which actually govern how the Lords conducts its business and behaves towards the Commons. We consider these existing conventions which are of a self-restricting nature impact profoundly on the relations between the Houses and need to be understood as a vital part of any future constitutional settlement.” Indeed, Chairman, if I were asked to offer one reason why the earlier attempts since 1997, particularly that of 2003, failed to reach a proper conclusion, I would suggest it was because there is a lack of agreement about the interconnection between the relevant powers of each House and the composition of the Lords. We have set out our view on this critical issue in paragraphs 13 and 14 of our memorandum and the Clerk of the Parliaments in a very helpful memorandum set out his view in paragraphs 33 and 34 of his statement. In our memorandum we note first of all in paragraph 13 that overseas experience which is very substantial shows that there is no necessary connection between the powers and the composition of second chambers. You can have, and indeed this seems to be quite widespread, wholly elected second chambers but it is also accepted and laid down in those

constitutions that those wholly elected second chambers are very clearly subordinate chambers and acknowledge the primacy of the first chamber. But we also go on to say that in the particular context, and this is paragraph 14, of the United Kingdom, as the Lords move to become more representative it would also seek to be more assertive about its powers, and we suggest to a degree this has already happened. So we suggest if we are to make progress on this issue of reform of the composition of the Lords, it is important to pin down what these conventions are and why. I suggest the conventions are there to ensure clarity and consistency about the complementary roles of the two chambers and to secure the primacy of the Commons. We look forward to the Committee’s descriptions of these conventions but suggest that codification in practice can, is and could be achieved by a variety of methods from description in non-binding texts through resolutions of each House through to statute. Indeed, it seems to us that different current conventions are currently reflected in some of these different forms: Salisbury-Addison in non-binding texts on the one hand, financial privilege on the other in clear resolutions of the House of Commons underpinned by the Parliament Acts. The last point, Chairman, I want to make in this preliminary statement is about the nature of manifestos. Salisbury-Addison was against the context of the 1945 election where Labour secured a very significant majority in the House of Commons, the first time we had ever been a majority, so therefore the first time effectively we, the Labour Party, had faced a situation where there was a huge majority of the main opposition party in the House of Lords. The interesting thing however, and that is less known, is that the 1945 manifesto which was the subject of the Salisbury-Addison agreement was very short, extraordinarily short by common standards. I have brought a copy here and it ran to just eight pages.

Q2 Chairman: Unlike the longest suicide note in history.

Mr Straw: Some of us remember the longest suicide note in history which was the 1983 manifesto. Some of us even remember the much longer Labour programme of 1982 on which the suicide note was based. I recall that such was its detail that it included, as you will recall because you were the Opposition spokesman I believe, a commitment to license horse dealers, which even in 1982 seemed slightly eccentric. Just to return to the point, Chairman, eight pages compared with a very good manifesto on which we won the last election which was 112 pages long. My point here is that Salisbury-Addison agreed that the very general terms in which the 1945 manifesto was written—and I may say about half of it was expressions of general concern about the war and the peace—were sufficient to give the authority which they needed to respect here. I suggest that must still more be the case in circumstances in which not just the Labour Party but all parties now write manifestos in very great detail, as indeed we do. My last point is this, all

elections and all manifestos within elections are about the future, about what the party if elected is going to do in the future, and however careful the process—the process within the Labour Party and I think the other parties has become more and more full and more and more careful over the years—predicting the future by definition is an uncertain business, it is bound to be, and manifestos cannot cover every eventuality, they simply cannot, and sometimes there are events which are totally unpredictable and have never been predicted which go on to re-shape the world and therefore the political environment in which all of us are working. The most obvious one is the one which followed the 2001 general election, which was in June, and in September we had 11 September and everyone knows what happened then, that did not only change the security environment in the world but it changed the political environment here. Our assertion is that governments of course must be assured that Salisbury-Addison will operate in respect of manifesto commitments because it is absolutely fundamental to the contract that is entered into between electors and parties, without that we would all have to say at the beginning of a manifesto, “This is what we hope to do but it all depends on the quixotic composition and views of the House of Lords.” In addition to that, governments must be allowed to get their essential legislation which may not be in a manifesto through, without having to resort to the blunderbuss of the Parliament Acts.

Q3 Chairman: Thank you for that very important opening statement which in a number of respects goes wider than the memorandum of evidence which was submitted to the Committee. I will make time in a moment for colleagues to ask general questions if they want on the statement you have just made, but perhaps I can begin by asking a couple of questions myself. Is not the concern that to ensure every Bill which a government introduces can be treated as a “manifesto commitment” manifestos will simply get longer and longer and more and more detailed to try to cover every possible eventuality, and what does that imply for the electors who probably in the main never read them anyway even when they are brief and succinct let alone when they run to several chapters? Is that not a concern? Secondly, why is it in that case do you think it necessary to talk about the codification of conventions if, notwithstanding what I have just said, in the main, indeed overwhelmingly, governments do get their legislation, and the Parliament Act is hardly ever invoked?

Mr Straw: On the first, and indeed I was slightly anticipating your question as it turned out, what Salisbury-Addison was about was respecting the democratic authority of the House of Commons and acknowledging that governments have broad manifestos and it was for the Lords, yes, to scrutinise and revise legislation but not to operate in such a way that the democratic authority of the Commons was sabotaged. That required a respect of the spirit in which a manifesto was put forward as well as of

its detailed letter. That is shown very clearly by the brevity of manifestos—and the same is true of the Conservative and Liberal Parties in 1945—from which they were working. My colleagues may disagree but I think the reason that manifestos have become more detailed is not so much to do with worries about whether the Lords would overturn the legislation but rather more to do with the internal workings of government, because all governments find it easier to sort out significant chunks of their legislative programme in advance in a manifesto. As you know, Chairman, if you have a manifesto commitment then it means when you come to argue for legislation or for the resources for the legislation disagreement in Cabinet Committee is curtailed. So that is one of the drivers for the detail as well as just the much more intense scrutiny that we are all subject to by the press these days than ever we were; there just was not the same scrutiny of promises. If their Lordships were to get to a point where they were saying, “Hang on, on page 51 it says this and this Bill says that, although the Bill is about the same thing, we disagree you have a mandate”, I think that undermines the spirit of the Salisbury-Addison Convention. Of course that is what happened in respect of the Identity Cards Bill we would suggest. I will ask colleagues to come in on that. On the question, is codification necessary, yes, I think it is. Codification does not mean by any means you have to codify by legislation but greater clarity of these conventions is necessary in a circumstance where already the Lords is becoming more assertive about its powers and pushing the envelope without any question. There are people around this table who have suggested Salisbury-Addison is no longer appropriate. I think they are entirely wrong, let me say, and I think democratic government would break down without Salisbury-Addison or its equivalent, but I certainly do not believe that the Parliament Acts are sufficient. The Parliament Acts are necessary and they were passed by a Liberal Government but they are certainly not a sufficient basis for conventions. I do not know whether Lord Falconer would like to say anything.

Lord Falconer of Thoroton: I agree with what Jack has said but just two particular points. The Salisbury-Addison Convention would not be convincing if it depended on a very fine reading of each individual manifesto. I am quite sure Jack is right when he says manifestos are not getting longer because of concerns about the Salisbury-Addison Convention, but the essence of the Convention is having gone to the people and being elected to form a government through your majority in the Commons, it will be completely wrong that precisely what the powers of the Lords depends on a very, very fine reading of the manifesto. It also means to some extent the Chairman’s point, you do not want to start putting into manifestos pages and pages to cover the Lords’ points. That is why I think what Jack is saying is so accurate, it needs to be a general sensible reading both of what is in the manifesto and broadly what the government stands for in determining what is covered by it. On the issue of is it necessary to codify, I think how one codifies is the

question. As Jack has said, it may be that a statement by this Committee representing a huge cross-party and cross-bencher group saying in a united way what the conventions are is enough to give that assent. You need to form a view in relation to it but there needs to be set out in some authoritative way what they are and they are two-fold, I think. One, Jack's point that people like Lord McNally are saying the conventions do not exist any more. Secondly and separately, we are embarked on a process in which Lords' reform is being looked at by both Houses. There needs to be a basis on what the current position is so people can vote in whatever votes are coming on those issues.

Lord Grocott: The critics may well say that the weakness of the Salisbury Convention is that it was an agreement between the Government and the official opposition, it was not an agreement between the House of Commons and the House of Lords or the Government and the House of Lords. Therefore it is obviously open to criticism on the grounds that people in the Upper House who are not members of the official opposition or the government—Labour, Conservative, to be simple about it—are not party to that Convention. For the Convention to work it must apply to the whole House of Lords. The other caveat to put in is this, it has to be acknowledged that almost from its start there have been qualifications written into the application of the Convention by people who do not like the way in which it is working at a particular time. It relates to things like how big the government's majority is, or how long it is since the most recent general election, in other words how current is the mandate of the government. So there have been weaknesses in the Convention and what I think is needed is clarity.

Q4 Chairman: I am going to call on others in a moment on these general questions before we come more specifically to Salisbury-Addison, but in the second paragraph of the Government memorandum the final sentence says, "Our view is that greater certainty about the conventions is desirable, but without losing essential flexibility." An important statement. Does that then rule out a statutory definition of conventions?

Mr Straw: I do not think it completely rules out a statutory definition but I think Salisbury-Addison would be very difficult to put into statute. There are other conventions—financial privilege is in a resolution of the House and in statute. The power which lies behind Salisbury-Addison, which is the Parliament Acts, plainly is in statute, but I think, Chairman, and it is a matter for the Committee, that there is plenty of legislation which is discretionary but I would hope that the Committee would first of all be able to accurately describe Salisbury-Addison. Can I add one important rider to the Wakeham Royal Commission definition of Salisbury-Addison. We believe it applies to Bills whether or not they are introduced in the House of Commons; it must apply to Bills introduced at either end, so therefore it is wider than the Parliament Acts. It seems to me that with this Convention it is better to operate by descriptive text, or you could have a descriptive text

in your report and, as Charlie says, a resolution of each House adopting that definition. I think that would be very good.

Q5 Mr Tyrie: As I understand it, your argument is that codification is needed because without it manifesto commitments may not be implemented or may be put at risk. As you put it, it all depends on the quixotic views of the House of Lords, which is what you will say to the electorate when you hold up the manifesto in an election. As we all know, we have the Parliament Acts which have worked reasonably well, as the Chairman pointed out a moment ago, and your response to the Chairman's reference to the Parliament Acts was to say, "We think they are necessary but they are insufficient", but that was an assertion. Could you possibly add something to that? Manifesto commitments by definition are made at the beginning of a Parliament, there is normally a full term to implement things, Parliament Acts can only delay measures for 13 months. What is the problem?

Mr Straw: Our fundamental case for codification and greater clarity is wider than you imply, Mr Tyrie, and it is to pin down what these conventions are and hopefully to get agreement as to what they are in advance of changes in composition. If you do not do that, first of all there is a practical problem in that I think it will be extremely difficult to reach agreement on future composition, and even if you do get agreement on future composition there will be a constant battle between this House, the Lords, and the Commons which cannot be good for governance nor for democracy. It goes back to the point we make in paragraphs 13 and 14 of our memorandum which is, first of all, to make a very profound point to those who claim that if you introduce, say, an elected element into the House of Lords by virtue of that fact power has to be conceded by the Commons to the Lords, that they are simply wrong by any overseas reference. Secondly, what we also know from our UK context and we have seen this happen in the last 10 years, the more that the composition of this House is changed and "modernised" the greater the appetite is at this end for an assertion of powers over the wholly elected House. Therefore, unless you are going to have continual disagreement you need to get clarity about the powers. It is something which will affect I believe all governing parties over time. On the Parliament Acts, no one I think, certainly not the Liberal Democrats and not the Conservatives, in manifestos going back to 1950 has suggested repealing the Parliament Acts, they are accepted as part of our constitutional landscape, but like much of our constitutional arrangements they are a necessary part of the framework but by no means sufficient. If we were simply to rely on the Parliament Acts, in other words if a majority here were not to be self-restricting and were to follow through its instinct on every Bill, most Bills, whether it was a Conservative or Labour Government, would find themselves overturned, and then you would have to use the Parliament Act. It would also, let me say,

undermine the right of this House as well because they would be knocked out at Second Reading I assume, unless the whole thing was going to be a charade, and then go back to the Commons and it would take longer but end up by restricting the role of this place. I do not think that is very appropriate.

Q6 Mr Tyrrie: To clarify this, is your argument that because the House of Lords might have the capacity to push everything into the condition of being subject to the Parliament Act that necessarily that would be the case? I would think that was a rather extreme assumption to make in order to justify additional executive power, powers additional to the existing Parliament Act.

Mr Straw: I do not think the powers would be additional to the Parliament Act at all, in fact I am quite sure not. We do not want to change the Parliament Act except perhaps if we cannot get agreement in respect of the oddity that Bills started in the Lords are not subject to the Parliament Acts in the way Bills are which start in the Commons. I am simply saying the Parliament Acts are a necessary part of our constitutional framework but are not sufficient. I think everybody understands that and Salisbury-Addison has substantially filled in the gaps.

Q7 Lord Elton: We have been asked to look at the conventions between the two Houses which have an intimate effect on the balance of power between the two Houses. You said there is no necessary connection between composition and power, of course there is an actual connection between the power of the House of Commons and its composition at any one time, and that affects the inter-House balance and the balance between the government and Parliament. Do you regard the balance between Parliament and government as about right now? How do you foresee this doctrine developing if we were to have, say, a coalition government with several manifestos in its portfolio or a hung Parliament? Would you find it was necessary to adjust the balance between the Houses in regard to the change in balance between Parliament and the government?

Mr Straw: I will just say first of all, not all of us are in favour of coalition governments precisely because they involve a deceit on the electorate in that you put forward a manifesto and then determine what you do afterwards rather than before the election, but of course you could end up with a coalition or with the arrangement which the Labour Government secured in 1977 with the then Liberal Party to stay in power. What happens with coalitions is that there is a post-election policy agreement. My own view is that if any coalition or arrangement as in 1977 gains the support of the democratically elected House and is endorsed by a motion of confidence then the programme for which they gain that endorsement should be respected by this House.

Lord Grocott: If at the heart of Lord Elton's question is whether the legitimacy of a government in the Commons depends on its majority particularly in relation to the Lords, that is to say a government with a small majority in the Commons is necessarily weak in relation to the Lords and one with a larger one is the opposite, that may be a *de facto* statement but I do not think it is one which could ever be translated into any kind of constitutional arrangement. A government is a government. It has frequently been said, and I think this was behind your question, that because a government only has a small majority it therefore does not have the authority to invoke the Parliament Act if necessary, or expect its legislation to be carried by the Lords. I hear that argument frequently but, if I can say without being flippant, I never hear the reverse said which is, as per 1997, that because the Commons has a colossal majority therefore the Lords needs to defer to it on all occasions. So I think we have to stand by the principle that a government is a government is a government.

Q8 Lord Elton: Can I get an answer to my first question which was, does the Government think the balance of power between government and Parliament is about right at present?

Mr Straw: Between government and Parliament? In the Commons?

Lord Elton: No, between government and Parliament. That is the point I am making.

Q9 Chairman: Parliament meaning both Houses.

Mr Straw: If you are asking me whether I believe we should stop any further reform which improved the power of scrutiny by Parliament over government, the answer to that, Lord Elton, is no, I do not believe that. I think we have seen in the last 30 years very significant improvements in the scrutiny of Parliament, by Parliament of government, at both ends, and I welcome that. I do not think we should suddenly say we have reached a state of perfection. Governments are scrutinised far more effectively than they were 30 years ago, indeed I am certain of that, and I still think—and I say this as a minister who ran two very large departments for nine years—that scrutiny although it can sometimes be uncomfortable actually benefits governance and our democracy. I am quite clear about that.

Q10 Lord McNally: Can I say at the beginning, there is absolutely no doubt in my mind or in the mind of my party that this process should end up with the supremacy of the House of Commons underlined and entrenched, but I have listened very carefully to what you have said and I am still not clear what sin we are guilty of which needs to be put right. The Government has lost no legislation, there is no manifesto commitment that has been defied by the House of Lords and I still do not understand why, other than the convenience of the government machine, there needs to be changes. My questioning of the Salisbury Convention is that

there is a difference between a House of Lords with a massive hereditary, Conservative majority facing the elected chamber and the partially reformed one we have today. It was put very well by the *Guardian*. The 1906 Liberal Government and the 1945 Labour Government faced a House of Lords defending vested interests, the modern House of Lords, as the *Guardian* put it, “. . . defends civil liberties and human rights against an increasingly autocratic government.” That is the difference we face in terms of the politics of the day. I have two questions. What happens to manifesto commitments which are not honoured or indeed turned on their head? How is Parliament to judge them? What about manifesto commitments further down the food chain? We were recently presented with an amendment to Welsh legislation and we were told we must not touch it because it was included in the Welsh manifesto. No, it is not in the main manifesto, we were well assured of that. So we have to be very alert that there is not lurking in some sub-manifesto somewhere some piece of legislation which will be defended. Two key points. The Leader of the House has said “a more assertive House of Lords”, but he has not said whether he thinks this is a good or bad thing. At the end of this process would he like to see a House of Lords that is more and more healthily assertive whilst recognising the supremacy of the Commons? Does he reserve the right of the House of Lords in the last resort to say “No”, because if we cannot say “No” all the rest becomes a charade?

Mr Straw: First of all, we are not accusing you of sin, although we may be in the Moses Room. My accusation against you is of error, not of sin—profound error—illustrated by the beginning and end of your remarks which were inconsistent, with respect, one with another. You said at the beginning that you accepted the supremacy of the House of Commons had to be underlined and entrenched—your words, not mine. You then at the end implied the Lords should have a right to say “No”. Those two are impossible to reconcile.

Q11 Lord McNally: Sorry, no—

Mr Straw: Sorry, I listened to what you said. That is my first point. The second point is that of course I accept the landscape has changed since 1906 and since 1948–49, it is a self-evident truth, but the landscape has also changed since the resolutions on financial privilege were passed and they have changed since 1906 and 1948, but that is not a reason for abandoning them if we think they underpin a sensible, and indeed I would say essential, balance of power between the two Houses. If they do not, you get rid of them. What we are seeking here is not to change the essence of these conventions as we understand them but to seek to get better description and, I suggest, a more formal codification, not necessarily by legislation, precisely because of the change in composition which has already taken place and is likely to take place in the future. Yes, it is, of course, the case in 1948–49 there was a massive Conservative majority. As Lord Grocott described, the nature of

the challenge affecting the Labour Government today is just as difficult in many ways although it is a different one, which is that we have a third of members of the House and if all the opposition parties unite, or the two main opposition parties unite, we get defeated. If we look at the number of defeats which are suffered they have shot up. The same, I may say, I believe will affect a future Conservative Government. That is one reason why this has become in a sense an even more important matter because it is going to affect governments of all political persuasions and that is a very big change. You asked me also what happens to manifesto commitments which are not honoured. If you do not honour your manifesto commitments, you are punished in the appropriate way at the next poll, both locally and nationally. Your last point, I may say, is I do not think very persuasive and it was in respect of this canard that there was a commitment in a regional manifesto but not a national manifesto. First of all, there was a serious objection to what was in that regional manifesto, which was not only available in Welsh in Wales but available in English on the internet worldwide—and when I was in Wales I became familiar with it and your Leader went there and no doubt you did—so everyone was aware of it and it was the subject of a debate. Secondly, I happen to have the UK manifesto in front of me. You said there was nothing in it but at page 108 it says, “In Wales we will develop democratic devolution by creating a stronger Assembly with enhanced legislative powers and a reformed structure, an electoral system to make the exercise of Assembly responsibilities clearer and more accountable to the public.” So as it happens it was in the UK manifesto, but even if it had not been a reference in the Welsh manifesto would have been sufficient.

Lord McNally: The House of Lords rejected the Hunting Bill, the House of Commons had its way. It is not true to say the House of Lords can say “No” and that challenges the supremacy of the Commons. The Commons has to go through a procedure to have its way but the House of Lords must have the right to say “No”, otherwise the rest becomes a charade.

Q12 Sir Malcolm Rifkind: I have one general question and then one detailed question, Lord Chairman. First of all, clearly conventions have evolved over the years, and I am sure the Government would agree it is inconceivable that if we end up with a wholly elected or partially elected Upper House the conventions will not evolve further to take account of that. What therefore is the point of asking us to codify now, unless the Government is trying in effect to pre-empt that future evolution of the conventions in respect of a possible elected House. That is my general question. So far as the detail is concerned on Salisbury-Addison, the Government says in its document, “The Government has made a commitment to the nation in the form of a pledge in the manifesto.” With respect, I do not think the Government have responded properly to Lord

Elton's question. If you have a hung Parliament or coalition government that means by definition the leading party did not get a mandate from the majority of the electorate and therefore would not codification simply give, if I can put it in these terms, the government an unfair advantage being able to claim it was in their manifesto regardless of the result of the election? Likewise, if the government chooses to put other details in a Bill which were not foreshadowed in the manifesto and gets carried along with the manifesto commitment. All these are arguments surely for a convention which can be interpreted in the light of the actual circumstances of the day rather than some form of codification which itself, if it means anything different, would simply give the government a grossly unfair advantage—whatever government it was, I am not talking about this Government—regardless of the merits of the circumstances.

Mr Straw: On your first point, Sir Malcolm, you said it was inconceivable a fully or partially elected Lords would—and here I paraphrase—not seek or obtain greater power. I do not accept that formulaic connection between composition and power. I do accept that the more you have an elected element at this end, the greater the appetite there will be to increase the exercise of power by this place and an assertion of power over the Commons. It is precisely because, first of all, there is no necessary connection, and as I say, and I am sure you have looked at overseas experience, it is very interesting, you can have wholly elected second chambers and if the constitution says, "This is a subordinate second chamber, it is revising, that is the basis on which you get elected", that is the basis on which you get elected and people have to just accept that. I think particular problems would arise, although no one is suggesting this, if you had an exact replication of the system of election at this end but, that aside, then it is not inconceivable at all. However, precisely because if you do have a greater elected element as I say there will be a greater demand for an assertion of power at this end, it is my belief that we need to pin down what these conventions are and if appropriate codify them. You use the word "pre-empt" which is a pejorative one. I do not say this is to pre-empt the debate over composition, I just think it is a necessary precursor to a conclusion over composition because I do not think we will reach a conclusion unless we have been able to pin down the powers first. On a hung Parliament, with respect I think I gave the only answer one can give on this, which is that coalitions in my judgment are unsatisfactory and I think that is the view of the Conservative Party too. If you ended up with a coalition or some arrangement by which a minority party agreed not to vote against the government, it would put a programme through and gain a vote of confidence and it would be entitled I think to govern on the basis of that vote of confidence in the Commons until it lost it.

Q13 Sir Malcolm Rifkind: On the earlier part of your response, can I suggest you are treating primacy rather like pregnancy, either it exists or it

does not. It is entirely possible that an elected House of Lords would, as you have indicated, continue to respect the primacy of the Lower House but what that would actually mean in practice might be different from what it would mean today. The kind of pressure an elected Upper House might be legitimately entitled to exert, having been elected by the people, might be greater even if ultimately it deferred to the Commons. So primacy cannot just be defined as you either have it or you do not have it.

Chairman: A statement of fact, I think.

Simon Hughes: Like Sir Malcolm I have a general point to the Leader and then a specific one. In the submission by the Government there are two paragraphs, 7 and 33, which talk about the need to avoid the constant danger of gridlock. In paragraph 7 it says, ". . . there must be clear rules . . . if there is not to be a constant danger of gridlock." In paragraph 33, on page 10, at the end it says, "Unless Government is to be continually deadlocked there has to be some means of resolving disagreements on contentious issues." Would the Government accept, Chairman, that certainly in our lifetimes there has actually never been gridlock or deadlock and that the balance of powers has always worked generally well? There have been delays but never gridlock or deadlock. That is the general question. Therefore whatever the formulation of the rules, the rules have never led to that. The specific question is this: again for the first time in my experience in the last few months we have had the Government asserting that the manifesto has said something—I am talking about the ID cards commitment—when it was clearly controversial as to whether it said that at all. Is there not a distinction between what is clear—nationalise the coal industry, create a National Health Service, denationalise the shipbuilding industry—and something which is clearly controversial and open to interpretation of different sorts and that clearly cannot be, I would ask the Government to accept, claimed as something that benefits many conventions in the same way as a clear manifesto commitment?

Chairman: It is wrong to say nationalisations and denationalisations were not controversial.

Q14 Simon Hughes: No, but they were clear. They were controversial but clear. ID cards were controversial but not clear.

Lord Grocott: On the point about manifesto commitments, I think we would be in absolute agreement that it would be impossible to precisely define and interpret every clause in every party's manifesto. Whatever your Committee comes up with in conclusion, Chairman, I would bet it will acknowledge there will be grey areas in any interpretation of any manifesto. I am not saying I agree with you there was a grey area in the particular example you quoted. Gridlock or deadlock? I think we need to acknowledge the facts of the relationship between the two Houses since the Second World War as measured by one measure—I could give others—the number of

government defeats. The figures are—and they start in 1975 by the way because records were not kept prior to then—1975–79, a Labour Government, 240 defeats; 1979–83, 45 defeats; 1983–87, 62 defeats; 1987–92, 72 defeats; 1992–97, 62 defeats; 1997–2001, 108 defeats; 2001–05, 245 defeats. Now you will be amazed to hear that I am not actually making a party political point, but it does happen to be the case that defeats are staggeringly larger under Labour Governments than under Conservative Governments, but in my job you try and avoid paranoia. What I do think it illustrates is that there is a significant difference, and this is a lesson for the future which really was Malcolm Rifkind's question I think, which is that obviously the relationship between the two Houses will be significantly different when there is a different party elected in the Commons and where the Lords has no overall majority. That, to project into the future, though we must all be diffident about this, is likely to be the situation however the composition is finally established. It will, as far as I can see ahead, always be the case that the House of Lords or the second chamber is a chamber where no one can command an overall majority. I would not describe it as gridlock or deadlock but I would say that the mechanism for identifying the relationship between the two Houses clearly becomes more significant if you have a House where there is no overall majority for the government.

Q15 Lord Carter: The point which has just been made by Lord Grocott is actually central to our debate about the relationship between the two Houses. There are two limbs to this. One is the manifesto argument, the other one is the fact of minority governments. As we have just heard there was a minority government in 1947, there is now a minority government in the Lords and always will be, therefore is it not our job to try and formulate—and I am avoiding the word “codification”—a convention which actually recognises this new situation which will last for a long time in my view? Also, if in fact that formulation is adopted by both Houses on a vote, that will be a statement of the convention. If the composition of the Lords were to change, there will have to be another statement of the convention, it will not just evolve as people say, because the policy of the two Houses will have been agreed. Therefore even if the composition of the Lords changes if there is pressure for a convention, the two Houses will have to vote again on a new approach or new formulation. The crucial point in my view is not just the manifesto, which in some ways puts the wrong weight on the argument, the real problem is how do we define a convention which allows the elected government to obtain its programme of legislation and at the same time allows the Lords the right balance of scrutiny and revision and if necessary delay. The reason there has not been deadlock is because we have the ultimate deterrent of the Parliament Act. The fact we have used it rarely is because we have avoided deadlock but the

Parliament Act is there. It is an extremely blunt weapon to use but is that not the central argument we have to answer?

Mr Straw: Can I say that the Parliament Act has been used during the course of this Labour administration. It was used in respect of one Bill I had, which was the European Elections Bill when I was Home Secretary, but also this House, unelected, operated in such a way as to quash altogether another Bill, which was the Mode of Trial Bill, which was introduced into this House so the Parliament Act did not apply. Although it was a controversial measure, of course, I always thought it was quite wrong of this House to use its power, a very clear power, to actually veto a Bill just because it had been for the convenience of both Houses introduced here rather than at the other end. Yes, it was controversial, but the way to deal with controversial legislation if there is a majority in the Commons is for them to go through it, to introduce it, to implement it and then for the electorate to make their own mind up, and not for this House to veto it. At the risk of repetition, Lord Carter, I would just say this, unless we are able to get clarity about the relative powers of the two Houses as a starting point and then make decisions about whether you want those powers increased—I happen not to be in favour of this—I make this prediction, you will not get agreement about composition. Because the moment two or three are gathered together to talk about the composition of the Lords, it moves into a discussion about powers.

Lord Falconer of Thoroton: Can I pick up one point. I think what Denis Carter has said is incredibly important because, as Bruce and Denis have said and they are plainly accurate, we are now dealing with a situation where there will always be a majority against the government in the Lords. The essence of Salisbury-Addison was that we all recognised that relying on the Parliament Acts was not sufficient because if you rely on the Parliament Acts you end up basically destroying in effect the ability of the government to get its legislative programme through. So the need for Salisbury-Addison is in a sense permanent: the inadequacy of the Parliament Acts is the need for it. Just picking up what Sir Malcolm Rifkind said, which I think is wrong, we need to describe what the convention is in words, we need flexibility in what the convention is, but one should not be distracted in this Committee by a fear of losing flexibility such that we should not describe it. If we do not describe it, we end up with the situation which Lord McNally is putting, which appears to give the Lords *carte blanche* to reject a Bill and rely on the Parliament Act whenever it seems appropriate to the Lords. That is what his questions appear to imply and it is because everybody who has ever looked at that question, from Salisbury-Addison onwards, think that is an inadequate response that the work of this Committee is so important.

Q16 Lord Carter: The other point I made was about the acceptance of both Houses of whatever we are able to formulate as a convention. We do

not need to worry about the change in the composition of the Lords because the policy of the two Houses will have been agreed. The two Houses will need to keep thinking about what will happen in the future. What we have to think about is what is happening now because what is happening now will be the future because any future government will have a minority in the House of Lords.

Lord Falconer of Thoroton: Yes.

Q17 Chairman: Is it an accurate description of the Government's position this morning on these issues to say that lack of codification matters more now than in the past and, regardless of how the composition of the Lords may be determined in the future, it will also matter more and therefore—and this is taking a contrary view to Malcolm Rifkind's question—there is not a problem with seeking codification now? Is that what you are saying to the Committee?

Mr Straw: That is a fair summary.

Q18 Viscount Bledisloe: You have told us what you would like the Salisbury Convention to be, I want to take you back to what it actually currently is and to do so by two or three brief questions and one very long one. Could you look at paragraphs 22, 23 and 25 of your memorandum? Paragraph 22, "... proposals on which the Government had won an election"; paragraph 23, proposals "... which had been clearly set out in the party's election manifesto"; paragraph 25, "... when the country has so recently expressed its view ...". What the Convention relates to is things upon which it can actually be said that the party won the election, like nationalisation, rather than something which is mentioned on page 85 of that rather lengthy document of 112 pages. If you had asked a voter, "What did you vote for them to do?" he would have said, "Nationalisation" in 1945 but he probably would not even have noticed page 85 today. Do you accept it only relates to key core proposals on which the government got in?

Mr Straw: No, Lord Bledisloe, I do not. I would also say that it would wreck democratic government were it to. We have to have an arrangement by which proposals are put to electors, there is a competition between parties, the parties are able to say to the electors, "If you vote for us we will do what is in this manifesto ...", the Conservative manifesto, the Liberal Democrat manifesto, "... moreover, since this is an election for the House of Commons we would have the power with the majority we seek in the House of Commons to carry through that programme." It is absolutely fundamental to the operation of our democracy that that should be so, that there is a contract between the electors and the elected. So I do not agree with you at all and although it is certainly the case in recent elections not every elector has been able to recite every part of the manifesto, it is equally the case that interested electors can tell you what was in particular parts of the manifesto and they demand to know and sometimes they will swing votes. The last thing I

would say is that the final decision about what is a manifesto commitment has to be a matter for the Commons as the body having primacy, it cannot lie in the role of the Lords for the Lords as an important but necessarily subordinate chamber to say, "Well, it may have said X but we think Y", or, to pick up your phrase on the 1945 manifesto, "There is a difference between really important election commitments and those which are unimportant." I do not think with respect it is a matter for their Lordships to say.

Q19 Viscount Bledisloe: Secondly, do you accept it only applies to something which is spelt out in the manifesto with sufficient detail that one can say that the Bill which is brought forward is what the party said it was going to do? For example, to take it to extreme, if you merely said, "We will bring forward a Bill to reform the National Health Service", you could not say that any Bill you happened to bring forward to reform the National Health Service has the blessing of being a manifesto commitment?

Mr Straw: No, again, I am sorry I do not agree with you. The 1945 manifesto travelled extraordinarily light over the National Health Service, it just simply says, "In the new National Health Service there should be a health service for the people." It was a couple of paragraphs. So I do not agree with you on that. I think if a democratic party has been elected to form a government, it is then entitled to get its programme through and it cannot be the case that a manifesto, and even one frankly as prolix as our manifesto in the last election, can include every detail of legislation. Nor, with respect, can it be the case that governments stop thinking the moment they agree a manifesto. What we are talking about here is first of all ensuring an important degree of respect by this House as well as by governments for what has been put before the people, but there is a wider point which I referred to in my opening remarks which is if you like a development of Salisbury-Addison, that there has to be acknowledgement by this chamber however it is composed that if a prime function of the Commons is to deliver a government and that determines who forms the government and who leads the government, and it does, and that will continue under any arrangement I can foresee, then it must be the Commons which on the basis of a programme agreed there, say for example by a coalition government, has the right to ensure that programme is developed.

Lord Falconer of Thoroton: Wakeham said there is a deeper philosophical underpinning of the Salisbury Convention which remains valid and this arises from the status of the House of Commons as the United Kingdom's pre-eminent political forum. What Lord Bledisloe has done is take specific words from what Salisbury said in 1945 and treat them as being like a statute rather than looking at the wider philosophical underpinning of the Convention.

Lord Grocott: In a sentence, I agree very strongly with the Wakeham Commission Report which in a sense goes beyond Salisbury where it says, “More generally the second chamber should think carefully before challenging the clearly expressed views of the House of Commons on any issue of public policy.” I believe that is a refinement of Salisbury which has developed and I might say it has been clearly recognised by the Lords where it is close to being a convention—and maybe the Committee might consider this—that Bills are not rejected at Second Reading. It is very rarely the case there is a vote on Second Reading and that is entirely consistent with the Lords’ position as a revising chamber not a vetoing chamber. You cannot revise if the Bill does not even go into Committee.

Lord McNally: Would you read the second sentence of Wakeham.

Chairman: Hold on, Tom, I have responsibilities to other members of the Committee. They have been sitting for over an hour waiting to ask questions.

Q20 Baroness Symons of Vernham Dean: Jack, can we come back to what you said a moment or two ago when you said, “Unless there is clarity on the relative powers there is not going to be any agreement on composition.” You said something more concrete than that earlier, you said, “The view on the current position would provide the basis of future reform” and indeed that is what Charlie said as well. What I deduce from that is that for you it is the relative powers of the House which are the absolute crux of the matter, not the composition. It does come back to the point which Malcolm Rifkind was raising a moment or two ago about if we are setting in concrete the relative powers then composition flows from that. You have talked about the election of the Lords in the statement you made to us and of course—and we have just been reminded again by Charlie—there is the Wakeham point about the Commons being the pre-eminent political forum but you say in here, “That is because it is elected.” Then the point you quoted over and over again, paragraphs 13 and 14, the overseas examples. That is not quite fair, is it, because there are overseas examples where the second chambers have much greater powers on the basis of being elected? The point is the electorate, what the electorate expects of an elected second chamber and they are going to expect rather more. In any case, and we come back to the point about a convention, those are all based as you acknowledge on a written constitution. This begs the question, are you in effect saying that what we are doing now is going to have the effect of that written constitution and therefore be the bedrock of that reform or are you saying no, it does not matter, we can review all that at a later date?

Mr Straw: I am saying what I have already said. First of all, I think the overseas examples are interesting, because, yes, of course there are some second chambers which are more significant and more powerful than anybody anticipated for the House of Lords, most notably the US Senate,

wholly elected. What is interesting about the analysis of overseas examples is in most cases they are subordinate chambers which are elected and they stay subordinate. Of course it depends on clarity about the role and an understanding that when people are elected that is the—

Q21 Baroness Symons of Vernham Dean: And in all those cases a written constitution.

Mr Straw: Yes, okay. What is said in paragraphs 13 and 14 is not contradictory. First, there is a necessary connection from overseas examples between powers and composition. Secondly, in the UK context from where we are starting, unless you get clarity and clear definitions about powers, the more you move over to an elected element the more will be the demand for more power. That is the purpose, in my view, of this Committee. On this issue of a written constitution, we do not have a constitutional arrangement set in a single black-lettered text, but the constitutional arrangements are written down of course, that is the basis on which they are transmitted, by words, and they can be found in a range from descriptive text books through to statutes. The whole purpose of asking this Committee for advice on codification is to suggest the case for making more solid if you like the basis of these understandings between the two Houses in order that they become more robust with a change of composition.

Lord Falconer of Thoroton: I do not think the critical thing is whether there is a written constitution but whether there is an acceptance of the conventions. It does not matter whether they are written down in a statute, that is probably going too far in many cases because you lose flexibility, but if for example this Committee gave a clear description of the conventions and that was then accepted by both Houses of Parliament, there would be a clear basis on which to operate. Nobody I think in the room or in Parliament wants the conventions written down in such a way that the courts have to adjudicate upon them, but if there was political acceptance right across the spectrum they become workable and a clear basis then for people to make decisions about the change in composition. They might take the view there would be pressure for change but they can at least make a judgment at that stage.

Q22 Lord Higgins: I would like to raise some new points which arise on paragraphs 61 to 65 of the paper, although there is no doubt many of the points between the discussions we have just had and that part of the paper we may wish to return to later on. I want to address my remarks to Mr Straw because our terms of reference, unlike the Labour Party manifesto, do suggest we should look at the conventions in the House of Commons as well as those in the House of Lords. It is of course complete common ground that each House can determine its own procedures, nonetheless I think there are some conventions which in a sense ought to be so obvious they are not even described as such which are now not being abided by. I just take two

examples. One would have thought, given all the talk about the primacy of the House of Commons, there was a clear convention that the House of Commons was the primary scrutiniser of legislation. That is no longer the case. Because of the way in which programmes are working in the House of Commons I know only too well from my own experience on the front bench on pensions that Bills arrive in this House which have not been properly scrutinised and which we in this House have had to amend and return to the other place. I would have thought, and I would hope Mr Straw would agree, that the convention is that the House of Commons is the primary legislative body in terms of looking at amendments and it is no longer doing that. We need to affirm that convention and we need to ensure that the work is done there and that we do remain a revising chamber. The other related point which I think is worth making on this is the question which is raised in the paper in the paragraphs I have referred to about the way in which amendments from this House are dealt with in the House of Commons and in particular the reference to packaging. I am not here concerned with the rather esoteric points which were made in the statement in both Houses recently on the problems which arise if there is packaging and so-called double insistence arises, I am concerned with when this House has spent days and days and days examining in detail a particular Bill, it then sends those amendments back to the Commons and the Commons package those amendments and present them to a House of Commons which is very severely restrained in the way in which it is timetabled and where on one occasion I think half the available time was taken up by the Secretary of State. So again I would have thought we ought to look carefully at what the conventions are with regard to the proper consideration of amendments which are sent from the Lords to the Commons. These are two conventions which we ought to look at very carefully in the present context.

Mr Straw: Lord Higgins, first of all, it is the job of both Houses to scrutinise legislation and, as somebody who for four years was Home Secretary and was responsible at that stage for the largest single legislative programme of any government department, I welcome the scrutiny by both Houses. I did not welcome a veto of one Bill, and I have dealt with that, and although sometimes the scrutiny was uncomfortable my overall judgment is that the Bills I put forward were improved by scrutiny by both Houses. So I have no argument about that. Where I disagree with you, Lord Higgins, is in your implication of a golden age of scrutiny in the Commons and that it is no longer the case that the Commons scrutinise legislation. There is a big issue about how the Commons scrutinises legislation but, coming back to look over the waterfront after five years' absence from any legislative programme, I think the scrutiny has got better rather than worse. The scrutiny I took part in in the 1980s was absolutely dreadful. There were Finance Bills on which I cut my teeth against Terence Higgins MP, there was the Housing Bill

1980 where we talked and talked and talked and talked and the government members opened their correspondence, we were seeking a guillotine saying how outrageous the Government was, it was no real scrutiny, and the whole thing got forced through. These days, thanks not least to the Modernisation Committee process, you have many more Bills going for pre-legislative scrutiny, draft Bills, and with the help of your neighbour, Sir Nicholas Winterton and others on the Modernisation Committee we are now looking at other ways in which scrutiny in the Commons can be improved and I think we need to. So I do not accept the assertion behind your question. On packaging, the Commons has always packaged amendments; it did when the Conservative Party was in power. The difference is, and this is bound to be a partisan point, there were many, many fewer occasions when the Conservatives were in power when they ran into really serious trouble at this end so the number of occasions of ping-pong were fewer.

Lord Grocott: I can certainly pick up on the issue of ping-pong which is another major—

Q23 Lord Higgins: I am not on ping-pong.

Lord Grocott: Okay, but can I pick up on scrutiny. I agree very much with Jack that both Houses scrutinise legislation by quite different methods and are very effective in their own way and no doubt this could be improved. I just want to put one factual point on the table which is, as there are frequently criticisms of the Commons' method of programming by people in the Lords, on virtually every Bill there is substantially more time spent in scrutiny in the Commons than is the case in the Lords. For example, in one session I have the figures for here, the 2002–03 session—in the Commons during that period there were 1,121 hours spent on scrutiny, in the Lords during that period there were 812 hours spent on scrutiny. It is for a very simple procedural reason, not to any Machiavellian tendency, it is simply the case, obviously, as we all know, in the Commons Bills pretty well automatically go into committee and four or five Bills can be dealt with simultaneously and committee time is therefore longer usually than it is in the Lords where far more Bills are dealt with on the floor of the House and obviously there is limited floor time. So it is for a procedural reason. I am not suggesting that hours spent necessarily indicates better scrutiny, I am certainly not suggesting that, but it is quite difficult to argue that timetabling of legislation severely restricts the capacity to scrutinise.

Q24 Lord Higgins: I think, Chairman, we must beware of taking that kind of group of figures which are averages rather than looking at what is happening to a particular Bill. If I can give one more specific example from the last Pensions Bill, we sent back 672 amendments to the Commons, of which they accepted all but five. It does suggest

perhaps that if they were scrutinising it properly, they would have carried those amendments in the first place.

Lord Falconer of Thoroton: That is a slightly unfair point because many of the amendments—I am sorry, Chairman.

Q25 Chairman: I think we should move on but please answer.

Lord Falconer of Thoroton: Two things. Jack is as keen as anybody to ensure that the scrutinising process across the whole of Parliament gets better, and mutual respect between the two Houses on that is incredibly important, and we are as keen as we possibly can be to ensure proper mutual respect. Underlying your point, if there is a sense that particular things the Lords have done are not even looked at in the Commons, that inevitably gives the sense there is not that respect. I am completely with you in relation to that. Your last point though was a stonkingly bad point, if I may say so, because many of those hundreds of amendments, as you know perfectly well, Lord Higgins, would have been government amendments which could have been made in either House and it is not a fault of the scrutiny in the Commons, it is much likely that the Bill team, as it were, see change which needs to be made which everyone accepts. So I think that is a bit unfair.

Lord Higgins: That is absolutely right but of course those government amendments ought to have been done earlier.

Q26 Chairman: Can I ask a simple, brief question about this and with regard to ping-pong. Does the Government believe there is any ambiguity in the conventions governing ping-pong which codification would resolve?

Lord Grocott: Chairman, there was some difficulty a couple of years ago which relates to the point Lord Higgins made about packaging which has been largely resolved. I do think though that there is an issue which is not a problem at the moment but which needs to be put on the radar for this Committee in terms of what conventions may or may not exist. The issue is this, that there is very strong evidence again that there is far more extensive use of ping-pong, as you would expect, when the Upper House does not have the same majority as the Lower House. Statistically that is pretty well unarguable. If you take, for example, and I can give these figures to the Committee, in fact I think they are in the Clerk's evidence to the Committee, when there is no majority—and I am deliberately not saying when there is a Labour Government or a Conservative Government—in the Upper House which compares with the majority in the Lower House, the exchanges between the two Houses are far more extensive and far more frequent. If you measure it by three exchanges—and I say “three exchanges” because that generally indicates that the Lords is quite clear about the position it is in and does not want to give way—in the whole of the 18 years when the Upper House, I am avoiding saying the Conservative

Government, had a majority pretty much the same as the Lower House, there were only three occasions when there were more than three exchanges of ping-pong between the two Houses. In the last couple of Parliaments, 2001–05, 13 Bills went into protracted exchanges, and so far this year of course a record has nearly been broken on the ID Cards exchange. I give these figures to the Committee simply to say that clearly the issue of exchanges between the two Houses in a situation where there is no majority for any government in the Upper House, which is the situation which we all accept and will all live with, will inevitably become something which needs to be discussed. I am not looking for any suggestion of a convention or a rule but it is clearly an issue which needs to be addressed.

Lord Fraser of Carmyllie: I have absolutely no difficulty accepting your proposition, so long as we have the current arrangement that we are unelected but the Commons is elected, the Commons should be supreme; that must be a fundamental democratic principle and I have no difficulty accepting that. However, what I do find startling about your memorandum is that you seem to imply that the composition of this chamber is an irrelevance. I really do not see it, other than in Lady Symons' context, where you place the second chamber clearly within a written constitution, otherwise I am afraid you are going to make the same mistake as Charles I made, that we will have a Commons, a House, but you will still do what you are told and that is anti-democratic and I will go as far as saying that. You say “If we are to be elected” but we are still not allowed to do what we believe to be the will of the people.

Chairman: I do not want to get diverted on this because this Committee is not here to discuss how members get into the Upper House, we are here to discuss the conventions. Look at the terms of reference of the Committee, the method of deciding the composition of the Upper House is clearly outwith the terms of the reference of the Committee. I do not mind you responding to Lord Fraser but do not let us get into elections or any of that.

Lord Fraser of Carmyllie: Chairman, I would not have raised it but it is quite specifically raised and has been repeated in the evidence—

Q27 Chairman: It does not mean that because it is in the Government's memorandum it is within the terms of reference of the Committee, and I am saying quite clearly it is not in the terms of reference of the Committee as everybody around this table knows. Maybe it should have been but the fact is it is not.

Mr Straw: Lord Fraser, I have never ever said, suggested or implied that we regard composition as irrelevant. I put forward a view about the connection between powers and composition, and in view of the Chairman's comments I will leave it there.

Q28 Lord Fraser of Carmyllie: I will not pursue it. I have a technical question which I would like to address to Lord Falconer, although I think he has answered it already. How do you codify a convention in a statute?

Lord Falconer of Thoroton: You can write it down. I think what the Clerk of the Parliaments said in relation to this is powerful. You need, in looking at the convention, to see whether it is something you want to be looked at in a strict statutory way. For example, with Salisbury-Addison you plainly cannot cope by statute with the words “what is in a manifesto”. What the Clerk of the Parliaments’ evidence is saying is you need flexibility which comes from it being not legalistic but sensible and broad brush. So some you can and some you cannot.

Q29 Lord Fraser of Carmyllie: What you do say in that memorandum is that codification could mean anything from statutory definition to writing it down—

Lord Falconer of Thoroton: Exactly.

Q30 Lord Fraser of Carmyllie: — but your view, and I take it you are putting it that way because you do not want to exclude it from other considerations, is that you do not believe it should be within a statutory framework?

Lord Falconer of Thoroton: Speaking personally, Salisbury-Addison does not look remotely possible to put into statute. That is my view and I think it is both Jack’s and Bruce’s view as well. It does not mean that the other ones may not be because, as Jack has pointed out, financial privilege is actually in an Act of Parliament, the Parliament Act. With another convention, the secondary legislation one, you cannot generally say “No, but there might be acceptable circumstances”, that does not sound right.

Q31 Lord Fraser of Carmyllie: Can I confirm the Government’s view on this. If you put it in a statute, you cannot avoid having the courts adjudicate upon it and you do not want to do that. If I may say so to the Leader of the House, it seems to me one point he has not emphasised is that the value of conventions is not just flexibility but also it makes sure that courts do not intervene, and any matters are regulated by one House or other or both and the courts would just throw their hands up in horror if you went to them with a convention.

Mr Straw: I understand that. The Parliament Acts of course you can call a convention but they are enshrined in law and there is a risk of statutory interpretation. I happen to think it is a risk worth taking. It may be, to pick up the point Charlie has been making, if we change the rules in respect of secondary legislation we need to put those into law; maybe not.

Q32 Ms Stuart: This turns very much on the questions which Lord Fraser raised but I think, Mr Straw, you have mentioned in your opening statement there are three ways in which you can

deal with conventions. You can simply state them in a non-prescriptive way, as a matter of resolution and in statutory form. You also later on I thought implied that you had no intention at this stage to strengthen or widen the Parliament Acts, which then leads to the very basic question of what kind of mechanism of enforcement of any of these conventions if you were to codify them were you thinking of? Were there any kind of new mechanisms you had in mind or simply a gradation of codifying the convention without then an appropriate mechanism of enforcement?

Mr Straw: On the Parliament Acts, the record will show that I said we have no plans to change the Parliament Acts except in respect of removing the qualification of the Parliament Acts that the legislation has to start in the Commons, not the Lords, to get the benefit of the Parliament Acts. In terms of guarantees, you have raised a very important point there about how they are enforced, but many of the existing conventions and rules are self-enforcing and that is one of the strengths of our constitutional arrangements. For many centuries the rule of financial privilege was based on resolutions of each House and no more. Certainly I would like to see Salisbury-Addison made more formal. There will be a report from this Committee, if it recommends an agreed form of words that could be adopted by resolutions of each House and that will then become part of our constitutional framework. There would always be the possibility of legislating if you ended up with a complete impasse between one and the other, but I hope that would not arise. There may be, as Lord Falconer said, some other areas, for example, legislation on change in the composition, where there were propositions in the initial Bill about the relative powers to actually provide for additional clarity.

Q33 Ms Stuart: One observation on the earlier discussion about manifesto commitments and the debate about what would happen with a hung parliament, I think an extension to manifesto commitments and coalition agreements would solve that.

Mr Straw: That is a good point.

Q34 Lord Tomlinson: Earlier on, Mr Straw, when we were dealing with conventions you spoke about the need for agreement on conventions in advance of changes in composition. Now I agree we are not talking about the composition but you seem to have implied in your memorandum at paragraph 14 that the subordinate position of the second chamber does not depend on the second chamber being wholly or partially appointed. That is in direct contradiction to the view that you actually referred to from the paper of the Clerk of the Parliaments earlier at paragraphs 33 and 34 where, and I do not propose to quote it all, in the very last sentence of paragraph 34 the Clerk of the Parliaments says, “All in all it is likely to be difficult to ensure that any definition of the convention now would survive a significant change in the

composition of the Lords.” One can be right, one can be wrong. Are you saying that the Clerk of the Parliaments is wrong?

Mr Straw: I do not say the Clerk of the Parliaments is wrong, but there is a difference of emphasis between the Clerk of the Parliaments and our memorandum and I perfectly accept that. I think his memorandum is extremely good and, if you will allow me, my emphasis is slightly different. He also says in the middle of paragraph 34, “Thus the number of elected members and the mode of election may be crucial for the survival of the convention. For example the preservation of an appointed element in the Lords and a system of staggered elections for the remainder so that only a minority of membership is elected at any General Election is one way of protecting the convention. There may be others.” I happen to agree with the Clerk in that respect.

Q35 Lord Tomlinson: But he has also said at paragraph 33, “It can be argued that the greater the proportion of elected members the stronger the mandate. If the Lords were elected by a proportional system they might even claim a superior mandate.”

Mr Straw: I am sure they will claim one, as indeed will your next door neighbour. Both of them might seek to claim that in the absence of winning a general election in the Commons. It was ever thus. I sought to anticipate that in paragraphs 13 and 14 of our memorandum. There are those who claim, and the Clerk at one stage comes quite close to this, that there is an inexorable, almost arithmetic relationship, between the proportion of people elected at this end and the powers relative to the Commons. I do not accept that and overseas evidence is on my side. I do accept, however, that the greater the proportion of elected members the greater the tendency of the House of Lords, the second chamber, to demand additional powers, and that is why essentially this Committee is sitting, so we can get clear the baseline, and then if we make decisions and have an extra election and need to give them more powers we are explicit about what those extra powers should be.

Q36 Sir Nicholas Winterton: It is certainly my understanding that we are considering these important conventions based on the present composition of the House of Lords, not projecting ourselves into the future, and I hope the debate can actually therefore be concentrated on the current composition. Would not our witnesses actually believe that if we seek to codify these conventions we are in reality reducing dramatically the essential flexibility of the present system which does enable men and women of reason, good sense and construction to agree how both Houses should deal with legislation? Is it not a fact, and I come back to one of the points Lord Higgins raised, that Bills will start out in the House of Commons and it is not unknown for the government of the day dramatically to change those Bills either at Standing Committee or even during the Report or

remaining stages of the Bill, removing large tranches of the original Bill and substituting a new section or new clauses and dramatically changing the Bill, which means that legislation because of programming could then go to the House of Lords with huge important sections of that Bill totally inadequately scrutinised? Is it not therefore important that we retain the flexibility in the relationship between the Commons and the Lords without in any way impugning the primacy of the House of Commons, because if we are going to change that relationship in my view the ability of the Lords to scrutinise legislation, to amend it, is going to be dramatically reduced? I think codification can dramatically reduce the flexibility which exists. I sit on the Committee chaired by the Leader of the House, the Modernisation Committee, and we are looking at how the House can more adequately scrutinise legislation. Surely we do not want to undermine the current flexibility? Again I pick up the point from Lord McNally, how often has the government failed to get its legislation? The fact is, it has not. The current system works. Codification could I think reduce the flexibility which enables the Lords and Commons relationship to be a good working one, to enable the Lords to be an amending and delaying chamber but not ultimately to frustrate the government. Perhaps the Leader of the House, Jack Straw, and the Lord Chancellor, with whom in the past when I was Chairman of Procedure I had a very good working relationship, would comment on those two points. We do not want to lose the huge assets of the current system.

Mr Straw: Sir Nicholas, I agree with you about the flexibility, but your use of the phrase codify implies that codification could only take place in a kind of Germanic or French way where you write it down in legally binding texts. I accept, particularly in Salisbury-Addison, there are considerable dangers there and I remember when we had a debate in the Commons on 10 May David Howarth, the member for Cambridge, himself a jurist, quoted an aphorism amongst French jurists which was, “To codify is to modify”. David Howarth then made it clear that in the French system codification began with “ifs” and “whereases” and was trying to be very legalistic. We are not suggesting that, certainly not we three here, for Salisbury-Addison, but we are suggesting that there is a strong case for, first of all, agreement about Salisbury-Addison, an agreed text, and then for its endorsement by each House. As I have said, I think the best way of doing it would be agreement within your Committee, my Lord Chairman, and then endorsement of that by each House. I think that would help. I think it is perfectly possible to preserve flexibility, respect for each House, but respect for primacy within the terms that we use.

Lord Falconer of Thoroton: I endorse what Jack has said. We all sitting at this table recognise completely there are two good things which come from it being a convention, one is flexibility and, two, it keeps the courts out and it is dealt with in relations between the two. That does not, we think,

mean you should not describe it. For example, simply to say, "The Commons is prime" is not enough, one needs to go into a bit more detail. For example, and I do not mean this to be the comprehensive definition, "Manifesto Bills are not rejected at Second Reading or subject to wrecking amendments in the House of Lords." There is value in saying that, there is difficulty, as the evidence shows, sometimes defining what a manifesto Bill is, but a convention gives you a flexibility in relation to it. If this Committee says that and there was broad political assent represented for example by a resolution in both Houses, that would move the matter on without in any way losing flexibility because we all agree with you flexibility is utterly critical.

Sir Nicholas Winterton: Could I raise the matter of the convention that government business in the Lords should be considered in reasonable time? Would not the Leader of the House and the Lord Chancellor admit that to an extent what is reasonable time in one situation may not be reasonable time in another? The government itself is actually responsible very often, because of programming, for the amount of time the Lords might seek to consider a piece of legislation, large tranches of which would have been not scrutinised properly in the House of Commons or inadequately scrutinised. So is it not very difficult to define "reasonable" because it will entirely depend upon the circumstances most of which will have been dictated by the government itself?

Chairman: Before you respond to that, can I say the Committee has the average number of sitting days on Bills in the Lords for the last two and a half sessions and Nicholas has an important point. It would help the Committee, I do not expect you to do it now, if you could let us have a note in which you said when you consider the reasonable time convention has been breached in the recent past, on how many occasions and what the circumstances were. I think that would be very helpful to the Committee.

Q37 Sir Nicholas Winterton: Thank you. Could you deal with my point?

Lord Grocott: The short answer to the question, does there not need to be flexibility in a convention of this sort, must be yes. The word "reasonable" does imply that there will be occasions when, for good reasons, any particular time limit would be exceeded. We can imagine all sorts of reasons why that might be the case. It might be because of new evidence emerging during the passage of a Bill, it might be because Bills are overtaken by emergency legislation which gets brought in from time to time, so any convention of this sort must acknowledge that there needs to be exceptions. I would say that the convention that government business should be considered within reasonable time is a very fundamental convention which is acknowledged in the Clerk's evidence as well as in our own evidence, and it does beg the question of what is reasonable and that is something which the Committee will no doubt consider.

Lord Falconer of Thoroton: I agree completely. You said flexibility is vital, of course it is. Bruce is right, "reasonable time" depends on all the circumstances. Bills get delayed because sometimes governments want them delayed, sometimes other things happen like emergency legislation in another area. You do need flexibility. The question the 60 days raises is, is it helpful to have a starting point in relation to it? Does it help in the usual channels reaching definitions of "reasonable time" in a particular case? Neither Bruce nor I remotely disagree with the basic proposition that flexibility is vital in that area.

Q38 Mr Spellar: If I can refer back to some previous exchanges on the interpretation of manifestos, I thought Lord Shawcross summed it up rather effectively in 1945 in response to Churchill's doctrine that "Words will mean what their masters want them to mean", to which Shawcross gave a very effective response. Can I move on because Jack laid quite considerable stress on paragraphs 12 to 14 and the powers of the second chamber and can I press him a bit more on that. I am not sure it necessarily describes the situation. It is true, I think, that the Australian Senate does not have the power to sack the government through a motion of no confidence, nor would the government need to resign, but it can make the position of the government fairly impossible because the government can have very significant legislation which can be blocked in the Senate. The constitutional mechanism, as I understand it, to resolve that is for the Prime Minister to seek a double dissolution of the House of Representatives and the Senate, which is a fairly drastic solution. Therefore there are very considerable powers, it is maybe not in the same situation as the US Senate but that is a different sort of system. On something which is closer to a Westminster system there are far greater powers for another House and ones we would not want to forget. Can I press you on that?

Mr Straw: I acknowledge what you say, Mr Spellar. The point being made in paragraph 13 is to bring out that it does not follow that the moment you go for election by whatever form you have to accord that body extra powers. However, we equally accept, and this is mentioned in paragraph 14, that as you move towards election and build up an elected element, there is going to be a bigger demand for additional power and you know what the Clerk of the Parliaments said in paragraphs 33 and 34.

Q39 Chairman: Can I ask a couple of questions about other things which we have not touched on very much this morning. Secondary legislation, which you raised. You say, "There is a long-standing convention that the House of Lords does not use its power to reject statutory instruments", that is paragraph 54 of the memorandum. But it is clear, and this is admitted in the memorandum, that the Lords has done so on three occasions since 1945. Not much evidence of a problem there really,

is there? I wonder why this is apparently regarded as a significant difficulty. It is true that there have been from time to time divisions which, if carried, would have been fatal on other issues, but they are always pretty well substantially defeated, so it would help us to know why you think there is a particular problem here with secondary legislation.

Mr Straw: I think that the fact this has been breached on some occasions—and also there have been plenty of other occasions when fatal motions have been moved if not carried—would make it helpful. Your job is to describe as is, but it would be helpful if there was a change as we suggest in paragraph 55. There was a strong case set out by the Wakeham Royal Commission to change this particular convention and to give the Lords a clear power of delay but not of veto.

Lord Grocott: It certainly reflects Wakeham that there is a constitutional anomaly here which it may or may not be sensible to resolve. The anomaly is that whereas the second chamber, the Lords, cannot veto primary legislation because of the ultimate recourse to the Parliament Acts, the House of Lords can veto secondary legislation. The House of Lords does not want to do that very often and does not do it very often but the very legitimate question arises, as the Leader of the House has said, whether it would be sensible to consider the proposition that the Lords in respect of secondary legislation should do what it does with primary legislation, and see its function as being a delaying, revising chamber but not a vetoing chamber. That is really the question that is being put.

Q40 Lord Carter: You have mentioned the three occasions when this has happened. I was on the front bench for two, which were on the GLA Bill, and it was almost accidental, there certainly was no great plan to veto. The other thing which would help is if the Government were to take more notice of non-fatal motions. We have devised this procedure where we do not kill the order but put down a non-fatal motion, and it can be a non-fatal motion which, if it were acceptable would be fatal, but we allow the order through. There are others which suggest changes, more consultation, whatever, and I suggest if the Government were to take more notice of the majority of the non-fatal motions, this would be very helpful.

Lord Grocott: I can say, Chairman, the Government takes very seriously non-fatal amendments which are carried. It is sometimes difficult to know precisely how to respond but, believe me, there are long periods of discussion which follow a government defeat on non-fatal amendments.

Q41 Simon Hughes: Is the problem with this convention that it does not give enough options, bluntly? That if the Lords see a problem, because you cannot amend a statutory instrument you either detonate the nuclear option or you pass a comment which bluntly need not be picked up, and the solution is actually to find another way, as one does with primary legislation, if the Lords thinks

there is a serious problem it ought to be able to say to the Commons at least once, but possibly not more than once, “Go back and look at it again, we think there is a problem with this, guys.”

Mr Straw: I agree with Simon Hughes and I think if the Wakeham proposal was introduced, whilst it would take away the power of veto, it would give a greater role and more sensible role to the Lords and force governments to take notice.

Sir Nicholas Winterton: This is very important because I am sure the Leader of the House is aware that his own Committee is really concerned about this, and it seems to us absolute nonsense and totally negative that we should not be able to amend secondary legislation. I believe it is necessary and this is surely something the Modernisation Committee itself will be looking at, and if we are looking at it the House of Lords likewise should bear in mind our considerations.

Q42 Chairman: Can I turn finally and importantly to the issue of financial privilege which we have not touched on at all this morning. The Commons’ financial privilege is one of the fundamental aspects of the relationship between the two Houses and in our special report the Committee said that we take it as a given, that we did not regard it as an issue which was being challenged in any way. Your memo invites the Committee to consider in particular, firstly, scrutiny of the Finance Bill by the Lords Economics Affairs Committee and, secondly, National Insurance. At present Commons financial privilege does not restrict the activity of Lords Committees and does not cover National Insurance. Do you agree with that as a statement?

Mr Straw: I am concerned, and I have to say Treasury Ministers still more so, that the establishment of the Finance Bill Sub-Committee of the Lords Economic Affairs Committee seeks to circumvent the financial privilege of the Commons. It is seeking to insinuate a function for the Lords which was never envisaged before by the passage of the Parliament Act 1911 or during the rest of the 20th century. It is our judgment that the existence of the Finance Bill Sub-Committee is incompatible with the conventions which cover the running of matters dealt with by the Commons. I have to say I think that has to include the administration of the tax system as well as the setting of the rates. I was on Finance Bill committees for four years in the early 1980s and I did some revenue law years before that, it is all in many ways part of the same thing. I very strongly signed up to the increasing scrutiny role of the House of Lords and I have seen legislation that I believe benefits from it. I am wholly opposed, and so is the Government as a whole, to the Lords transgressing into areas of taxation. National Insurance, I do not know enough about previous practice, and colleagues here may do, but these days National Insurance is, and has been for a long time, inextricably intertwined with overall taxation and economic policy, so I have similar anxieties there.

Q43 Chairman: It seems to me curious that in the very last part of the memorandum this Joint Committee of both Houses is invited to come to a judgment about the proper scope of financial privilege. Is that not simply a matter for the House of Commons itself?

Mr Straw: Would that it was. Normally we do not interfere in the establishment of committees by this House but the establishment of a Finance Bill Sub-Committee of the Economic Affairs Committee by this House seems to me to be a quite deliberate claim to additional powers over a Bill in respect of which this House is not supposed to have any power at all.

Q44 Chairman: In practice, is this just the Chancellor, or any chancellor not just the present Chancellor, and the Treasury getting a bit worried about somebody putting a toe on their hallowed turf or is it a real problem in practice?

Mr Straw: This is the Chancellor's view but as a Member of the House of Commons, I have to be concerned about toes being put on our hallowed turf. I worry about that more.

Q45 Simon Hughes: Compatible with the view expressed by the Leader, does he accept that compared with comparable legislatures actually there is still relatively little financial scrutiny of Government supplied by the Commons here? If you look at very nearly all public places—Australia, the States and so on—accepting the proposition that it may be a Commons only matter, is it not a fact that we do it far less well and far less effectively?

Mr Straw: I am not familiar with the overseas evidence, Mr Hughes.

Q46 Chairman: It is an interesting question but I think that is a matter for the House of Commons.

Mr Straw: There is a wide range of experience overseas, such as you describe, others similar to the House of Commons or less effective. In any event, scrutiny of all the areas of government business has very significantly increased in the 27 years that I have been a Member of Parliament, not least through the introduction of effective departmental select committees, and will go on increasing. As you say, my Lord Chairman, that is a matter for the House of Commons.

Q47 Lord Higgins: Can we be quite clear, does the Government regard National Insurance contributions as a tax or not?

Mr Straw: The definition of tax is a matter for the Office of National Statistics and the OECD, Lord Higgins, and not for me.

Q48 Chairman: I am not aware of any joint conventions on tax matters. I wish I was aware of some. No doubt you will pursue this matter.

Mr Straw: That will be for debate I feel sure. However 'twas ever the case when you were a Treasury Minister that issues of National Insurance rates have a clear effect on economic policy and on taxation levels and ought to be covered by the Commons convention.

Chairman: Thank you very much. Thank you on behalf of the Committee to our witnesses this morning. It has been a very interesting and wide-ranging session. We are grateful to you not only for the memorandum but for the time you have given us and the patient way in which you have dealt with the questions, assertions and views of the Members of the Committee. Gentlemen, thank you very much.

Supplementary memorandum by Her Majesty's Government

BACKGROUND AND CONTEXT

1. *You say at para 2 that "greater certainty about the conventions is desirable". What are the main uncertainties, and why do they matter?*

As we said in our oral evidence, the Government notes what was said by 2002 Joint Committee:

"insufficient attention has been paid to the conventions that actually govern how the Lords conducts its business and behaves towards the Commons. We consider that these existing conventions, which are of a self-restricting nature, impact profoundly on the relations between the Houses and need to be understood as a vital part of any future constitutional settlement." (para 11).

It is clear that there are disputes about the extent and even the existence of the conventions. For example, the Liberal Democrats are beginning to challenge the existence of the Salisbury-Addison convention and cast doubt on it again in both their written and oral evidence to the Committee. The Conservatives seemed to be suggesting in their evidence that they would regard proposals to reform the House of Lords, however clearly stated in a Manifesto, as not covered by the Convention. We have also noted their comment in paragraph 4.5 of their written evidence that they would vote against legislation to introduce a 60-day limit on the time for Lords consideration of Bills, despite that being clearly included in the Government's manifesto. The Committee has itself raised questions about the extent to which a link between the Salisbury-Addison convention and a party's Manifesto can be sustained in the modern age. It has raised questions about the position of regional manifestos, and about the effect of coalition governments.

The Wakeham Commission suggested that the convention should be limited to Bills which had been received from the Commons. The Government does not accept that restriction. This is therefore another potential area of uncertainty. There is also the question of the extent to which issues which were not envisaged at the time of the election should nonetheless be treated as part of the government's mandate if they are within the spirit of the manifesto or necessary for the protection of the country and plainly enjoy the confidence of the Commons. The Government believes they should be covered, as did the Wakeham Commission. There has also been, what is in effect, a refinement of Salisbury-Addison in recent years, whereby the Lords has virtually stopped voting against Bills at Second Reading. We believe that this practice is entirely consistent with the agreed role of the Lords as a revising Chamber. A Bill defeated at Second Reading cannot be revised. Others have raised questions about whether the Salisbury-Addison convention should be regarded as of less relevance towards the end of a Parliament or where the Government has a smaller majority in the House of Commons. Conversely, some have argued in the past that if the Government has a very large majority in the Commons, the Lords should be entitled to act as the only effective opposition. Again, the Government would not accept any of these qualifications.

The Government endorses the view that it is particularly important to get an authoritative statement of the Salisbury-Addison convention now we are facing the situation where Governments of every political party are and will be in a minority in the Lords.

There is uncertainty about the extent to which the conventions on secondary legislation mean that the Lords cannot even consider a fatal motion on an SI.

The whole question of what is to be regarded as "reasonable time" is also one where there are a number of differing views.

As to why these issues matter, both Houses need to be confident that they have a common understanding of what the conventions are, and how they should operate in practice. As we said in our written memorandum, a contested convention is not a convention at all. The Government believes that they give effect to the central constitutional principle about the relationship between the House of Commons which provides and endorses the Government of the day, and the House of Lords which provides in particular a revising and scrutiny function complementary to the Commons. That relationship is not dependent on the composition of either House.

2. *How does our inquiry fit into your wider plans for Lords reform? In particular, how do you see the relative timing of debates on our report, the promised free votes on composition, and any legislation?*

It is important that the Committee's Report informs the debate on any legislation. The free vote must also precede any legislation. The Leader of the Commons has said that following the report from the Committee at the end of the session, he hopes that the Government will have propositions to put before Parliament on composition some time around the turn of the year.

It is clear that any substantial change in the composition of the Lords, should that be proposed, would lead to demands for much greater clarity in the relations between the two Houses.

SALISBURY-ADDISON CONVENTION

3. *How could a codified Salisbury Convention be enforced?*

There are a range of options for codification: it could be done by authoritative statement from a committee like this, endorsed in a vote on its report in each House, by standing order or by statute. The Government believes that, in practice, legislation to set out the Salisbury-Addison convention would be very difficult, and envisages something less formal in this case. It does not accept the view set out by the Liberal Democrats in their written memorandum that "codification would have to occur in statute". One option the Government could envisage would be codification by the Committee as a prelude to the endorsement of the Convention by the House of Lords and the House of Commons. How a convention could then be enforced would depend on the way in which it was codified and endorsed, but we believe that a conventions endorsed in this way would not be lightly disregarded. The Government's main concern is to see acceptance of the convention. We are certainly not looking for something on which the courts could adjudicate. Many of the existing conventions are self-enforcing, and the Government would like to see that continue if at all possible. Clarity about the meaning of the conventions should make this easier to achieve.

SECONDARY LEGISLATION

4. *You say, "There is a long-standing convention that the House of Lords does not use its power to reject statutory instruments" (para 54). Yet you admit that the Lords has done so 3 times since 1945 (para 43), and that it regularly though infrequently divides on fatal motions (para 46). Do you regard these occasions as breaches of convention? Or do they suggest that the convention properly expressed is that the Lords uses its power "sparingly" (L Mackay of Ardbrecknish, para 52) and "with very great care" (L Goodhart, para 51), and rejects an SI only as "a last resort" (L McIntosh of Haringey, para 50)?*

The Lords clearly has the power at present to vote down subordinate legislation. However, the Government believes it is not appropriate for it to exercise that power, given the fact SIs are not covered by the Parliament Acts. The House has shown by its actions that it is exceptional for it directly to vote down an SI, and the House has gone to great lengths to avoid having to do this.

This makes sense given that both Houses must agree to give the Minister the power in the first place, and that Bills offer an opportunity to reconcile differences between the two Houses while the delegated powers are being considered. The Government and its Ministers are, of course, ultimately accountable to the House of Commons.

The Lords have developed practices which enable them to express concern about an instrument without endangering it; the Government accepts and welcomes this.

The Opposition, when they were in Government, took a very hard line on the convention. Lord Hesketh, Government Chief Whip in 1993 said in debate:

“It is the convention of the House that it does not seek to divide against delegated legislation.”

For the Government, the issue is not so much whether there is a division *per se* on an Order, but whether the effect of the division is to block it. The fact that only 3 SIs have been voted down since the war indicates that there is a strong convention against defeating SIs; on only two occasions since 1945 has the Lords actually passed fatal motions: in 1968 on Rhodesian Sanctions and twice in 2000, on some aspects of electoral arrangements for the Greater London Authority.

We have identified about 50 cases over the 15 years since 1990 where there were divisions in the Lords. About half of these were on motions which would have been fatal to the instrument if passed. Given the thousands of items of subordinate legislation which have been passed in those 15 years, that there were only a couple of dozen attempts to defeat one is good evidence that the convention exists.

It should also be noted that often, when the Lords considers a fatal motion on an SI, it is only voted on when the mover is certain that the motion will not be agreed.

5. *You say that for the Lords to reject an SI is “incompatible with its role as a revising Chamber” (para 54). Yet the Lords Committee on the Merits of SIs argue in their written evidence that the right to do so underpins their scrutiny function by giving “leverage”. Mr William Sargent, Chairman of the Better Regulation Executive, appears to agree: on 1 Nov 2005 he told that Committee, “The parliamentary system is part of those checks and balances which ensures that the job is done right in the end because if it is not, you should reject it”.²² Are they wrong to see the power to reject as a backstop for scrutiny?*

Para 50 of our first memorandum states: “The House has shown by its actions that it respects the convention that it should not usually vote down statutory instruments.”

If Parliament has granted a power to a Minister in primary legislation, the Government must usually be entitled to expect that to be respected—unless, perhaps, the instrument has not been properly made, or is *ultra vires*. On the point raised by Mr Sargent, the Commons of course retains the power to reject a statutory instrument regardless of any convention about how the Lords should treat it. As we pointed out in our oral evidence, the Government in any case takes seriously the points raised in non-fatal Lords motions of objection to SIs. These are a way of the Lords exercising its proper functions as a revising chamber even in respect of secondary legislation.

The Wakeham Commission recommended that the Lords power of scrutiny could be replaced with one of delay, thus bringing it more into line with their powers over secondary legislation. As we said in our oral evidence, the Government sees some advantages in that approach and would be interested in the Committee’s views on it.

6. *If the House of Lords were barred altogether by convention from defeating an SI, might it be less willing to agree to new delegated powers?*

The Government sees no reason why this should be the case. Codification would recognise an existing convention, not create a new one.

7. *You suggest that different considerations apply to super-affirmative orders (para 47). What do you consider the difference to be?*

We are in the process of adding an explicit power in the Legislative and Regulatory Reform Bill to give the Lords DPRRC a veto power over super affirmatives under that bill. The DPRRC already has effective veto powers under the 2001 Act, and our written evidence says that different considerations may apply to super-affirmatives (para 47). The different considerations which apply to super-affirmative instruments stem from the purpose of those instruments. When used appropriately, they often directly amend primary legislation, sometimes—as in remedial Orders under the Human Rights Act—in very sensitive circumstances. A case can therefore be made for the Lords to be able in certain circumstances to say that the issue being raised is so significant that primary legislation is the only appropriate way of proceeding.

²² Oral evidence to inquiry into Management of Secondary Legislation. HL Paper 149-II, Q39.

REASONABLE TIME

8. *On what occasions do you consider that the reasonable time convention has been breached in recent years?*

Outstanding recent examples of bills which took what could be defined as an ‘unreasonable time’ in the Lords include the Animal Health Bill 2002, produced in response to the foot and mouth in 2001, which was sent to the Lords from the Commons on the 13 December 2001, having spent 6 weeks in the Commons. The bill did not complete its Lords’ passage until the 4 November 2002, having spent nearly 11 months in the Lords, as a consequence of a dilatory motion to hold off consideration; a procedure not used since the end of the 19th Century.

A further example is the Constitutional Reform Bill, which was announced as a major bill in the Queen’s Speech in November 2003, and presented to the Lords on the 24 February 2004, as a Lords’ starter. The bill was then retained in the Lords until the 20 December 2004 in the following session. A vote in the Lords sent the bill to a select committee, requiring carry-over. Thus a bill which had been announced by the Government as a central plank of its legislative programme for the session 2003–04 could not be presented to the Commons until over a year later, and into the next session.

However, the case for reasonable time does not rely solely on the actions of the House until now, but the fact that, where the upper House will always be dominated by opposition parties there is always the threat that the House could attempt to slow down the legislative programme in response to one controversial bill. This threat was used in 2003 in response to the proposed introduction of a Lords Reform Bill (HoL Debates, 18 September 2003, vol 652, col 1062).

9. *Is 60 sitting days an appropriate period? In this Session and the previous two full-length Sessions many bills have taken longer. The bills which took longer were not usually particularly controversial, and in most cases the time taken seems to have been due to Government business management or the sheer length of the bill, not to opposition. Would you accept this? If all you want is a “backstop” (para 58), how about 120 days?*

We fully accept that “reasonable time” will impose responsibility on government, as well as on other parties. The Government has suggested 60 days as a reasonable outside time limit for most Bills. The Clerk of the Parliaments points out in his evidence that during the current session the average time taken for consideration of government bills (first reading to third reading) has been 62 sitting days; that the average for the 2003–04 sessions was 57 days; and that the average for the 2002–03 session was 48 days. Moreover, past sessions have not been organised on the basis of an outside time limit. It is not, therefore, surprising that some Bills have taken longer than 60 days to pass through the Lords.

The Government is happy to listen to other suggestions about giving better definition to the reasonable time convention. The Committee may wish to consider when the clock should start. It may be thought that second reading is when effective scrutiny of a bill really begins, and it might be sensible for a time-limit to start from the date that the second reading of the Bill is moved. What is clear is that some sort of agreement as to what is meant by ‘reasonable time’ would be beneficial on all sides.

Critics may argue that 60 days is unreasonably short. It is emphatically not the Government’s intention to define “reasonable time” by proposing an unreasonable time limit. However, it should be noted that the average length of the last four non-election sessions was 165 sitting days. It would surely be unreasonable for Bills to spend more than half of the parliamentary session in the second Chamber. And of course allowance has to be made for time on ping-pong, which would not be included within the time limit. The Government’s clear view is that 120 days, as suggested in the question, would be far too long.

10. *You concede that “The Lords must have enough time to consider Bills thoroughly” (para 56). Would the Government be obliged to provide enough time for thorough consideration of every bill within the fixed period? How would this be enforced?*

The House of Lords is self-regulating. It is not within any government’s power to dictate the scheduling of legislation—this is done through the usual channels. It is however normal practice in the Lords to abide by conventions governing the passage of Bills, most notably the recommended ‘minimum intervals’ between the different stages of consideration. The “minimum intervals” convention means that there are usually at least two weekends between first and second readings; 14 days between second reading and the start of committee stage; on most Bills, 14 days between the end of committee and start of report stage; and three clear sitting days between report and third reading. There are no sanctions against breaches of these rules, but they are only ever over-ridden by agreement in the usual channels. We envisage any greater clarity given to the “reasonable time” convention would operate in a similar way.

11. *You say the limit would apply to most bills (para 58). In what circumstances might the period be extended? Who would decide?*

Continuing with the “minimum intervals” comparison, any extensions of the time limit would be a matter for the usual channels. We can however envisage some instances in when we would expect a Bill to take longer. These would include when emergency legislation was introduced and had to take precedence over certain Bills already before the House; when a Bill was particularly long; when events occurred during the passage of a Bill which required substantial amendment to the legislation; and when the Government, in response to points made by Members, proposed extensive amendments to the Bill.

12. *What exactly is supposed to happen when the 60 days are up? Will the bill be sent/returned to the Commons as it stands? Or will the Lords be deemed to have failed to pass it, triggering an amended Parliament Act?*

We expect that the usual channels would observe any time limit, modified if necessary by the kind of exceptions listed above, and that the Bill would return to the Commons, with or without amendment, in the usual way.

13. *Owing to programming, parts of Commons bills arrive in the Lords apparently unscrutinised. Does your proposal take account of that?*

Yes. Our proposal simply gives greater definition to the convention about reasonable time. Most Bills, including the most controversial, are currently accommodated within 60 days giving the Lords plenty of time to scrutinise legislation in its own way. The Government does not accept that the Commons fails to do properly its job of scrutiny. Most Bills in fact spend more time being scrutinised in the Commons than they do in the Lords. The total time spent by the two Houses on scrutiny of Bills in the past three full sessions is as follows:

<i>Session</i>	<i>Commons</i>	<i>Lords</i>
2002–03	1,122	813
2003–04	828	760
2004–05	351	240

14. *Do you believe that your proposal would be workable with Lords practices and procedures as they are (eg minimum intervals between bill stages)? Or would changes be necessary?*

With minimum intervals, the minimum number of sitting days required to pass a small Bill is 20–30 days, depending on whether one or two days are needed in Committee, whether it is decided to start the period from 1st or 2nd reading, etc.

For a larger Bill, the minimum might be 10 days more—say 30 to 40 days. There is no need to change minimum intervals, unless the House finds it convenient to review them.

15. *Please explain your remark about opposition spokesmen in para 60.*

One difficulty in timetabling Lords business in the usual consensual way is that Members—including Opposition front bench spokespersons—are not paid. Commitments outside Parliament quite legitimately make major demands on the time of many of these members. The Committee may wish to consider whether the House should provide greater support to opposition front-benchers, on whom the planning of future business principally depends.

PING-PONG

16. *How far in your view can the Lords push ping-pong before it is considered to have been pushed too far?*

One of the roles of the Lords is to ask the Commons to think again. Therefore, if it sends an amendment to the Commons, the Commons should consider that amendment carefully. If, however, the Commons concludes that it does not wish to accept the amendment, the Lords should respect that decision. If the Commons agrees that the Lords have made a good point, but that they have expressed it wrongly, or overstated it, and wish to substitute their own amendment, then clearly the Lords has a right to consider that amendment and if necessary propose further changes to it. So long as there is a real dialogue in place, the Government accepts that this is a legitimate operation of ping pong. But the Government does not accept that it would be right for the Lords repeatedly to reject a Commons amendment without seeking to promote a compromise.

The Government believes it is important to recognise that ping-pong occurs far more frequently when the governing party in the Commons does not have an effective majority in the Lords.

BILLS RESULTING IN 3 OR MORE EXCHANGES BETWEEN THE TWO HOUSES 1974–2005

<i>Legislation</i>	<i>Numbers of exchanges</i>	<i>No. occasions per Parliament</i>
Labour Administration 1974–1979 Government		
Trade Union and Labour Relations	4	
Aircraft and Shipbuilding Industries	6	
Scotland	3	
Wales	3	4
Conservative Administration 1979–1983 Government		
None		0
1983–1987 Government		
Housing and Building Control	4	1
1987–1992 Government		
Criminal Justice	5	1
1992–97 Government		
Railways	3	1
Labour Administration 1997–2001 Government		
Teaching and Higher Education	5	
European Parliamentary Elections	6	
Welfare Reform and Pensions	4	
Transport	3	4
2001–2005 Government		
Education	3	
Enterprise	3	
Nationality, Immigration and Asylum	3	
Animal Health	3	
Local Government	3	
Criminal Justice	6	
Health and Social Care	4	
Armed Forces (Pensions and Compensation)	4	
Civil Contingencies	4	
European Parliamentary Elections (Pilots)	10	
Hunting	4	
Pensions	4	
Planning and Compulsory Purchase	4	
Prevention of Terrorism	10	14

Source: House data

The clear message from this table is that protracted exchanges between the two Houses have substantially increased. This we believe is likely to be a permanent feature of our constitution, on the assumption that any future government will find itself in a minority in the Lords. There is clearly a possibility that in order to avoid stalemate a new agreement will one day be required to resolve differences between the Houses. The Government's belief is that any such agreement would need to be based on the fundamental constitutional principle of the primacy of the Commons.

The Government does not accept the Conservatives' and Liberal Democrats' contention that the Lords should be entitled to decide on how far they push their disagreement on the basis of their analysis of the "legitimacy" of the Commons majority which has proposed or rejected the relevant amendments.

17. *One of the conventions which used to govern exchanges between the Houses was that, in the Commons, only Lords Amendments which were not material were considered without notice. Do you think there is still a convention on the amount of notice which should be given before either House considers amendments or reasons from the other House? If not, would you recommend such a convention?*

This is a matter for either House to consider within its own practices and procedures.

FINANCIAL PRIVILEGE

18. *The last sentence of your memo invites us to inquire into the proper scope of the financial privilege of the Commons. Would it be appropriate for a Joint Committee to do so, rather than the Commons itself?*

It is wrong in principle that the Lords should be able effectively to influence or circumvent the financial privilege of the Commons. By engaging in enquiries into the Finance Bill, via the Economic Affairs Subcommittee, the House of Lords is performing a function which was never envisaged before the passage of the Parliament Act or in the decades after its enactment. The fact that this scrutiny by the Lords has been undertaken at the very time the Finance Bill is in committee in the Commons would be unusual in relation to any Bill but is highly irregular in relation to a Finance Bill. Normally, a House only has cognisance of a Bill when it is in that House.

Moreover, the Sub-committee has not confined its activities to matters of tax administration as its terms of reference require. The Government therefore disputes the Liberal Democrats' contention that the sub-committee's activities pose no challenge to Commons financial privilege. A look at some of the recent topics they have examined confirms that it is hard to draw a line between issues of incidence of tax and issues of tax administration.

An unequivocal reaffirmation by the Joint Committee of the primacy of the Commons in financial business and of the limitations of the role of the Lords would carry considerable weight, not least because it would engage both Houses and carry a presumption that it would be acceptable to the House of Lords.

19. *At present Commons financial privilege does not restrict the activity of Lords committees (May p918), and does not cover National Insurance (May p919). Would you agree?*

We feel strongly that the principle of financial privilege must be reinforced, as set out above. That the House of Lords is apparently free to undertake enquiries into Finance Bills, via the Economic Affairs Subcommittee, is breaching that principle—especially given that the inquiries take place while the Bill is in the Commons.

It seems logical and reasonable to us that charges on the National Insurance Fund should attract financial privilege. The House of Lords partially acknowledged this fact when they agreed that the 2002 National Insurance Bill could have an accelerated passage through the Lords, in view of its status as a Bill of Aids and Supplies. There is a lack of clarity in this area and we need to ensure that the general principles of financial privilege are not eroded. When the Parliament Act 1911 was enacted, national insurance did not exist in the form in which we now know it. The Government believes that it is time for the issue to be resolved.

Leader of the House of Commons

11 July 2006

Supplementary memorandum by Her Majesty's Government

NON-FATAL MOTIONS ON STATUTORY INSTRUMENTS

The Committee has asked for further evidence on the Government's response to defeat on non-fatal motions on statutory instruments in the House of Lords. It is particularly interested in the Government's response on motions on the following Orders:

14 November 2005	Licensing Act (Second Appointed Day) Order
22 March 2005	Higher Education (Northern Ireland) Order
13 November 2003	Regulation of Investigatory Powers (Communications Data) Order
12 November 2003	Food Supplements (England) Regulations 2003
27 January 1998	Beef Bones Regulations

As the Government said in its original memorandum, the Government always listens carefully to the views of Parliament in whatever form they are expressed. In relation to non-fatal motions, the Government considers the views expressed by the House of Lords, and responds on a case by case basis.

LICENSING ACT (SECOND APPOINTED DAY) ORDER 2005

Viscount Astor's amendment called on the Government to withdraw the Order and replace it with one which would come into effect on 30 June 2006 in order to allow more time to address public concerns about the effects of the proposed changes and for arrangements for any required changes to be completed in an orderly manner. It was therefore expressed as a concern about the timing of the Order, rather than the substance of the changes to be made.

Following the debate, the Secretary of State wrote to Lord Astor explaining why the Government did not think it was in the public interest to withdraw the Order and replace it with another one so close to the date on which it was due to come into force. Many agencies, including the police, licensing authorities, local residents, members' clubs and the industry had already made considerable efforts to prepare for the introduction of the new regime, and the Government considered that any delay in implementation of the 2003 Act would result in an increase in drink-related disorder and crime. The Secretary of State concluded:

"I wanted to reassure you that in partnership with the Office of the Deputy Prime Minister, the Department of Health, the Home Office, the police, licensing authorities and the industry, the Department for Culture, Media and Sport will carefully monitor and evaluate the impact of the new Act on the four licensing objectives. If there is considered evidence that the legislation fails to achieve, over time, the objectives set out in the legislation, we will consider seeking Parliamentary consent to amend it."

HIGHER EDUCATION (NORTHERN IRELAND) ORDER 2005

Lord Glentoran moved an amendment to the Order regretting that the Government had not provided an opportunity for the people of Northern Ireland to express their opinion on the matters contained in the Order, either through democratically elected institutions or by means of a referendum. His particular concern was aimed at the Order in Council procedure under which legislation with the effect of primary legislation for Northern Ireland is handled during periods of direct rule. The amendment did not directly address the higher education regime being introduced in Northern Ireland.

The terms of the amendment meant that it would not have been appropriate to respond to it by any change in the policy. The amendment was concerned with the process, which is an integral part of the direct rule arrangements for Northern Ireland. There was therefore no direct Government response at the time.

Similar issues have been expressed during the passage of the Northern Ireland (Miscellaneous Provisions) Bill. In inviting the House of Commons to disagree with a Lords amendment which would have allowed either House of Parliament to resolve that an Order in Council should be amended, and requiring the Minister to withdraw the original order and either amend or relay it, the Minister of State said:

"... the Government has given an undertaking that, if we are unable to restore devolution by 24 November, we will quickly introduce measures to make direct rule more accountable... Many of the matters dealt with under the Order-in-Council procedure are properly dealt with by the Assembly, should it be reconstituted. In the event of the Assembly not being reconstituted—of course, I hope that it will be—we will consider how to make those measures more accountable, agreed through the usual channels, if I may say so, with a stage of parliamentary consideration at which Northern Ireland Orders in Council can be amended. We will also ensure that, whenever possible, we legislate for Northern Ireland through primary legislation." (Commons Hansard 25 July 2006: Column 766)

REGULATION OF INVESTIGATORY POWERS (COMMUNICATIONS DATA) ORDER 2003

There were two successful non-fatal motions to this Order. Lord Phillips of Sudbury called for the Interception of Communications Commissioner to be required to inform anyone who had been subject of an abuse of the powers in the Regulation of Investigatory Powers Act. Baroness Blatch called for a full report to be given to Parliament about the UK's obligations to share communications data with other governments or international organisations. Neither of them sought to propose amendments to the Order before the House, or to query its actual contents; instead they called for the Government to lay new draft Orders to give effect to the issues they wanted to see covered.

The Government took the view that it would not have been possible technically to lay orders of the kind the House of Lords called for. The Lords concerns were about the way the legislation was being implemented. The Government has addressed the spirit of the Lords' view by incorporating measures which address those concerns into a draft statutory code of practice which is currently subject of public consultation. The House of Lords will be able to consider the content of that code in due course when it is laid before Parliament with an affirmative order.

MISUSE OF DRUGS ACT 1971 (MODIFICATION) (NO 2) ORDER 2003

Lord Hodgson of Astley Abbots moved a motion to ask the House to "note" that the Order might lead to increased use of cannabis and regretted that the Government had not waited to finalise its own proposals in relation to Class C drugs generally. It therefore invited the House to express an opinion about the possible consequences of the Order which, in the nature of things, could not be demonstrated one way or another until after the Order had been passed.

During the course of the debate, the Minister promised an education campaign to ensure that young people understood that cannabis would remain illegal and was harmful. This would take the form of a targeted leaflet and extensive radio advertising. The Government did not accept that the effect of the Order would be to increase cannabis use.

Figures made available to Parliament in January 2006 (*Hansard, 19 January 2006, col 984*) showed that cannabis use among 16–24 year olds fell from 28% in 1998 to 24% in 2004–05. The preliminary assessment, therefore, was that reclassification of cannabis had not led to an increase in use.

FOOD SUPPLEMENTS (ENGLAND) REGULATIONS 2003

These Regulations gave effect to an EU Directive. Earl Howe's amendment regretted the limited nature of the list of permitted nutrients, and called on the Government to negotiate an amendment to the Directive to allow more recognised food supplements to be marketed; to secure simplified requirements for the submission of dossiers seeking approval; and to ensure that maximum permitted levels of vitamins and minerals were based on sound science.

The Government's view was that the Directive to which the Regulations gave effect already represented the best compromise it was possible to negotiate within the EU. They did not see any prospect of reopening negotiations, since the Commission had secured agreement to the Directive to which the Regulations gave effect. They continue to endorse the view expressed by the Minister, Lord Warner, in the debate, that:

"Noble Lords should not underestimate the difficulty of the negotiations on the Food Supplements Directive. They were carried forward with great vigour and in full consultation with a wide range of interested parties. However, we should recognise that only in the Netherlands and the Republic of Ireland are there, as in the UK, diverse markets in food supplements. Those two other EU member states were the only ones sympathetic to our concerns over potential loss of products from the market."

"I do not want to spend too much time going over old ground, although quite a few other noble Lords did go over old ground. It is important to understand that while the directive does not deliver all that the UK wanted, it was a lot better than it might have been and certainly was the best deal that we could achieve in the circumstances. At the time of the vote on the directive in the Council of Ministers the UK made a carefully considered judgment that if it had blocked the directive's adoption and forced further negotiations, that would very likely have resulted in a more rather than less restrictive regulatory framework." (Lords Hansard 30 June 2003: Column 692)

BEEF BONES REGULATIONS 1997

These Regulations were laid under the negative procedure and the period for objection had already expired when Lord Willoughby de Broke called for them to be revoked to allow for further consultation.

The Government took the view, as expressed by Lord Donoughue in the debates, that the scientific evidence made it advisable to prevent bone in beef from cattle more than six months old being sold to consumers. The Government therefore simply disagreed with the premise of the motion. There was no scope for compromise if, in the Government's view, public safety was to be ensured.

25 July 2006

Tuesday 20 June 2006

Members present:

Cunningham of Felling, L, in the Chair

Bledisloe, V	Mr Russell Brown
Carter, L	Simon Hughes
Elton, L	Sarah McCarthy-Fry
Higgins, L	Andrew Miller
McNally, L	Sir Malcolm Rifkind
Symons of Vernham Dean, B	Mr John Spellar
Tomlinson, L	Ms Gisela Stuart
Tyler, L	Mr Andrew Tyrie
Wright of Richmond, L	Sir Nicholas Winterton

Memorandum by the Conservative Party

INITIAL OBSERVATIONS ON THE CONVENTIONS BETWEEN THE TWO HOUSES

1.1 We welcome the role of the Committee. The fundamental view of the Conservative Party is that the executive in the UK has become too strong and Parliament is too weak. We wish to see both Houses strengthened. We do not believe strengthening of scrutiny in either House would be to the detriment of the other House. The Houses should work in partnership in scrutinising governments. Each can gain by listening to the other. Each can gain from studying the procedures and conventions of the other, although in our view the freer procedures of the Lords are better conducive to legislative scrutiny. The Joint Committee is a welcome example of that partnership.

BACKGROUND TO THE JOINT COMMITTEE

2.1 We ask the Committee to bear in mind that this enquiry did not arise from any cross-party agreement, as would befit change to Parliament, but from a report by a group of Labour peers, to which no peers of other parties were invited and whose Chairman had been, and is again, a government Minister. Its proposals were then incorporated in a Labour Manifesto which sought to:

- codify key conventions of the Lords;
- develop “alternative forms of scrutiny that complement rather than replicate those of Commons”; and
- legislate to restrict to 60-days time spent by Bills in the Lords.

The only inference to be drawn from these proposals is that the government intends further restriction of the freedoms and powers of the House of Lords. We would start from precisely the opposite premise—the freedoms of both Houses should be upheld and, where possible, extended. We further disagree with the government’s view that “codification” is necessary as a prelude to reform of the House of Lords. Even if true, which it is not, it could never justify further weakening of Parliament.

2.2 Despite these fundamental reservations, on the principle that we should not wilfully block in Parliament a significant Manifesto commitment, the Conservative Party agreed to the creation of a Joint Committee. However, we do not subscribe to the need for any of the ideas put forward by the government. We would draw the Committee’s attention to the fact that no convincing evidence has been put forward by the government in oral or written evidence or in either House of Parliament that:

- the House of Lords is not doing its job properly;
- any Manifesto Bill has been obstructed or lost;
- any existing convention has been overturned; and
- any government business has not been dealt with in reasonable time.

We urge the Committee to ask the government to answer the fundamental questions: *What conventions has the Lords broken? What precisely is the problem that they wish to solve?*

2.3 Is the Lords too powerful? Does it fail to respect the Commons? We see no evidence for that. The Parliament Acts have existed for almost a century. They guarantee the primacy of the Commons. They have had to be used on a very limited number of occasions, which demonstrates that the Second Chamber does defer to the elected House. We see no case for change. We note that the government has objected to the Lords’ resistance to some Home Office proposals in recent years, for example, on restriction of right to trial by jury, control orders, extension of detention without trial and compulsory enrolment in a national ID register. We believe the widely supported stands by the Lords in these cases is an argument for, not against,

the present operation of our bicameral Parliament. All these proposals went to the heart of the liberties of the citizen which Parliament evolved to protect. None was in a Manifesto. These incidents provide no basis for restricting the role of the Lords.

2.4 Does the House work badly? On the contrary, the modern House of Lords is widely recognized as the more effective revising Chamber with procedures that are already complementary to the Commons, indeed, we would contend, superior to those of the Commons in respect of independent scrutiny of Bills.

2.5 No government business been lost or held up. No Manifesto Bills have been rejected. Unless there is a major problem to solve—and we see none in the Lords—we submit there is no case for placing shackles on a Chamber of Parliament.

THE CASE FOR “CODIFICATION”

3.1 “Codification” could cause more problems than it solves. Our constitution is unwritten, has evolved, and will evolve, to the advantage of our political stability over the centuries and, by reason of its flexibility, to governments of all parties in constantly varying circumstances. In a sense it is continually modernizing itself.¹ This characteristic of flexibility is an enormous advantage. To give just one example, it enabled the saving of the Planning and Compulsory Purchase Act 2004 which had been lost by the government on a technicality. Had the system been codified it is arguable that any objector to that Act—and there were many—could have sought the intervention of the courts, because proper procedures had not been followed.

3.2 We therefore agree with the government that it would be undesirable to legislate on the conventions and other relations between the two Houses. That would lead to judicial intervention in and resolution of parliamentary and political difficulties.

3.3 We see no case for legislation on the Parliament Acts or on the powers of the two Houses over the increasingly used framework of regulation. The present system works. On secondary Orders, only two affirmative Orders have been rejected by the Lords since the War. The present convention of restraint is effective, but the stopgap power is important for Parliament, particularly when legislation like the Legislative and Regulatory Reform Bill, which would have massively extended order-making powers, can be presented. On the Parliament Acts, we note the suggestion that they be extended to cover Bills originating in the Lords to enable the Commons to constrain the Second Chamber to pass Bills of its own with which it disagrees. As the Wakeham Commission noted,² beyond any strict constitutional objections, the proposal might be counterproductive as the Lords would have no motive to pass legislation it thought might be fundamentally altered, then imposed. The discipline of the present system requires all governments to ration the number of highly controversial Bills that can be taken through Parliament, a point also made by the Royal Commission. Had the present government had this power, it could have forced into law the restriction of jury trial, even though it had found no time for this non-programme, non-emergency, non-Manifesto legislation in the Commons.

3.4 If statute is ruled out, we see little benefit in trying to write down conventions in a snapshot way. With respect to the legal profession, we think that is a lawyer’s, rather than a Parliamentarian’s, way of looking at the matter. Our Parliamentary system is essentially pragmatic and fluid—and what we have works.

3.5 To seek to fix conventions could be like trying to fix Prices and Incomes. No future House with elected peers would necessarily be bound by conventions appropriate to the current one. If there is election (and we favour that), elected peers will wish to exercise more power, just as the current House has been more assertive since the end of the right of anyone to sit by virtue of a hereditary peerage in 1999. Nor do we accept that a House of Commons that agreed to create an elected Lords must be concerned by alterations in conventions between the Houses. It must be presumed to have made an informed judgment in joining in creating a new kind of House.

3.6 It has been suggested that some written document might be agreed between the two Houses. There would be immense practical difficulties. Even assuming such a draft document could be agreed, given the different perspectives of the two Houses (for example, on treatment of Lords’ amendments by the Commons or the Lords’ existing resolution that it has an unfettered right to reject secondary legislation), it is hard to see how it would be enforced, how it could remain fixed or how it would help. Any definition would be of limited value if generalized and restrict flexibility if it attempted precision. It is hard to see how it would reduce the scope for disputes, either across parties or across the Houses—indeed, differing textual constructions can intensify disputes, as in the passage of the Identity Cards Act, where debates focused on contradictory interpretations of a written sentence in Labour’s Manifesto.

¹ The Opposition parties have, for example, agreed major procedural change in the Lords in that far more Bills go to Grand Committee off the Floor—a record 23 this session. This is a significant shift in the convention of the House before 1999 that almost all Bills were taken in Committee on the Floor. This may not relate directly to the conventions between the two Houses; but it is certainly material to the issue of whether the government gets its business in reasonable time. Each House will find its way to accommodate that well-accepted convention. On the principle of comity of the Houses, each House should respect the other’s modes of doing this. We think solutions, such as this, can be found that go beyond the conventions between the two Houses.

² *A House for the Future*, para 4.18, page 38.

NOTES ON SPECIFIC CONVENTIONS

4.1 We expect to explore these in discussion and would currently add little beyond the above general remarks. However, in summary, we would offer the following views.

4.2 The *Salisbury-Addison Convention*, though a convention between the two major political parties, rather than one between the two Houses, has worked well, in conjunction with the Parliament Acts, to underpin the primacy of the Commons. As one of the parties to the convention, we have made clear we do not believe it should be applied to any unilateral proposal to alter substantially the nature of the House of Lords, on which the House must reserve its right to independence of judgment.³ Otherwise we believe the Lords should not normally vote at Second Reading against a Manifesto Bill, or pass a wrecking amendment to such a Bill. We have so behaved in practice, by convention, over many years. It is inevitable, as the Clerk of the Parliaments notes,⁴ that some will feel that as the House of Lords changes and the constitution evolves the Convention will evolve with them. But in the foreseeable future and the presently constituted House the Conservative Party will stand by this Convention, which is well understood. We do, however, agree with the Royal Commission that: “It is not possible to reduce this to a simple formula, particularly one based on Manifesto commitments.”⁵ The Convention was pragmatic in origin—and should continue to be addressed in pragmatic fashion from case to case.

4.3 The conventions on *secondary legislation* are equally well understood. We propose no alteration. We uphold the right of the Lords to reject secondary legislation, while considering its use should be exceptional in the extreme. However, there is an important balancing convention to this, namely that government should not use their majority in the Commons to introduce skeleton Bills as a basis for introducing unamendable secondary legislation. The creation of the Delegated Powers Scrutiny Committee by the Lords was an important point of defence by Parliament against this practice. Its example has evolved successfully in both Houses. We see it as near to a constitutional convention that no government should ignore recommendations by such Scrutiny Committees against the abuse of secondary powers. We welcome the respect so far given by governments to that principle.

4.4 We recognise that some have long sought means of amending secondary legislation, but accept that there are inherent difficulties in this. We do not think that the model proposed by the Wakeham Commission, which involved surrender of the veto power, or the proposal of so-called “super-affirmative” orders provides the answer. The best route is less regulation and readiness to include as much as possible on the face of legislation to enable full scrutiny by both Houses.

4.5 The convention that *government business should be considered in the Lords in reasonable time* is fully observed. The Lords does not filibuster. We reject the idea of legislation to limit to 60-days the time allowed for legislation in the Lords. The table attached shows that in the present session up to the end of June a number of Bills have far exceeded this limit. Normally, the Bills concerned have been held up for the convenience of government business managers. But controversial Bills, such as the ID Cards Act, were dealt with swiftly. There is no basis whatsoever in the government’s concerns. We oppose any guillotine in the Lords, whose free procedures enable its revising skills. The 60-day limit would be entirely artificial. “Exceptions” would have to be negotiated in Usual Channels, if they were not to be for government advantage alone. That would replicate the present system. But it would be a major breach of the convention of comity between the Houses for the Commons to seek to legislate to control the internal procedures of the Lords. We would vote against such legislation.

4.6 The conventions relating to exchanges between the Houses are exceptionally important and deserve close attention. They would, as argued by the Clerk of the House of Commons, be exceptionally difficult to codify.⁶ In our view:

- (a) greater respect should be paid to Lords’ amendments by the Commons. The Lords, with its great experience, very often raises issues of importance which deserve fuller attention than is allowed by government-dominated timetabling;
- (b) “ping-pong”, as it has operated, is a reasonable means of resolving differences. Given that both Houses will almost invariably want to avoid loss of a Bill, the double-insistence rule forced each side to offer compromises to avoid it and to perpetuate conversation. The recent practice of “packaging” in which non-related matters are grouped together enables a government to avoid the need for compromise by insisting, while offering an amendment in lieu on an unrelated matter. We think this can operate in a highly unsatisfactory way and is a breach of the convention that respect is paid to the other House’s amendments by each House. It needs further examination in the light of recent experience; and

³ “Despite inclusion in Labour’s Manifesto of promised legislation to introduce a guillotine on legislation in the Lords, I must say bluntly that I would advise the House to throw such a Bill out. The same goes for any Bill or motion to reduce the powers or freedoms of the House.” (Lord Strathclyde, Speech to *Politeia*, 23 January 2006)

⁴ Ev 83, paras 28–31.

⁵ *A House for the Future*, Recommendation 7, page 40.

⁶ Ev 101, para 16.

- (c) both Houses should offer more than “cosmetic” changes in the process of “ping-pong” and allow more time for consideration of each other’s proposals to enable a search for compromise. Large packages and haste accentuate confusion and entrench conflict. We are also concerned that recently some amendments in lieu offered to the Lords by the Commons have been insubstantial. This, we believe, is also in breach of the conventional courtesies between the two Houses.

Annex

GOVERNMENT BILLS—SESSION 2005–06—FIGURES AS AT 29 JUNE 2006

<i>Bill</i>	<i>First Reading</i>	<i>Third Reading</i>	<i>Sitting Days</i>
Animal Welfare	15 March 2006		(51)
Armed Forces	23 May 2006		(19)
Charities [HL]	18 May 2005	8 November 2005	53
Children and Adoption [HL]	13 June 2005	29 November 2005	56
Childcare	9 March 2006	26 June 2006	51
Civil Aviation	11 November 2005	28 March 2006	71
Commissioner for Older People (Wales) [HL]	25 May 2005	15 February 2006	99
Commons [HL]	27 June 2005	18 January 2006	68
Company Law Reform [HL]	1 November 2005	23 May 2006	100
Compensation [HL]	2 November 2005	27 March 2006	75
Consumer Credit	19 July 2005	21 March 2006	89
Council Tax	5 December 2005	8 March 2006	45
Criminal Defence Serv [HL]	23 May 2005	24 October 2005	46
Education & Inspections	25 May 2006		(17)
Electoral Administration	12 January 2006	7 June 2006	71
Equality [HL]	18 May 2005	9 November 2005	54
EU Accessions	28 November 2005	7 February 2006	34
Fraud [HL]	25 May 2005	29 March 2006	122
Government of Wales	1 March 2006		(60)
Health	15 February 2006		(64)
Housing Corporation	11 May 2006		(27)
Identity Cards	19 October 2005	6 February 2006	56
Immigration & Asylum	17 November 2005	14 March 2006	58
Legislative & Regulatory Reform	17 May 2006		(23)
London Olympic Games	7 December 2005	14 March 2006	46
Merchant Shipping [HL]	25 May 2005	26 October 2005	42
National Insurance Contributions	19 December 2005	20 March 2006	42
National Lottery	20 January 2006	23 May 2006	61
Natural Environment	12 October 2005	27 March 2006	88
NHS Redress [HL]	12 October 2005	1 March 2006	72
NI Miscellaneous Provision	18 May 2006		(22)
Police and Justice	11 May 2006		(27)
Racial & Religious Hatred	12 July 2005	24 January 2006	63
Regulation Finance Services	21 July 2005	5 December 2005	36
Road Safety [HL]	24 May 2005	10 January 2006	78
Safeguarding Vulnerable Groups [HL]	28 February 2006	7 June 2006	47
Terrorism	10 November 2005	1 February 2006	41
Terrorism (NI)	1 December 2005	14 February 2006	36
Transport (Wales)	18 October 2005	14 February 2006	63
Violent Crime Reduction	15 November 2005		(111)
Work and Families	19 January 2006	8 May 2006	51

Source: Weekly Information Bulletin

Average number of sitting days for completed Bills: 61.7 days (GC: 61.4; CWH: 62.4)

Strathclyde

Rt Hon Theresa May MP

Cope of Berkeley

15 June 2006

Witnesses: **Rt Hon Lord Strathclyde**, a Member of the House of Lords, Leader of the Opposition, **Rt Hon Lord Cope of Berkeley**, a Member of the House of Lords, Opposition Chief Whip and **Rt Hon Theresa May**, a Member of the House of Commons, Shadow Leader of the House of Commons, examined.

Q49 Chairman: Lord Strathclyde, Mrs May and Lord Cope, good morning and welcome to the Joint Committee. We are very pleased to have you here and thank you for getting your memorandum to us in very good time for members of the Committee to have the opportunity to study it and formulate their questions. I understand you do not want to make an opening statement, but if you want to say a few words to the Committee before we come to questions please feel free to do so.

Lord Strathclyde: All I would like to say is thank you very much indeed for inviting us early on in your deliberations to come and give evidence. As you can see, I have brought Theresa May who is the Shadow Leader of the House of Commons; and the Chief Whip in the House of Lords for the Opposition, Lord Cope, who brings a wealth of experience and knowledge not just on how these conventions work but also tremendous experience from his time in the House of Commons.

Q50 Chairman: Thank you. I propose to take a few minutes for any general questions which may arise from your memorandum, and then we will go through it: Salisbury-Addison; secondary legislation; reasonable time; ping-pong and financial privilege; and various members of the Committee will lead on them. Can I start with a general question: you say right at the outset of your memorandum, “We wish to see *both* Houses strengthened”; can you tell us how you would like to see them strengthened, briefly, and why?

Lord Strathclyde: This is in respect of Parliament’s ability to scrutinise legislation, scrutinise the workings of the Executive, rather better than we think it has done over the course of the last few years. We have seen (and this is not a fault only of the present Government; I think that this is a gradual increase over many years) more and more legislation spending less and less time in Parliament being individually scrutinised by each House. There is a sense that Parliament has increasingly lost the skills of effective scrutiny. In part it may be that there is a generational change of parliamentarians inside the House of Commons. Certainly my Party, and indeed other parliamentary committees, have looked at the case for strengthening powers; strengthening the select committees, for instance; having more time for legislation on the floor of the House. We would replicate that view inside the House of Lords; getting government to listen to Parliament. I have perhaps rather an old-fashioned view that strong government is a very good thing, but government is strengthened by having a strong Parliament questioning and obliging the government to think through what it is doing. I am not sure in recent years we have seen that strength.

Q51 Chairman: The Leader of the Government in the House of Commons made exactly the same point giving evidence last week. In your memorandum

also you say “. . . the freedoms of both Houses should be upheld and, where possible, extended”. What does that mean?

Lord Strathclyde: I can see the case, for instance similar to what happens in America, for our select committees being given power overlooking appointments to the most important quangos. That would be an increase in a power of the House.

Q52 Chairman: Are you referring to the House of Lords there?

Lord Strathclyde: Yes, very much so, either in a joint committee or in individual committees. I have no particular view which way it should work out; but I think as parliamentarians we should always be looking at ways in which we can increase the role of Parliament and parliamentarians, rather than simply relying on ministers and their civil servants.

Q53 Chairman: The Government’s contention in giving evidence to us last week was that the House of Lords has something of a split personality. It seems duty-bound to exercise its role of scrutiny and constitutional safeguard with more vigour and more time and greater extent when there is a Labour Government rather than a Conservative Government. The Government Chief Whip in the House of Lords produced some figures from the Clerk of the Parliaments’ memorandum and elsewhere to substantiate that. Certainly a cursory look at the numbers would suggest that that is so, both in respect of frequency and extent of ping-pong, for example, and the change in the number of sitting days. In 1995–96 the average number of days spent on normal government bills in the House of Lords was about 48; and by 2002–03 it had risen to 58; that is a 20–25% increase in the number of days taken on a bill. Do you think that substantiates the Government’s case?

Lord Strathclyde: I know there is a long-running sore through many members of the Labour Party in the Lords and the Commons, that the House of Lords is more vigorous when there is a Labour Government than when there is a Conservative Government. Having been Chief Whip between 1994 and 1997 it did not feel like that at the time. I am aware that the bald figures of Divisions demonstrate quite clearly that over the last 20 to 30 years the Labour Government loses more often than the Conservative Government. I do not think it is very helpful though to compare figures pre and post 1999 because it is a very different House that we have now. Prior to 1999, although not a Conservative majority House, it was certainly a Conservative dominated House, and the Labour Party was relatively weak. That is simply not the case now and has not been since 1999. I do not know for sure but I think there have been more weighty bills over the course of the last few years, but also there is an increase in confidence, ambition perhaps, in the House of Lords to do its job well; and also (if I can refer back to my first answer) a feeling that the

House of Commons has not been giving legislation the scrutiny it deserves; there seem to be more and more bills less and less thoroughly scrutinised; and vast tracts of bills which have not been scrutinised at all.

Mrs May: If I may just add to that point. I think that is one of the other crucial differences that has taken place over the period which you have cited; which is that the automatic use now of programme motions in the House of Commons means that very often with significant bills large sections of bills are not scrutinised; there is not time to scrutinise them in the House of Commons and that job is effectively left to the House of Lords.

Lord Strathclyde: The Company Law Reform Bill for instance, which has spent months and months in the House of Lords, is going through the House of Commons in a matter of weeks. It has got a thousand clauses in it. It is a very good example of the Lords taking its duties in terms of scrutiny very differently from what the House of Commons is able to do.

Lord Cope of Berkeley: There is also a further point which is certainly not capable of any statistical evaluation. The fact is that over the decades, the sort of period being spoken about in those figures, the nature of the appointments to the House of Lords has changed a little—in fact actually quite a lot. A few years ago the appointment of a peerage was primarily an honour. It was also two things: it was both an honour and a job. The extent to which it is a job is now much more emphasised in the selection of people in the appointments. The extent to which it is an honour has actually moved down the scale a little bit in the appointments.

Q54 Chairman: You mean people are expected to turn up these days!

Lord Cope of Berkeley: I mean people are expected to turn up and are appointed on that basis, not least by the Appointments Commission. The cross-benchers are appointed on that specific understanding, that they are being appointed to do a job of work in the House of Lords. The same applies also to the parties making their recommendations.

Chairman: Thank you. Now general questions, I emphasise, because we are going to follow the format the Committee has been given.

Q55 Sir Malcolm Rifkind: With regard to the conventions generally, can I just go back to 1999 and ask you whether you think the consequences of the end of a Conservative dominance and no party having a majority permanently in the House of Lords, does that in your judgment have implications not for the principle of the primacy of the Commons but for the way in which that primacy will be expressed over the years, even if there is no further change in the composition of the House of Lords?

Lord Strathclyde: After 1999 there was a lot of pressure internally that some of these conventions should be re-examined—conventions on secondary legislation and on the Salisbury Convention. I took the view (and I still do) that although there had been

a change in the balance between the parties, I did not feel there had been a fundamental change in the composition of the House. I did not accept the argument that some may have done that it was a more legitimate House than the old House; and I therefore felt, after some thought and a look at extending the boundaries of the powers of a relationship between the two Houses, that the conventions should stick and they have done so. I am not quite sure what you mean about the “primacy”?

Q56 Sir Malcolm Rifkind: Even acknowledging that the House of Commons ultimately must have the last word, is the House of Lords in your judgment entitled to, as it were, put more pressure on the Commons to resist longer or in a more intensive way, given that it is no longer dominated by one party?

Lord Strathclyde: In practice that is what has happened. Today’s House of Lords, a 21st century House of Lords, takes things much further than the old House did, or I think would have done. In fact there are a number of arguments where the pre-1999 House would have given way, and if you just look at the two years between 1997 and 1999 that was clearly the case compared with the two years after 1999 where the House of Lords felt more vigorous and more confident in being able to push the House of Commons a little bit further—wholly accepting though that in the end the House of Commons should get its way.

Q57 Lord Elton: You mentioned fluctuations in the membership of the House of Lords; and there are also dramatic fluctuations in the composition of the House of Commons with every General Election. I would like to know what the Leader of the Opposition thinks should be the structure and conventions which, if they are to be fixed, have to cope with Houses of Commons which are both faced with a massive government majority and those with a very narrow majority. Will the same conventions suffice for both?

Lord Strathclyde: Broadly speaking, yes. If a government has a majority in the House of Commons, a government has a majority in the House of Commons and so the same conventions should apply. Equally where a government is trying to push through some very unpopular measure with a very, very small majority, with a substantial government rebellion, I think it is a clear signal for the House of Lords to take extra special care in examining that measure. That may mean sending it back to the House of Commons more than once. I can think of more than one example recently—and this does not apply to a government with a small majority—on foundation hospitals. The proposal was passed initially in the House of Commons on a majority that was dependent on the votes of Scottish MPs. The House of Lords sent that back to the House of Commons. It came back on ping-pong to the House of Lords with a higher majority, which

included a majority of English MPs, and at that point the House of Lords accepted that the Government should have its way.

Q58 Lord Tyler: In your written evidence 2.1 you say, “We ask the Committee to bear in mind that this enquiry did not arise from any cross-party agreement . . .” There is a flavour there that you think the whole of this exercise is misguided and is a lot of fuss about nothing. You saw the evidence from the Government, written and oral, last week. Do you share their concern that there is a major problem over the current rules of engagement; or do you think basically we got it right?

Lord Strathclyde: I see no evidence at all from what the Government have said publicly or in their evidence that there is a problem that needs to be solved here. I have no idea what the problem is. I have no idea of what the examples are of where the House of Lords has overstepped the mark; has broken what are accepted conventions; or really a fundamental disagreement about what the conventions are. It is not that I think any of you are wasting your time. I know, my Lord Chairman, in particular you will take this job extremely seriously of working out what these conventions are, and all of you who have spent a great deal of your lives in Parliament; but we should not pretend we do not know where all this comes from. This comes from a report of Labour back-benchers chaired by a former minister, who is now a minister, probably bored one night in the Bishops’ Bar of the House of Lords who felt there was probably a better way of spending their time and wanted to explore ways where the House of Lords’ business could be speeded up. That went into the manifesto and here we all are. I am very happy to play a part in all this but I think we should be fully aware of what the Government’s motive is.

Q59 Chairman: Is the convention on secondary legislation dead, as someone once famously said!

Lord Strathclyde: Perhaps I should put that in the context of why it was said, where it was said and what actually happened.

Q60 Chairman: For a headline, no doubt!

Lord Strathclyde: It was a good headline at the time! I said it deliberately to try and push out the boundaries of what the House of Lords did in the context of the words of the then Leader of the House of Lords, Lady Jay, who famously said that the reformed House would be listened to more by ministers. Secondly, the convention on secondary legislation was always the one which gave me most difficulty. That was the context in which I said it was dead. We tried it out early in January 2000 on the question of the London mayoral elections, where the Government had denied a free post to the candidates and the House of Lords decided this would be wrong and we defeated the Order. There was though (and we chose this quite deliberately) a legislative vehicle to put the Order back in place with revisions so that the mayoral elections could take place. What that experience showed me was that there was a necessity

for this convention not to vote against secondary legislation when there was no primary vehicle to fill any gaps.

Q61 Chairman: So we resurrected it!

Lord Strathclyde: So we resurrected it. Why did we do so?

Q62 Chairman: Was this the kiss of life?

Lord Strathclyde: I think we can spend a great deal of time thinking about how one could improve the convention on secondary legislation but, I would not remove the power. In the absence of a Parliament Act to regulate the relationship between the two Houses, it is a very powerful weapon in the hands of the House of Lords because it stops secondary legislation dead. Secondly, we often do have the opportunity of primary legislation not to accept the secondary Order. We have also developed over time a good practice of the House of Lords being able to voice concern about a piece of secondary legislation without throwing it out. However, on many, many occasions the House of Lords has asserted its unfettered right to maintain its power to throw out secondary legislation; I think the custom and practice that has built up, in combination with the long-stop power in the House of Lords, works extremely well.

Mr Tyrrie: You have given an interesting description of the origins of the work of this Committee and, with it, a clear suggestion that our work probably should not and does not have much relevance for the working of the current House, and the current House can work perfectly satisfactorily using its existing conventions. What about a reformed House? What about a House that has a stronger democratic element? Do you think it is necessary that codification take place in the event of such reform?

Chairman: How people come to be in the House of Lords does not fall within the terms of reference of the Committee.

Mr Tyrrie: I refer to the fact that if we look at 2.1 of the evidence that has been put before us—

Chairman: It does not matter what is in the evidence—I am telling you what the standing orders governing the work of the Committee are. I said exactly the same about the Government’s memorandum.

Q63 Mr Tyrrie: Perhaps I could be permitted to ask a more general question. Do you think it is possible to create, whatever the structure of the Lords, a mechanical relationship between powers and composition?

Lord Strathclyde: I am naturally averse to that sort of relationship between the two Houses, partly because I think what we have works extremely well. There is no disagreement really fundamentally about how the relationship works and what the conventions are. Without crossing what you have said, my Lord Chairman, it is very difficult I think to freeze the relationship between the two Houses if it is intended to change the composition of either House or the way either House were elected. That

would inevitably have an impact on those rules and what those boundaries were. I hope that I have walked down that line sufficiently clearly.

Lord Cope of Berkeley: Could I just add, with these conventions however much you write them down—and they are to a degree written down, as we know—it is also the spirit in which they are operated which is important. If you change the composition, and the composition has changed gradually as we have been discussing earlier on, then the spirit in which they are operated does alter too. The letter killeth; the spirit gives life, as it were.

Chairman: It is very difficult to argue. The life peers were first introduced decades ago; the conventions have endured. I cannot myself see any evidence to suggest if there were further changes the conventions could not continue to endure.

Q64 Lord Carter: I would just like to correct a throwaway comment from Lord Strathclyde about the Labour group of peers being formed over a late night drink at the Bishops' Bar. Actually it arose from successive meetings of the Labour group who were concerned about this area, and all the members of the group we are talking about were elected from amongst Labour peers. Turning to Salisbury-Addison, as you know that was formulated in 1947 which in effect was the first ever example in the House of Lords of a government actually being in the minority. There were two limits to the convention: one was the manifesto, the elected mandate argument; and also the fact of a minority government. As we have said already, this will now be a permanent feature of the House of Lords. Since 1999, so far as we can see in the foreseeable future whatever the composition of the House of Lords, the government of the day will be in the minority. With no Speaker and self-regulation obviously the conventions are crucial in the way that the House works. Could you help us to bring Salisbury-Addison up-to-date to formulate a convention which would balance the primacy of the Commons, the undoubted right of elected government to obtain its programme of legislation, and the right of the House of Lords to scrutinise, review and ultimately, very, very, very rarely, delay by the use of the Parliament Act?

Lord Strathclyde: Yes, I think that is precisely what happens. I did not detect there anything I was hugely going to disagree with. That is how the Salisbury Convention has worked over the last few decades and how it works now. There is more talk about the Salisbury Convention, and there has been over the course of the last seven or eight years, than perhaps there was in the prior 10 years, but that is partly borne out of a more vigorous House of Lords and changes that have taken place in the House of Commons.

Q65 Lord Carter: Would you put your weight on the elected mandate argument or the manifesto argument, or the fact of a minority government in the House of Lords which is now a permanent feature of the House?

Lord Strathclyde: No, I would put a bit more weight on the elected mandate of the House of Commons. I am confused about this point about a minority government. When I was a Government Chief Whip I accepted there was a dominance of Conservatives, but we only had 40% of the House. It may have looked like a big chunk of people, and it was the largest Party and we did win most divisions but we did not have a majority. It is about the House of Commons. The House of Commons is elected on a manifesto and that must have an impact on the way the House of Lords does its business.

Q66 Sir Malcolm Rifkind: First of all, if I could refer you to paragraph 3.1 of your submission, in saying that you would be concerned about codification, that it might lose flexibility, you give as an example the Planning and Compulsory Purchase Act 2004. I would be grateful if you could just give us a little bit more explanation as to why you feel that what happened on that occasion would have not been possible, and we would have lost out, if we had some form of codification. Secondly, in paragraph 4.2 of your submission you say, "As one of the parties to the convention [that is the Salisbury-Addison Convention], we have made clear we do not believe it should be applied to any unilateral proposal to alter substantially the nature of the House of Lords . . .", even if that has been in the election manifesto of the governing Party. Indeed you are quoted in the footnote as saying, "I would advise the House to throw such a Bill out". That is pretty strong language. On what constitutional basis have you made that claim? Have you reinterpreted Salisbury-Addison, or do you feel justified in making that remark going back to the original form of the Convention?

Lord Strathclyde: Thank you. My Lord Chairman, Sir Malcolm has put his finger on two very important aspects of this evidence and goes to the nub of the problem—flexibility—which is what unites what seems to be two very different issues. On the question of the Planning and Compulsory Purchase Act, this was a Bill which, by virtue of an error that was made in the House of Commons (and I will not go into the details but if you want to know all the papers exist),—

Q67 Chairman: I can assure you the Committee has had a note on that.

Lord Strathclyde: —was effectively lost. If you had some statutory codification that Bill would have been lost; but because we have flexible, open procedures the Government approached me, they explained what had happened and we unbundled it and we put it right. We were under no obligation to do so. I am not sure that it necessarily suited our Party interests to do so. We did it because we were able to do it and it was in the spirit of the passing of the legislation in the first place. The second aspect on Salisbury: I began to be concerned prior to the last election that such was the argument about the Salisbury Convention, codifications, that they were seeking to put the House of Lords in a straitjacket; whereby almost a footnote in the manifesto—"Oh,

and by the way, we're going to abolish the House of Lords"—would tie the hands of the House of Lords to be able to do anything. I thought in practice the House of Lords would seek to resist changes in powers in any case; so far better to say, "This is an amendment to the Salisbury Convention on manifesto bills, but where something directly affects the powers and the freedoms of the House no government, Conservative or Labour, should assume that the House would honour the Salisbury Convention". That is the only exception I can think of. I do not need to repeat this, because I have said in practice I think that is what would have happened in any case, but I thought it was sensible to put it on the record. It also demonstrates that there is a flexibility within the Salisbury Convention.

Q68 Sir Malcolm Rifkind: Just to clarify, you are not saying that is itself a convention. You are saying that was a statement of your view on the matter?

Lord Strathclyde: Yes, what I was waiting for was for a senior member of the Government to repudiate this; to say, "Ah, no, you must stick to this because otherwise this breaks the Salisbury Convention". The silence was deafening and so I assumed that they accepted the point of what I was saying and they understood the purpose of this; and since then there has been much talk about consensus on reform of the House of Lords which I very much welcome.

Q69 Simon Hughes: Can we therefore take it, Lord Strathclyde, that your interpretation of the obligation on the Lords in relation to the commitments in the last Labour manifesto, which is partly the genesis of our deliberations, is in the general context of what you have just said—you do not regard the Lords as bound by that commitment in the 2005 Labour manifesto?

Lord Strathclyde: In fact there was nothing in the Labour Party manifesto which suggested that they were going to massively reduce the powers or freedoms of the House, except for the 60-day issue, which no doubt you will want to come to. This was specifically to do with the House of Lords itself. This was not a sort of general repudiation of the Salisbury Convention which, as I have explained, I think serves a perfectly reasonable function.

Q70 Simon Hughes: I am just trying to discover your general view, which I think has been clear to the Committee, which is that the one exception to the Salisbury Convention that you have generally accepted was a proposal to curb the power of the House of Lords?

Lord Strathclyde: Yes.

Q71 Simon Hughes: Do you regard the 2005 Labour Manifesto commitment on the House of Lords as being included within that exception?

Lord Strathclyde: Yes; only so far as it affects the 60 days. The Government has said this is going to be a free vote.

Q72 Chairman: Can we be clear about this because it is important. Are you saying you accept the Salisbury-Addison Convention, except when you choose not to?

Lord Strathclyde: I knew you were going to say that.

Q73 Chairman: Which is a pretty obvious question!

Lord Strathclyde: It is interesting that I laid out this rather subtle exception to the Salisbury Convention prior to the last General Election and nobody said anything. It was as though everybody was totally happy with that and it was entirely obvious. Is that not the beauty of having conventions? Otherwise you have a complete straitjacket that says anything that goes in the manifesto, whatever it is, will tie the House of Lords.

Q74 Chairman: Forgive me interrupting but my question is quite straightforward. Are you reserving the right to choose at a moment when you, as the Leader of the Opposition of the Lords, abrogate the Salisbury-Addison Convention?

Lord Strathclyde: Not at all. It is purely this very small exception, and I give my example: supposing a manifesto said, "We will abolish the House of Lords", it is preposterous to imagine that the House of Lords would not have an opinion on that and would not seek to modify it.

Q75 Lord McNally: The great strength of the Lords is that during these periods of negotiation with the Commons there is always the final sanction of the Lords to say no. Do you still reserve to the House of Lords that right to say no?

Lord Strathclyde: Yes. I take two views. This is really a question about the Parliament Act.

Q76 Lord McNally: If you are simply going to engage in a madrigal with the Government, where they send it back three times and then they get what they want, then there is no need for a Parliament Act because they are always going to get their way?

Lord Strathclyde: The constitutional long-stop is the Parliament Act. Therefore, on whatever issue, the Government always has a choice either to accept a Lords' amendment, seek a compromise, or to drop the bill. It is very rarely in the interests of the Government to drop the bill and therefore they always look for a compromise, which is why the Parliament Act is used less than some people feel that it should. The Parliament Act is the ultimate long-stop, complicated though it is to use.

Q77 Lord McNally: There goes with that the right of the Lords to say no?

Lord Strathclyde: Completely.

Q78 Chairman: The Government says it considers the Salisbury-Addison Convention to apply to bills introduced in either House. Do you agree?

Lord Strathclyde: Yes.

Q79 Baroness Symons of Vernham Dean: Could I just press Lord Strathclyde on this business about the House of Lords being the exception. I am still not

clear why. Out of a huge range of enormously important issues and highly controversial suggestions that may get put forward in a manifesto, why is the exception of the House of Lords (apart from we are Lords and naked self-interest is always beguiling), the one thing you can defend publicly as being something on which the Conservative Party would reserve its position?

Lord Strathclyde: One reason is practical and the other reason is constitutional. A great and fundamental reform of Parliament is more than just the everyday legislation that we deal with, that is largely reversible and so on. A decision by a government in its manifesto to change fundamentally the powers of the House of Lords is something of great constitutional interest; and therefore I felt it was right to reserve the position of the House of Lords. The pragmatic aspect is that, in any case, I felt that was what would happen. It is much better to say what you think is going to happen.

Q80 Chairman: For the record, there were two legislative commitments in the 2005 Manifesto: one was the removal of the remaining hereditary peers and the other was the 60-day limit. Can we move on now to secondary legislation and ask, first of all, what principles guide the Opposition in either House in deciding whether to vote against a statutory instrument or not?

Lord Strathclyde: Before I answer that, could I respond to your point about being on the record. The removal of hereditary peerages, as you know, is not something the Conservative Party has ever opposed so long as it is part of a more fundamental and far-reaching reform. All I would do is to refer the Committee to the undertaking given by the former Lord Chancellor, Lord Irvine of Lairg, on 30 March 1999 which lays out the undertaking for the record. I would have assumed that the Manifesto position in 2005 is subject to the undertaking given to Parliament in 1999. My Lord Chairman, on the question of secondary legislation, as you know we have not (with one exception) defeated secondary legislation. What we do look at are a whole range of issues to do with secondary legislation; and we look at different ways of trying to influence the Government. The Chief Whip, whom I dare say deals with this on a more day-to-day basis, will have a view and will be able to explain more how we take the decisions we do.

Lord Cope of Berkeley: It is not so much that there are principles laid down which relate to the statutory instruments themselves; it is to do with the issue; what the issue is and how strong the issue is felt by peers and by us in particular in deciding what we do. I do not think you can lay down principles saying about it. I think it is entirely to do with the issues that arise as a result of the statutory instrument. It can be, of course, whether the statutory instrument is seen to be in tune with and follow on directly from the primary legislation which gave rise to it. Sometimes it is felt that the statutory instrument goes a lot further, or does things in a different way from what was expected by the House at the time it passed the

primary legislation. That is comparatively rare, and I do not think it has ever led, to my recollection, to a defeat or a vote against a statutory instrument.

Q81 Chairman: There have been some fatal motions which were only defeated because the Liberal Democrats voted with the Government?

Lord Cope of Berkeley: We do have this non-fatal motion procedure and that is, of course, far more often used than voting against a statutory instrument, which is extremely rare.

Mrs May: It might be useful, as it refers to both Houses, if I just make a reference to the Commons from my experience on this, which is entirely as Lord Cope has said that it is a matter of looking at the particular issue in relation to the statutory instrument—often the practicality of what the statutory instrument is saying and whether it is going to be a workable instrument in practice. I would just say this: there is a growing issue about statutory instruments because of course increasingly we are seeing on primary legislation very vague terms being put into the face of the bill, and the details of the bill being relegated to statutory instruments. I think this raises in a general sense other questions for both Houses in relation to statutory instruments. My own preference would be to see much more clarity on the face of the bill and fewer statutory instruments coming through.

Q82 Sir Nicholas Winterton: Do you think statutory instruments could or should be amended, either in the Lords or in the Commons?

Mrs May: My personal preference in the Commons would be to be able to amend statutory instruments because I think it is a very blunt tool that we have at the moment.

Q83 Simon Hughes: My question follows exactly on that exchange. In paragraph 3.6 of the Conservative Party evidence there is consideration of what the options to conventions are—a written document between the two Houses, or other things. In 4.3 there is the Conservative Party view on secondary legislation, just in part repeated by Mrs May. If there was to be a change in process, could it be by having something that is codified, or would it be by regulation separately of both Houses? If we were to move to a statutory instrument that was amendable would there need to be an agreement between both Houses as to process, or would it separately reside within the power of each House to decide its own procedure? Otherwise when it happens to be the case there is a danger that you would not get the coordination that your evidence suggests you would like and that other people, including members of the Committee, would like too.

Lord Strathclyde: I think if you were to move into the realm of amendable orders there would have to be an understanding between the two Houses about how that would work in practice, and what the nature of a conversation would be on an order that had been passed by the House of Commons and amended by the House of Lords, or vice-versa. I do not think that would necessarily be difficult to do.

The real difficulty is how to amend secondary legislation regularly given its enormous scale. It is one of many reasons, but it is a very important reason as to why it has not been done and some of the confusion that would arise from it. Theresa May is entirely correct that one of the problems which concern all of us in both Houses interested in the workings of Parliament is the increased use of skeleton bills. The last Conservative Government was not entirely guilt-free in all of this but the problem has become greater and greater. If we want to see less secondary legislation we need to have more clarity on the face of the bill.

Simon Hughes: If there was to be an agreement as to where we went to from secondary legislation, would that be done by a convention, or would it be better done by procedural rules governing the two Houses, or something else?

Chairman: I am reluctant to let this go on. We did say in our interim report that we were not going to look at this issue of amending statutory instruments. I think we have explored it so far, but I think we should move on. I will now call Nicholas Winterton on the issue of reasonable time.

Q84 Sir Nicholas Winterton: Our witnesses have conveyed a lot of legislation going from the Commons to the Lords, large tranches of it are inadequately scrutinised, if scrutinised at all; and I can speak with some knowledge as a member of the Chairmen's Panel recognising that large parts of bills do go through to the House of Commons un-amended, particularly because of the rather harsh programming regime. Would therefore our witnesses comment on the Government's proposition that there should be a limit on the time for the Lords to consider a bill; that perhaps they might take into account that the Government said in evidence last week that it has no immediate plans to legislate on a 60-day limit. Do they welcome that undertaking; and do they feel that an arbitrary 60-day limit could be very damaging to the proper scrutiny of legislation in those cases where legislation goes from the Commons to the Lords with large tranches of it un-debated and un-scrutinised?

Lord Strathclyde: I welcome what the Government has said in the same way that I would welcome a mugger greeting me in the street telling me that I am not going to be mugged today! Thank you very much, Mr Straw, for saying you are not going to legislate *yet*, but it is clearly still a dream for the Government to do so. In my evidence I produced an annex of current bills before the House, and there are numerous examples of where bills have spent more than 60 days in the House of Lords—not because of the successful machinations of the Opposition Chief Whip (on the contrary, we have cooperated fully with the Government) but usually at the behest of the Government that some of these bills take a long time. Not just in the House of Commons but in the House of Lords. Before the last election we were told that the Charities Bill was extremely important, had to be rushed through in the wash-up before the General Election. That was

not what happened. It was then passed very quickly in the House of Lords at the beginning this session, since when it has languished in the House of Commons for over 100 days. I have no idea where the Government's proposal is aimed to scrutinise the Government better; make the workings of legislation better. It seems to be an entirely one-sided ploy to ensure that the Government gets its business through Parliament more quickly than would otherwise be the case, for the convenience of ministers.

Q85 Sir Nicholas Winterton: My Lord Chairman, if Lord Strathclyde does not like the 60-day limit (and I have to confess I do not) can Lord Strathclyde, Lord Cope or Theresa May give us a better way of seeking to get this Convention to bite, so that there is some urgency in getting legislation through for the government of the day?

Lord Strathclyde: My Lord Chairman, Nicholas Winterton, in a way, answers his own question: it already does bite; it does work. There is no serious example from the Government of where this broad Convention has failed. From time to time the Government approach us to say, "Well, look, we're running out of time, how about an extra day here and we'll remove a day from this bill?". We have seen over the last seven or eight years a massive increase in the use of Grand Committees off the floor of the House. The House has adjusted to different ways of doing things. I really do not see that there is a problem of any kind which necessitates either strengthening the Convention or certainly not having a statutory limit which would introduce all the complexities of guillotines and knives and bills passing without scrutiny which has so infected the House of Commons.

Mrs May: I think the answer to Sir Nicholas's question from my point of view rests not with the Lords, and putting restrictions on the time that a bill will take to go through the House of Lords, but rests rather more with the House of Commons and the approach that the Commons is taking to legislation. As I said earlier, one of the reasons very often that the Lords is taking so long over these bills is because significant chunks, as you yourself have said as a member of the Chairmen's Panel, are not being debated in the House of Commons. If the House of Commons looks again at how *it* is handling legislation I think we may find that this issue actually is resolved.

Q86 Andrew Miller: People who look at Hansard of last Friday will notice that the House on a number of occasions described Friday as the "Eric Forth memorial day"—our hero of how to make Parliament work for his own advantage. Is not part of the problem that over recent years there has been no discipline about how amendments have been put down on bills; and in the Commons a huge amount of timetabled time has been wasted because the official Opposition have not focussed on the principal political points of objection? If we found a way at our end of the House of making that process

work better, would it not then open the door to creating more time in the Lords for the more detailed scrutiny that they should do?

Mrs May: I would say to Mr Miller that I do not think there is much evidence that the Opposition has failed to focus on the principal political arguments in relation to particular pieces of legislation. Yes, large numbers of amendments do go down to pieces of legislation. I have to say, one of the problems of legislation in recent years has been actually that a significant number of amendments that have gone down have had to come from the Government because of poorly drafted legislation in the first place. I think it was the Government of London Bill that actually had a thousand amendments placed down by the Government themselves. I think the number of amendments that are having to be debated is not purely a function of the stance that is taken on any particular piece of legislation by the Opposition. I do think there are ways in which the Commons could be looking at the way it is handling legislation. Indeed, this is a matter that is being considered at the moment by the Modernisation Committee on which I sit, as indeed does Sir Nicholas.

Q87 Andrew Miller: So if we got things right at this end, Lord Strathclyde, 60 days would be ample time for you?

Mrs May: From the Commons point of view, that is not what I am suggesting. I think there is a need to get things right in the Commons end, so there is more Commons debate on legislation, so that the Lords is not having to often mop up the failure of the Commons to actually look at legislation; but I do not believe personally that a time limit in the Lords is necessary either.

Q88 Mr Spellar: Lord Strathclyde said in part of his earlier remarks that a majority in the Commons is a majority, although I did notice he did try and qualify that slightly that the Lords could arbitrate on the nature of that majority as to which geographical division those members came from. In general he would accept a majority is a majority, unless we legislate to the contrary. Therefore out of that, having a majority that decides in a parliamentary system (not in an American system) who forms the government—or indeed (as people sometimes describe it even in this paper) the “Executive”, which seems to be normally the term used by those who do not expect to form the government in the near or the immediate future—as long as they have got that majority, and retain that confidence, then they are the government and they are elected on a manifesto, and they are entitled then to expect that to come through in legislation. What is wrong then in having some idea of the sort of timescale that we would be working on?

Lord Strathclyde: The Government can and they do. They start off at the beginning of a session of Parliament; they lay out their programme; we all know roughly how long that is going to take; and I cannot think of any examples where the House has deliberately filibustered a bill. First of all, it would be

very obvious in the House of Lords; and, secondly, it would not be very successful. I think people are very suspicious of what happens in the House of Commons, of procedures being abused, of heavy-handed reaction from the Government occurring in the House of Lords. If it did, supposing you ended up with a House of Lords which decided to behave irresponsibly and to use everything at its disposal to block, in a wholesale manner, government legislation, that would invite the kind of legislation that I would be very keen to avoid. I think this argument the Government is putting forward is putting the cart before the horse. With the practices we have in the House of Lords—and many former members of the House of Commons in the House of Lords say, “This is how the House of Commons used to operate. Wouldn’t it be a good thing if the House of Commons went back to that”—perhaps one of the purposes of this Joint Committee is to look at good practice in the House of Lords and make suggestions for its use in the House of Commons.

Lord Cope of Berkeley: A large part of the reason why certain bills take more than 60 days for example is because of the way the programme is arranged; and the programme is arranged by agreement between the Government Chief Whip, myself and the Liberal Chief Whip primarily, occasionally referring to higher authority; but essentially we try to fit the programme together. If the Government is giving priority to certain bills (and obviously it does within its programme) then those bills get through quickly and there are other bills for which it gives less priority; they are less needed in a short space of time so they sit a bit further on the backburner as it were and are brought forward as the time allows. That is the way the programme works. That is why, for example, the Commissioner for Older People in Wales Bill took 99 days. It was nothing to do with anybody opposing it at all. It was just that it was not as urgent in the Government’s eyes (or for that matter ours but primarily the Government’s eyes) as the others, so it took a bit longer to find its slot in the programme for the different stages.

Q89 Mr Spellar: It would be better to have some idea of what “reasonable time” would mean; for example, say, half a year?

Lord Strathclyde: The Government does have a very fair idea of what “reasonable time” is. It is that all bills are passed by the end of the session and in practice that is what happens.

Q90 Mr Spellar: Why not half a year within that? I am just pressing this point. Why not say half of the parliamentary year?

Lord Strathclyde: Let me give you an example. The Fraud Bill was introduced in the House of Lords on 25 May 2005; one of the first bills in the new Parliament and in the first session of this Parliament; it was finally passed on 29 March 2006—nothing to do with difficulties created by the Opposition. There were some very serious issues the Government had to sort out in its own mind before it decided how to proceed with the business. A time limit would have

negated the ability for the Government to think it through. We would have ended up with worse legislation, ill-thought out and badly drafted.

Q91 Chairman: Do you believe that the House of Lords breached the convention on the Animal Health Bill in 2002, or the Constitutional Reform bill in 2004?

Lord Strathclyde: The Animal Health Bill in 2002, this is one of those examples of a skeleton bill where there were regulations promised.

Q92 Chairman: I am aware of that. Do you think the convention was breached?

Lord Strathclyde: No, I do not think in either case. The Constitutional Reform Bill is a magnificent example of Parliament doing its stuff. Here was a non-manifesto bill—

Q93 Chairman: Lord Strathclyde, it is a simple question. Do you believe the convention was breached, yes or no?

Lord Strathclyde: No.

Q94 Chairman: In both cases?

Lord Strathclyde: In both cases it was not breached.

Q95 Lord Higgins: Could I just take one example on the 60-day proposal of the Violent Crime Reduction Bill which got its first reading in the Lords on 14 November; its second reading on 29 March; it finished its committee stage on 26 May; and it looks as though the report stage will go on until 9 October. It would seem in that particular case a 20-week rule would be more appropriate than a 20-day rule!

Lord Strathclyde: Yes.

Q96 Lord Higgins: Presumably if the system were to work at all it would be a change in the convention if we went for a 60-day rule. Presumably there would have to be exemptions. Would you see those exemptions being at the beginning of the process or as the thing ran out of time?

Lord Strathclyde: That is why I see that it has no purpose, because it would need so many exceptions. If the exceptions were simply at the behest of the Government it would be a massive increase in executive power over a House of Parliament. I can see no purpose in doing that in the light of the fact that there is no obvious problem that needs to be resolved.

Q97 Lord Higgins: On the more broad point about how much time we are taking, can I come back to the point Mrs May made which is that one has had a succession, for example, of pension bills arriving from the Commons with huge chunks which have not been debated at all. I was rather worried by an answer Baroness Amos gave yesterday in the House to a question I put down, which reflected what Mrs May has said, which is the idea the Commons is somehow focussing on particular parts of the bill because they have imposed a restriction on time but are quite happy that huge chunks of it arrive in the Lords for us to sort out in detail. That is not, it seems

to me, what the convention is. The convention is, or ought to be and always has been until recently, that the Commons looks at the whole thing. It does not select bits and pieces and leave us in the Lords to pick up the mess.

Mrs May: Indeed and that is what I believe the Commons should be doing: it should be looking at the whole bill. I would not want to see a situation where the Commons in some sense says, “We’ll look at clauses 1–252 and the Lords can look at clauses 253–500”, or something like that. I do not think that is right. I think the Commons should be looking at the whole bill and I think it is a problem that the Commons needs to address in relation to the length of time that is given through the programme motions. I believe there is a place for programming but I think it has to be sensible programming that enables bills to be properly considered, and that is in the Commons.

Q98 Lord Higgins: Unless that happens, any restriction on the Lords’ time taken will be quite absurd because it would mean huge chunks would go through not scrutinised either by the Commons or the Lords?

Mrs May: Indeed. If you had a limit on the Lords as well as the current situation we have in the Commons, then bills could be passed with significant sections of those bills not having been properly scrutinised by either chamber. If I may just refer on the 60-day limit to something Lord Strathclyde said earlier: I am not aware there is any evidence that failure to have that limit has caused problems for the Government in relation to getting legislation properly considered in the Lords.

Q99 Lord Elton: Lord Strathclyde mentioned the Grand Committee procedure for bills which was invented to increase the capacity of the House without increasing the time taken. I would like to know what his and the Chief Whip’s views are and indeed Theresa May on the relative effectiveness of scrutiny in that method—

Chairman: Unless they disagree, I think one answer will suffice.

Lord Elton: —and whether that process should be infinitely expandable to the number of bills that may be taken in Grand Committee at one time or in one session?

Lord Cope of Berkeley: I think it is an effective process up to a point. As all of your Lordships know, no amendments can be passed in Grand Committee unless they are unopposed, so no vote can take place. That means to say that on the controversial matters the votes need to be postponed until the report stage; and it does tend to load the report stage a little bit more if the bills have been in Grand Committee. Certainly for some bills that are detailed and less controversial it is a process that works quite well. I think there is a limit to it and the House certainly expects these days some of the major bills and the more controversial bills to be taken in committee of the whole House, as they all were until comparatively recent years. It is a process which works up to a point and I think we are exploiting it.

We have actually sent more bills by agreement to the Grand Committee this year than before and the numbers have been gradually rising over the last few years.

Q100 Chairman: In 2003, Lord Strathclyde, you said if the Government's Lords Reform Bill was introduced was introduced "the noble and learned Lord and his colleagues can be assured that he can expect a major fight on his hands and it will not be confined to this Bill". What did that mean?

Lord Strathclyde: The most important thing is to realise the context in which this came about. There was no announcement from the Government. There was a leak to a Sunday newspaper saying that they were going to break the agreements made—

Q101 Chairman: I am aware of the background. What did you mean when you issued that threat?

Lord Strathclyde: That would not be clear to anybody reading the oral report of this, and it is very important to put it in the context. There was a great mood right across the House that this was the Government behaving as badly as it possibly could, which is why I said what I said. In the event, either the leak was incorrect or the Government changed its mind, and looked at different ways of having the discussion about reform of the House which I thought was quite proper.

Q102 Chairman: That remark has nothing to do with the fact, as the figures from the Clerk of the Parliaments, show that since 2002–03 the average number of days on a Government bill in the Lords has gone up from 48 to 61?

Lord Strathclyde: They are longer Bills, I suspect. There are much longer Bills than they were, and also, taking up what the Chief Whip just said, since we are putting more and more Bills into Grand Committee off the floor of the House, when they get to report on the floor of the House inevitably it takes a little bit longer.

Chairman: Baroness Symons on ping-pong.

Q103 Baroness Symons of Vernham Dean: When I first came to the House of Lords 10 years ago the extended ping-pong was relatively rare and now it has become pretty much par for the course as we get to the end of the lifetime of a bill. How do you describe the convention? Having read your last paragraph, paragraph 4.6, you say there, "It is a reasonable means of resolving differences, and we ought to think about more than cosmetic changes", but how do you see ping-pong as it is at the moment and what would you like to see change in it more than is cosmetic?

Lord Strathclyde: Personally, I think that Lady Symons is right in saying that ping-pong occurs more often than it did, and I think that is entirely due to the change of the kinds of people who are now in the House of Lords who perhaps, not so much take it more seriously but are more confident about voting against the House of Commons time and time again or, occasionally, as on the ID Cards Bill, there is a new factor. In the ID Cards Bill the new factor was

Lord Armstrong of Ilminster, as a distinguished former Cabinet Secretary, who came up with a new idea right in the final stages of ping-pong.

Q104 Baroness Symons of Vernham Dean: He was the solution to the ping-pong rather than the cause of it, was he not?

Lord Strathclyde: Absolutely, and he brought something very valuable, but it extended the time that ping-pong took. However, it then came up to a solution that most of us were happy to continue with. The problem that I am highlighting in my evidence is of how that conversation between the Houses takes place, which I think is a more attractive term than ping-pong. It is about double insistence: if the two Houses are in disagreement, then the Bill cannot proceed. It strikes me that the House of Commons have come up with a ploy to get round double insistence, which is by packaging amendments, making a very minor change to a part of the Bill which has no relevance to the bit that we are disagreeing about and, therefore, drawing out the process. I think it would be better to get to a more honest position, where we decided what the disagreements were and then either for the Government, ultimately, to win the vote or for a compromise to be reached, which tends to happen, or for the Government to use the Parliament Act. So it is the procedure that takes place in the House of Commons which increasingly, I think, the House of Lords has a frustration with.

Q105 Baroness Symons of Vernham Dean: Are you saying that you would like to add to the conventions, if you like elaborate upon the conventions, in order to accommodate these changes that we both agree with?

Lord Strathclyde: It is not so much elaborating the conventions. What I would really like is for the House of Commons to decide what it is that the two Houses are in disagreement about and seek to resolve them, rather than finding a ploy to avoid making any compromise and to keep the conversation between the two Houses going rather artificially.

Q106 Baroness Symons of Vernham Dean: You have talked about different people now and you talked earlier in your evidence about the changes, but as things currently stand, how extendable do you think ping-pong is? When I first came here it was thought extraordinary when it went to three times. I think we got up to five on the Identity Cards Bill, and that equalled our record, but seven, ten? How far do you think that can be extended without becoming absurd?

Lord Strathclyde: It is a very good question which, of course, has no answer. It entirely depends on the case, on the issue, on the detail, on the view of public opinion of discussions between the two Houses. It is impossible to say how long this process should take.

Q107 Simon Hughes: There are two conventions you refer to about what we all call "ping-pong". One is that there is a process that can go on indefinitely and

the other is that each House should be courteous to the other. Will you accept that at the moment they are not both being upheld, because we have moved, not just this year but in previous recent years, to quicker and quicker exchanges? It is almost impossible to turn the papers round let alone consider the options. What is the convention now, that there should be timely, measured exchanges of views or that this can be rushed through irrespective of the ability of either House to do its job properly?

Lord Strathclyde: This is partly about style. I think the Government has sometimes misunderstood the debate that is going on between the two Houses and, by piling on the pressure, thinking that they can bulldoze the House of Lords into a desirable answer, and by doing so quickly, it has been rebuffed. Actually taking a bit more time and discussing what the issues are might be a better way to find a solution. Sometimes the relationship between ministers and opposition, including the Liberal Democrats, provides a much clearer view of what can be done than perhaps that of those who decide the speed at which ping-pong should take place. So, I agree with Mr Hughes that sometimes more time taken would reach a more desirable conclusion and, ultimately, the process would not be so complicated.

Lord Cope of Berkeley: But it also depends on the time of year, or, more precisely, the time of the session. Ping-pong quite often occurs right at the end of a session, with the Queen's Speech, breathing down our necks, as it were, and so it has to occur very quickly if it is going to occur at all; and that piles on the pressure but it also means that there is less thinking time. But, if you take the case of the Identity Cards Bill that was mentioned just now, that, of course, occurred in the middle of the session and therefore the stages were more leisurely with a day or two, or more than that actually, between each ping or pong, or whatever the proper phrase is. That gave more time for reflection, and it also, incidentally, gave time for the development of the Armstrong amendment which was referred to, but the process is not, if I may say so, indefinite because of the double insistence rule. I think the double insistence rule is extremely subtle, because it means that each House has got to think about compromises each time it passes backwards and forwards if it is not going to lose the bill, and that means the Houses do move nearer to one another gradually. Sometimes it is more artificial, or more cosmetic, and sometimes the compromises are more real. The difficulty of the packaging business is that it weakens the necessity for the two Houses to move towards one another and to reach agreement on the Bill itself.

Q108 Ms Stuart: Lord Strathclyde, I am trying to understand slightly better your answer to Baroness Symons' question on ping-pong. As a mere commoner, I cannot understand why it would never be in the Government's interest to pick unnecessary fights to increase the number of ping-pongs going backwards and forwards. Do you think the reason for that increase in going backwards and forwards is a reflection of the Government that Bills are badly drafted and therefore the Government is not quite

clear what it is asking for, or is it a reflection of the nature of the style of the debate of a macho House of Commons saying, "We will show you guys, we get in, amend and just draw this out"?

Lord Strathclyde: I think there is a bit of that, and this is particularly about the speed. This is Simon Hughes' question about the speed at which ping-pong takes place. I think Simon's question is much more complicated and has to do with how I think the House of Lords has changed rather than the House of Commons. I agree with the point that Lady Symons made earlier on that the old House would not have exerted itself in ping-pong as much as it now does. I think that that is just in response to the nature of the people who have now come into the House of Lords right across the House, including the crossbenchers, who feel very strongly about certain issues and believe that they have a duty to defeat the Government if they think that that is correct. Sometimes as an opposition, and I say this quite candidly to you, Lord Chairman, we are concerned about this. At some stage would like to be in government again and we would like the relationship between the two Houses to develop in such a way that ultimately the elected House gets its way without resorting to the Parliament Act or else can reach a sensible compromise. Therefore, during the ping-pong period, you need a certain amount of time to see whether or not a compromise is achievable.

Q109 Chairman: Does that explain why between 1979 and 1997 (18 years) there were three occasions when ping-pong ping-ponged three times and since 1997 there have so far been 12 such occasions?

Lord Strathclyde: Yes, I think it does in part, but I think the Labour opposition, and you would have to ask those who were in charge at the time, took a view that ping-pong was not desirable because the House of Commons, as the elected House, should always have its way on ping-pong, and when I was Chief Whip there were numerous occasions when I thought that the Labour opposition had won.

Q110 Chairman: This was a period when the Conservatives were in charge of both Houses.

Lord Strathclyde: Absolutely, but there were times when the Labour opposition could have won on ping-pong and they chose not to do so.

Chairman: Patrick Wright on financial privilege.

Q111 Lord Wright of Richmond: You said at the beginning that you did not know of any occasions in which the Conventions have been over-stepped, but Jack Straw gave evidence to us last week in which he made it absolutely clear that both he and the Chancellor of the Exchequer think that our scrutiny of the Finance Bill by the Lords' Economics Affairs Committee does over-step the Conventions. What he actually says is, "It is our judgment that the existence of the Finance Bill Sub-Committee is incompatible with the Conventions which cover the running of matters dealt with by the Commons." Do you have a view on that?

Lord Strathclyde: I think this is a most extraordinary and inexplicable line taken by the Government because, as I am sure you know, this Committee is a new committee, set up post 1999, in part to recognise the changing composition of the House of Lords, that it was a repository of a great deal of experience and knowledge in financial matters, former Chancellors of Exchequer, people from business and so on, and designed specifically to help government, and the Treasury in particular, in the non-legislative scrutiny of Bills. This is not a process that takes place on the floor of the House; it has no legislative force behind it; it is entirely there to help—and it was championed by no less an authority than the late Lord Williams of Mostyn, who saw it as a fair exchange for some changes in our procedure that may well have been seen to weaken some aspects of the House's work. He felt that this would strengthen it and give the reforms more balance by allowing the House to look at aspects of the administration of financial law. I have no idea where the Government are coming from on this, except perhaps they do not like the advice that they occasionally get from their Lordships.

Q112 Lord Carter: I was involved in the negotiations on the setting up of that committee with Gareth Williams. Of course, the original proposals for that committee, which I think were supported by the opposition at the time, were that it should go much

further. We had no power because, in fact, if the House had decided on a majority vote at the sub-committee, then the Commons would have done nothing about it. We negotiated hard to restrict the powers of that committee only to administration and taxation and its specific exclusion from looking at the incidence of taxation and all the rest of it, but I have to say that when negotiations started the remit was much wider than when it ended?

Lord Strathclyde: Fair enough. I suppose that is what negotiation is all about. The point is I do not think that that committee does anything which interferes with a statute of law which was laid down in 1911, the Parliament Act. If anything, I like to think that what the Lords have done has been helpful to Parliament as a whole and in particular the Government.

Q113 Chairman: On the grounds that the House of Commons is supreme, Mrs May, Lord Strathclyde, Lord Cope, thank you very much for your evidence.

Lord Strathclyde: Thank you very much.

Q114 Chairman: We may wish to follow up with some correspondence about various issues, but I am sure that will be fine.

Lord Strathclyde: If there are any points that need clarification, Lord Chairman, we would be very happy to follow them up in correspondence.

Chairman: Thank you very much.

Witness: Lord Williamson of Horton, a Member of the House of Lords, Convenor of the Crossbench Peers, gave evidence.

Q115 Chairman: Lord Williamson, good morning and welcome to the Committee. Thank you for being so patient. We did slightly overrun our time with the opposition, but we very much appreciate you joining us. I know you said you did not want to submit a memorandum, but is there anything you would like to say to the Committee by way of an opening statement?

Lord Williamson of Horton: Thank you very much. As I have not sent in a memorandum, I would like to make a very brief statement at the beginning which follows my traditional practice of being very brief, but I thought it would be useful to set out one or two points even if they may seem fairly self-evident. I would like to do that because, I should explain for the record, as crossbenchers are not a political group their Convenor cannot speak for all of them, a very satisfactory situation for me. However, we have discussed the main points which are covered by the terms of reference of the Joint Committee, and what I say here is likely to reflect fairly well the broad opinion of most of the crossbenchers. It is sometimes said that the Convenor is a general without an army. Perhaps not a very apt phrase in view of the fact that five former chiefs of defence are in the crossbench group, but I believe that in this case—

Q116 Chairman: They are all chiefs and no indians though!

Lord Williamson of Horton: There is a crossbench army moving broadly in the same direction. I have one or two very brief points. My first point is that many crossbenchers are not convinced that any substantial changes in the conventions covered by your terms of reference are necessary, but it follows from that, in my view, that they hoped that the Joint Committee will stay closely within its terms of reference and look at the practicality, as it is asked to do, of codifying certain conventions and not venture into wider territory. When 95 peers voted against the setting up of the Joint Committee there were 29 crossbenchers among them, although I myself voted for the setting up of the Committee, which is why I am sure you have made me welcome here. Secondly, notwithstanding the view, which is quite widely held, that if there were to be substantial changes in the composition and method of appointing or electing the House of Lords, then the conventions would need to be looked at again. We recognise that the Joint Committee has its mandate now to look at the practicality of codifying certain conventions, and if you do want more tight codification, in particular of the Salisbury-Addison Convention, I make it quite clear that crossbench peers will, I think, almost universally oppose any codification by statute as too rigid. I think probably the Committee already takes that view, but I should put it on record, and, like other committees before you, would prefer

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codification by a resolution of the two Houses. Crossbench peers do recognise that in the current circumstances, although we were not parties to the original agreement, the Salisbury-Addison Convention, despite its venerable age, does of course remain valid for good democratic reasons. I know that there are some who think it does not remain valid, but we think, on the whole, that it does because, as the Clerk of the Parliament said, "it is founded on the principle of the electoral mandate which in turn reflects the supremacy of the House of Commons as the embodiment of that mandate". Finally and thirdly, on the consideration of the reasonable timing for government proposals this is, of course, a sensible approach, but the statistics do show that there are cases where consideration takes quite a long time for very good reasons, for example, because the Government wants to look at it much more fully or because it is a monster bill, like the Company Law Reform Bill, which I am sure will be quoted to you on many occasions. It weighs quite a few pounds as well as having 882 articles, if I remember rightly. I think that the majority of crossbenchers would not like to see a specific time limit of, for example, 60 working days, but if your Committee did go in that direction we would hope that it would be possible to have some exceptions for practical reasons which would be agreed jointly by the two Houses. Those are the points I wanted to make. I have my long list of questions which you have sent me, including three more you sent me yesterday because the first lot were only a modest 12 or so.

Q117 Chairman: Thank you very much indeed. To begin with a general question, the Government said in its memorandum to the Committee in paragraph two that greater certainty about the conventions is desirable, but without losing essential flexibility. Do you agree that that is a reasonable proposition?

Lord Williamson of Horton: First of all, many crossbenchers would take the view that we should leave well alone, but if there is going to be a movement to change conventions along the lines mentioned that you just quoted, I think that keeping essential flexibility is, indeed, the most important objective for us, and that is why we do not want things done by statute. We would certainly not rule out, for example, the inclusion of a Salisbury-Addison Convention in an agreement of all major groups to be approved by parliamentary resolution in perhaps a slightly different form. I said that myself in the House of Lords in January 2005, but we all know that there are detailed points which we probably will come to about what constitutes a manifesto bill, what is a wrecking amendment, and so on, but the basic principle of flexibility is for us the most important point.

Q118 Lord Carter: On a general point, you mentioned the prospect of a parliamentary resolution. It seems to me that we could concern ourselves much too much with the future

composition of the House. If our report is agreed by both Houses with the conventions there, that will be the policy of both Houses until it is changed?

Lord Williamson of Horton: Yes.

Q119 Lord Carter: If the composition of the House changes, there are going to have to be some new conventions which will have to be agreed by both Houses, so all we need to concern ourselves with is the conventions as they operate now and, I suspect, for a long time in the future?

Lord Williamson of Horton: I certainly agree that if there is an agreed report from this Joint Committee and that is agreed by both the Houses, that is a substantive decision, it is quite clear, and therefore the conventions are, in that sense, codified. If that is a simple way of doing it, I am strongly in favour of it because I am always in favour of simple ways of doing things.

Q120 Lord McNally: On the reliance on the manifesto, do you not see a danger that parties are going to produce longer and longer manifestos and within them buried lines which might give legitimacy to legislation but then we find that Parliament has its hands tied by an over-prescriptive convention?

Lord Williamson of Horton: Yes. We are coming on now to what constitutes a manifesto bill, and I do see a problem there or a risk there. I thought the Labour Party's Manifesto of eight pages in 1945 was excellent, and the last one of 112 pages was less excellent, not for political reasons but simply because you should not over egg the pudding or some people will not eat it. I think it is a reasonable point to consider what are the core elements on which a party goes to the electorate to have a mandate and that you have to be careful, because every word in a manifesto may not necessarily be part of a core programme, that that does not tie too much the relations between the two Houses. I think that is a key point.

Q121 Simon Hughes: During the last year when there was the discussion and debate and disagreement about the Identity Cards Bill and the interpretation of the last Labour Manifesto, did you or your colleagues form a view as to how far it should be possible to stretch the definition of a manifesto commitment? Some of us thought that there was an attempt to rewrite a manifesto, but could you share your perception of that particular issue because it is about boundaries of where the manifesto perimeter is?

Lord Williamson of Horton: I can answer that point quite clearly, I think. First of all, there were a lot of crossbench votes on the Identity Cards Bill, so it was a point of some importance. There were some crossbenchers who felt very strongly about the point, whether or not we were going to have creeping compulsion. I will not go into the issue but they felt very strongly about that and were no doubt prepared to push on longer with the exchanges between the two Houses, but there were also a good number of crossbenchers who took the view that we ought to try to reach an agreement. I was one of

those, and Lord Armstrong was another, and it was as a result of that, that a crossbench amendment, of course, eventually provided the basis for an agreement, that is to say people felt that the manifesto said one thing and the Bill did not say exactly the same thing—that is what they felt—and therefore it was necessary to try to arrive at an agreement instead of having a continuous argument on this point.

Q122 Lord Tomlinson: Lord Williamson, you have expressed your admiration for eight-page rather than 130-page manifestos. Will that not encourage parties to have their promises at such a level of generality that they can mean a lot of things to a lot of different people?

Lord Williamson of Horton: It worked pretty well in 1945 and I do not see why it should not work well now.

Q123 Lord Tomlinson: “We will nationalise the steel industry”?

Lord Williamson of Horton: That was a clear commitment was it not, to nationalise the steel industry, but I do not want to over-do the point. The point I want to make is that there is a risk that if you have too long, too detailed a manifesto, including such items as regulation of horse traders, Lord Chairman, then you may arrive at a situation where it does somewhat run against commonsense to say that the regulation of horse traders is so important an issue that it must be pushed through both Houses without any possibility of disagreement.

Q124 Chairman: I do not want to cast aspersions about your age, Lord Williamson, but I cannot resist the temptation to ask you, if it was so persuasive in 1945, did you vote for it?

Lord Williamson of Horton: I am never allowed to vote for anything, not even for a Member of Parliament in whose constituency I live, and I see him here.

Chairman: I was being facetious.

Q125 Mr Tyrie: I am not sure whether that is you or me! I take it that crossbenchers consider their role partly to be engaged in ensuring that some sort of balance is maintained between the Executive and the legislature. Do you think (and I know you cannot speak of behalf of all your crossbenchers) that it is possible to engage in the sort of codification which we are discussing here without having the effect of enhancing executive power or authority at the expense of the legislature?

Lord Williamson of Horton: It is difficult to say what the influence of the crossbenchers as a whole will be, if I may say so. On certain bills the crossbenchers do take quite a strong view which tends to be linked to what they consider to be the defence of civil liberties, that is what has happened recently and is one of the reasons perhaps why we have had more ping-pong, but that is one of them; so I do not think it is possible to give a clear answer and say that crossbench intervention in one way or another influences the relationship between the Executive and the parties.

Q126 Mr Tyrie: My question is really, looking at what the Government appears to be intending, whether it is the view of the crossbenchers that that is likely to tilt the balance between the Executive and the legislature and, if so, in which direction?

Lord Williamson of Horton: If I may clarify the point, what the Government appears to be intending in the examination of the conventions?

Q127 Mr Tyrie: And therefore codification, yes.

Lord Williamson of Horton: I think there will be quite a number of crossbenchers who take the view that a greater codification might, in some respects, be a limitation on the way in which the system works, and that would run in favour of the Government and what is described as the Executive.

Q128 Mr Tyrie: And therefore weaken the role of crossbenchers?

Lord Williamson of Horton: Slightly, perhaps, yes.

Chairman: A leading question.

Mr Tyrie: Nothing like the ones we heard a moment ago from the Chairman!

Q129 Chairman: Did the House breach the convention on the Animal Health Bill in 2002 when a member of your group moved the motion?

Lord Williamson of Horton: Yes, in each case, I think, a member of the group moved a motion, did they not, on those occasions. First of all, I heard you ask that question to Lord Strathclyde and he replied, “No”. My reply is also, “No”, but it is more qualified, because we had to judge, people had to judge in the House of Lords, whether this would produce a long delay or whether it was a deliberate delay and so on. That is a matter of judgment. I do make this point, and I refer to the Constitutional Reform Bill, because there were lot of crossbenchers who were in favour of the action to put it to a select committee, and it was moved by a crossbencher, Lord Lloyd of Berwick. I did not myself vote in favour of the motion to refer it to a select committee and I did not do so because I thought it risked to give rise to an unjustified delay. This is, if I may say so, an illustration that within the crossbench group they do have variations of view. Deliberately, although I am rather loyal to my crossbench friends, I did not vote in favour of the reference to the select committee in the case of the Constitutional Reform Bill.

Q130 Chairman: Do you think that the conventions, whether they are more closely defined or not, are ever going to be enforceable in a self-regulating House when from time to time, as we have seen recently, crossbenchers move such motions?

Lord Williamson of Horton: I think part of the substance of the work of this Joint Committee, and it is not for me to say so, is about enforcement. This is a very difficult issue, in my view. The first point I would make is that, if a convention is accepted by both Houses and is reasonably well defined, it is most unlikely to be breached and enforcement is unlikely to arise. That is my first point. We have to work on reasonable assumptions. But it is possible,

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of course, to think of various ways of introducing some bite into conventions. I am not making proposals, but many people with great imagination can quickly think of ways in which you can do that. For example, in the House of Lords the Public Bill Office could refuse wrecking amendments, they could say, "That is a wrecking amendment, we will not accept it", and if you even went further than that there might be a possibility for the House of Commons to simply disregard them. I am not making a proposal, but it is possible to think of ways of maintaining conventions which would not normally be required to be enforced but to hold in reserve some means of pushing if they had to.

Q131 Lord Wright of Richmond: Can I ask you a question about crossbench attitudes to ping-pong. Do you think there is or should be any sort of convention that when it comes to ping-pong the crossbenchers should stand back and leave it to the political parties to sort out? You have already referred to Lord Armstrong's successful amendment, which is clearly the only exception to that, but do you have a personal view on that?

Lord Williamson of Horton: I think it would be going rather far to suggest that the crossbenchers, who are, after all, all members of the House of Lords, should stand right back and do nothing, and I do not think that that would be wholly acceptable to them, but I think it is also true that the crossbenchers are in a rather special position often on ping-pong and that the crossbenchers do behave in a way which is not always exactly the same as the political parties when ping-pong is running. For example, and as Convenor I see it quite clearly, there are often cases, and we have had rather a lot of ping-pong recently, where crossbenchers vote in reasonable numbers in favour of the position of the House of Lords, it goes to the Commons, it comes back, it goes and comes back again, and at a certain point crossbenchers are certainly conscious of the need to avoid too long a battle and too controversial a battle, and what often happens (I do it myself) is that at a certain stage we cease to vote for the Lords amendment, whose meaning is excellent, and instead we deliberately abstain. I have done that on a number of occasions, and my colleagues have sometimes done it too.

Chairman: I apologise; I thought Patrick was on the previous issue. We have kind of leapfrogged a couple of things in the order. Denis Carter and then we will move on to secondary legislation and Gisela.

Q132 Lord Carter: I was surprised at the answer you gave on the Animal Health Bill, which I remember well, that it was not a breach of the Convention for a dilatory motion to be moved by a crossbencher, and the answer also given by Lord Strathclyde. As far as we know that was the first time since the 19th century that that had happened. If that is not a convention I do not know what is.

Lord Williamson of Horton: To tell you the truth, I have not looked up the situation about the Animal Health Bill. I was personally much concerned about the Constitutional Reform Bill and I had to take a position and I know what position I took. I have not

looked up to see what I did on the Animal Health Bill, but I should think it is highly unlikely that I voted in favour of Lord Moran's motion, extremely unlikely.⁷

Q133 Chairman: Notwithstanding this was the first occasion that it had been done since the 19th century, you still do not believe it breached the convention?

Lord Williamson of Horton: As I said, I would try to slightly temper the sort of reply given by Lord Strathclyde because I think that it is a matter of judgment whether the delay which resulted from that was or was not unreasonable.

Q134 Ms Stuart: For completeness and clarity's sake, it would be helpful if you could tell us what conventions you think do apply to secondary legislation and also a brief word as to the process by which the crossbenchers arrive at a decision which they support?

Lord Williamson of Horton: As far as secondary legislation is concerned, what conventions do I consider apply? Answer, "None", as the Clerk of the Parliaments makes quite clear in paragraph eight of his memorandum. Why so? Because the House of Lords at least took a position, I think, on 20 October 1994, if I remember rightly, on a motion by Lord Simon of Glaisdale which was that the House of Lords has unfettered freedom to vote on secondary legislation. That is the position; it has not changed; so that is the way it is. We then come to the reality. That is the actual position. The reality is, of course, that the House of Lords has been extremely hesitant, very hesitant indeed, in rejecting secondary legislation, and I think the general sentiment, if I may say so, among the crossbenchers is that they really do not want to reject secondary legislation, they think it is a bit nuclear, and therefore non-fatal expressions of view are greatly to be preferred. That is their position, but as to whether that is or is not a convention, I think the position is quite simple. It could be rejected, a bit of secondary legislation in the House of Lords, if they felt sufficiently strongly about it.

Q135 Lord Higgins: In the context in which Lord Williamson has just set out, one can either go to that position or there are those who favour amendable statutory instruments, there would seem to be something in between, which is that if the House feels, and it is probably right, that the terms of the statutory instrument go beyond what it was led to believe was going to happen. I have in mind the instrument which implemented the Government's proposal with regard to the protests on the other side of Parliament Square, but I think in the course of debate everyone was quite clear that was what it was supposed to be about and the statutory instrument would deal with the matter. In the event it turned out to be totally ineffective. Nonetheless, it did go far beyond what was suggested by the Minister and it

⁷ *Note by the Clerk:* Lord Williamson did not vote in this division.

affected protests all the way down Whitehall, past Downing Street and over to the Wheel on the other side of the Thames. Is there some case to have means of referring it to a committee to consider whether such votes should take place if it is really felt the Government pulled a fast one?

Lord Williamson of Horton: Of course, the House of Lords is getting much better advice now than when I first went into the House on the merits of statutory instruments and on other issues sometimes related to statutory instruments, from the Constitution Committee or from other committees, so I think we get much better advice. My experience is that the Government does actually respond when we get advice which is critical, quite often, of statutory instruments, and so there is a sort of machinery, if I may say so, which does allow the possibility of withdrawing a statutory instrument, the Government has withdrawn statutory instruments in this session, have they not, and also makes possible the correction of something which perhaps is not very good. I remain of the view, of course, that in the last resort they could be voted out, but I think we should try to avoid that if possible.

Q136 Lord Tomlinson: Somewhere between the nuclear option and trying to persuade people to withdraw it, do you think statutory instruments ought to be amended in the House of Lords?

Lord Williamson of Horton: That is a tricky question which I can see has percolated into the terms of reference of your Joint Committee, my Lord Chairman.

Q137 Chairman: We ruled this out in our first report, I am afraid.

Lord Williamson of Horton: It is a tricky question. Many people are in favour of amendment.

Chairman: You are not obliged to answer. I am going to move on to John Spellar, who wants to ask you a question about reasonable time.

Q138 Mr Spellar: You probably heard the question asked to Lord Strathclyde regarding reasonable time. Do you think it would be helpful to decide some parts of the parliamentary year that would constitute reasonable time?

Lord Williamson of Horton: I have to repeat the point I made that basically crossbenchers, or many of them, are not in favour of a fixed limit for timing. I do understand that the Government has got to get its business through by the end of the session. Generally speaking, I think they have quite a lot of facility for doing that. I have not actually seen any significant difficulties myself, but if this Joint Committee wanted to go in the direction of some sort of limit, could I call it a sub-limit within the total period of the session, but if they did, then it would, in my view, be absolutely necessary to have some exceptions because the legislation is not coherent. Some of it can go through very quickly and some of it simply cannot because of the technicalities (we call it that, but they are very significant for the public) and, of course, the House of Lords does work very hard on amendments and that does mean that time is

taken. I think in the last session there were over 9,000 amendments in the House of Lords of which over 3,000 were adopted, were made. So, we are talking about a business which inevitably takes some time on a complicated Bill.

Q139 Mr Spellar: But unless you had that, you could end up with a huge back-up at the end of the session, so would not, say, something like half the parliamentary year be a reasonable figure?

Lord Williamson of Horton: I do fully understand your point. I do not think it is inevitable that you should end up at the end of the session with great difficulties. Such things could happen if we were coming up to an election, I understand, but not in the normal course of events. If we take just one example, which is today's example, there are three important Bills submitted by the Government rather late before our summer holidays: the Police and Justice Bill, the Education and Inspections Bill and the Armed Forces Bill. The Government had considerable difficulty in fitting these into the programme because they came, in my view, a bit late, but they came, but the Government has done that quite well. They scrapped a few other things. One or two people are irritated but they have scrapped other things which were on the agenda and they have got them all in and they are running on a perfectly reasonable timetable, very important bills, but they are going to get them all sorted out perfectly well.

Q140 Lord McNally: Would you not agree also that the introduction of examination in Grand Committee was quite a concession by the opposition parties to getting the Government business through and rather contradicts any idea that there has been any filibustering about the progress of government business?

Lord Williamson of Horton: I agree with that. There was quite a lot of opposition, as you will recall, at the beginning to the idea of us all drifting off to the Moses Room, where we are not even allowed to vote, in order to deal with quite important bills such as the Health Bill. That was dealt with in the Moses Room in committee and a lot of people did not like it. I think I supported it at the time, and I still think that it was a considerable addition to our armoury of getting legislation examined and that it shows that the House of Lords is responding. It has responded to a considerable flood of legislation and is handling it tolerably well at the moment.

Q141 Simon Hughes: Do you or does the crossbench group have a view about whether there is any convention governing the way you should vote and the Lords should vote when the Government have a skeletal Bill and then very significant secondary legislation? For example, Northern Ireland legislation, which is really an Act, a bill, although it is actually one instrument. Do you have a view about the conventions of the Lords in relation to very wide-ranging secondary legislation?

Lord Williamson of Horton: I think there is certain dissatisfaction with the volume of secondary

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legislation and, in particular cases, with the importance of the issues which are in secondary legislation, like in Northern Ireland the draft orders in council, of course, because of the system prevailing in Northern Ireland at the moment. So, they do present a bit of a problem because people do not want to push it to the extent of voting against them. There has been considerable controversy about draft orders in council in Northern Ireland, including the one on education which would remove the possibility of examination for movement from primary to secondary school, and I have had dozens of letters on it, dozens and dozens, and that is in secondary legislation. It is a bit of a problem and I think that people do not want to go to the extent of striking it out because that would be a fairly serious matter, so in reality there is a practical problem of how to deal with it.

Q142 Chairman: Do you believe that the codifying of conventions, for example, on reasonable time would have any impact on crossbenchers' ability to influence legislation?

Lord Williamson of Horton: I think that would be marginal, frankly. I think that those crossbenchers who are particularly interested in some bit of legislation will make an effort to be there, the attendance is high for the things in which they are interested, and I think that if business was going a bit faster because the convention was operating, let us say, a sixty-day rule, it might be going faster, they might be pushed a bit more, but I do not think that it would make a great difference to their participation or their consideration of the substance of the Bill.

Chairman: I think that concludes our questions unless anyone has a final burning question to put Lord Williamson.

Q143 Baroness Symons of Vernham Dean: Can we go back to the point that Lord Wright raised about ping-pong? You said in answer to him that crossbenchers felt that they came to a point where they would drop out over ping-pong. Do we take it, therefore, that your view on this is rather different to the view you may have heard the Leader of the Conservative Party in the House of Lords express to us a moment or two ago when he said that he felt that the changes there have been in the make-up of the House of Lords had emboldened people to keep going with the process of ping-pong but you are saying that is not a view that the crossbenchers take, that the changes, such as they are, in the make up of the House of Lords do not justify the continuing of a process of ping-pong in the way that Lord Strathclyde described?

Lord Williamson of Horton: Broadly speaking, I agree with you. I think it is true that the House of Lords has been emboldened perhaps to vote against the government on some issues more than in the past, but once you get into the ping-pong situation, then I think the crossbenchers, or many of them, continue to take the view that we cannot go on with this for ever, we have got to get to some sort of a

settlement or, in the last resort, to accept the primacy of the House of Commons. I think that is quite a common view among crossbenchers.

Q144 Lord Carter: You said correctly that crossbenchers are not a political party, the only vote he can deliver is his own. I think I am right in saying that on average crossbenchers tend to vote two to three to one against the Government. Would that change with a change of government?

Lord Williamson of Horton: What I would say about the crossbenchers, I want to make this point, is first of all the crossbenchers do attend a lot in the House. Let me make that clear. We have had over 400 people in the House every day over recent weeks but a large number of them are crossbenchers, so there is a big attendance. The second point is what action are the crossbenchers likely to take if there was a change of government? Would they vote more often or would they act differently? I do not really think that, because I think that the changes in the way in which the crossbenchers behave and vote have been underway for some time, if I may so. If you had to allocate a sort of political orientation (which you are not allowed to do) to crossbenchers, you would find that it has changed quite a lot in the last three, four, five years. I notice it very much as Convenor. So, I think that there would not be a big change in the way in which crossbenchers behave if there was a change of party or some other big change in the House of Lords.

Q145 Lord Elton: We have been convened primarily to discuss the codification of the conventions, and we have not yet decided what codification means. It may mean rendering them more permanent and less susceptible to alteration. In that context, and looking at the effect which the conventions have on the relationship between the Houses and the balance of power, not just between each House and the other but between both Houses and the Government, what is your view on the extent to which codification should make the conventions more permanent than they now are?

Lord Williamson of Horton: Subject to the point that we are in favour of as much flexibility and as little rigidity as possible (that is broadly the position of the crossbenchers). I think that obviously once you have codified them they would be more permanent, because people would hesitate to change them once agreement had been reached on them. Even if there were other changes in the House, they would be more permanent, and that would be an important point for considering the real relationship between the two Houses. I think it would be important.

Q146 Lord Elton: Would it be a good thing?

Lord Williamson of Horton: As we are in a period where it looks as though there are going to be changes in the composition of the House, I think it might be reasonable to foresee what sort of changes are coming before the final decisions are taken on further codification.

Chairman: Thank you very much. Thank you for your patience and your evidence, Lord Williamson. We greatly appreciate it. The meeting is closed.

Tuesday 27 June 2006

Members present:

Sir Malcolm Rifkind, in the Chair

Bledisloe, V	Mr Russell Brown
Elton, L	Simon Hughes
Higgins, L	Sarah McCarthy-Fry
McNally, L	Andrew Miller
Symons of Vernham Dean, B	Sir Malcolm Rifkind
Tyler, L	Mr John Spellar
	Ms Gisela Stuart

Memorandum by the Liberal Democrat Party

JOINT COMMITTEE ON CONVENTIONS

“Conventions must be understood in the context of the constitutional and political circumstances in which they have been forged” [Clerk of the Parliaments’ written evidence to the Committee, para 3]

We welcome this timely opportunity to reassess the validity and value of the “conventions” which are the subject of the Joint Committee’s inquiry, with a view to examining the practicality and desirability of some form of codification. We also acknowledge that this process with its fundamental constitutional implications should only lead to changes if there is consensus at least among the three main political parties. We believe the composition and powers of the House cannot be seen independently of each other. To that end we welcome the Committee’s decision to look at the matter of the present conventions in the context of continuing reform of the House. We believe, further, that the changed composition of the House since 1999 represents, to paraphrase the Clerk of the Parliaments, a considerably changed set of constitutional and political circumstances in which to see the conventions of yesteryear.

Our starting point is that the balance of power between the two Houses has not caused unnecessary and improper friction, and is not likely to. The shifting balance of power between the legislature as a whole and the executive, on the other hand, justifiably causes increasing anxiety of the onset of an “elective dictatorship”. We reject, for example, the notion that any government achieving a majority in the Commons—on an increasingly meagre share of the national vote and on a dwindling turnout of the electorate—should have the unalloyed ability to prosecute its business without the burden of proper checks and balances.

We believe that both Houses should be examining better ways to work together to achieve more comprehensive, more informed and more effective scrutiny of government legislation and executive action. We make some positive proposals to this end. It follows that the thrust of our evidence is designed to strengthen the role of Parliament—as a whole—not to convert the House of Lords from a revising chamber into an impotent debating society.

In this we note the substantial support for our approach (amongst the public, MPs and Peers including Labour Members) indicated by the Constitution Unit paper, *Views from Peers, MPs and the Public on the Legitimacy and Powers of the House of Lords*, presented to a seminar in the Moses Room of the House of Lords in December 2005.

We have sought to address each of the Committee’s questions in turn. Text in bold is taken from the Committee’s *First Special Report*.

QUESTIONS

SALISBURY-ADDISON CONVENTION

The Salisbury-Addison convention is described in the report of the Royal Commission on the Reform of the House of Lords (Cm 4534, 2000) as “an understanding that a ‘manifesto’ Bill, foreshadowed in the governing party’s most recent election manifesto and passed by the House of Commons, should not be opposed by the second chamber on Second or Third Reading.” (paragraph 4.21) The convention is also suggested to include the principle that the Lords will not pass wrecking amendments to such a Bill.

1. *Is this an accurate description of the convention? Is it sufficiently comprehensive?*

1.1 The Royal Commission's description elucidates well a common perception of the convention but fails to recognise the rationale for its existence, the basis on which it was agreed and by whom it was agreed. It is important to separate the Salisbury Doctrine from the Salisbury-Addison convention. The original (1868) Marquess of Salisbury's doctrine of the mandate implies a "referendal function" for the House of Lords to refer to the electorate any matter of dispute between the Houses at the next general election.¹ Salisbury was quite clear that his doctrine should not be interpreted in the sense that Denis (Lord) Carter expounds as a different and broader principle, namely that "the **electd chamber**" shall finally have its way². Salisbury implored fellow Peers even in 1868 that:

when the opinion of your countrymen has declared itself, and you see that their convictions—their firm, deliberate, sustained convictions—are in favour of any course, I do not for a moment deny that it is your duty to yield. **But there is an enormous step between that and being the mere echo of the House of Commons.**³

1.2 In our view, for the House to become such an echo in contemporary circumstances would be more absurd than Salisbury could ever have envisaged.

1.3 The Salisbury-Addison Convention refers to the more contemporary notion of "foreshadowing" which came about with the advent of the Attlee government of 1945. Labour's Viscount Addison came to an agreement with Viscount Cranborne (later the 5th Marquess of Salisbury), not to oppose "proposals which have been definitely put before the electorate"⁴ in a manifesto.

1.4 Lord Carter suggests his exposition of the broader convention has "more or less held"⁵ since the majority of hereditary Peers were removed. We believe that it is important to make clear that the principle at the root of the 1945 Salisbury-Addison Convention should be that it rests on the primacy of election over the principle of heredity.

1.5 It is worth taking note of three present-day factors which create for Parliament a very different situation to that which faced it when the Salisbury-Addison convention was established. First, in 1945 the Labour Party had a majority in the Commons of some 146, and had gained the support of 36% of the entire electorate; that is, nearly 48% of the vote on a near 73% turnout. By contrast in 2005, the Labour party gained a (still large) majority of 64 having attracted the support of only 21% of the electorate; that is just 35.2% of the vote on a 61.2% turnout.⁶

1.6 Secondly, in 1945, with a very considerable popular mandate, the Labour Party faced a wholly unrepresentative House of Lords, with an inbuilt Conservative majority brought about by virtue of the wholly hereditary Peerage. At that time, the Conservatives had 400 Members in the House of Lords, to Labour's 16 and the Liberals' 63 (despite the latter's very poor representation in the Commons at that time).⁷ The present Labour government, having received a rather less convincing mandate, faces a House of Lords whose composition is—paradoxically—more representative in terms of party strength than is that of the Commons.

1.7 Thirdly, we feel bound to point out that this agreement existed only between the Conservative and Labour parties because and on the assumption that the Conservatives were the dominant force in the House of Lords. It did not involve either the Liberals or the unaligned Peers.

1.8 This therefore lends credence to the contention of Rogers and Walters (Clerks in the Commons and the Lords respectively) that

the Salisbury convention is perhaps more a code of behaviour for the Conservative Party when in opposition in the Lords than a convention of the House.⁸

1.9 They go on,

Indeed it is a moot point whether, following the passage of the House of Lords Act 1999, the expulsion of the hereditary members and the ending of the overwhelming numerical advantage of the Conservative Party, the Salisbury convention as originally devised can have any continuing validity.

¹ C C Weston, "Salisbury and the Lords, 1869–1895", in C Jones and D Lewis (eds) *Peers, Politics and Power: The House of Lords, 1603–1911*, (1986), pp 463–464, quoted in House of Lords Library Note, *The Salisbury Doctrine*, LLN 2004/05, p 2.

² D Carter, "The Powers and Conventions of the House of Lords", *Political Quarterly*, Vol 74 (3), July–September 2003, p 320 (emphasis added).

³ *Parliamentary Debates*, Third Series, 26 June 1868, vol 193, col 89, quoted in House of Lords Library Note, *The Salisbury Doctrine*, LLN 2004/05, p 4 (emphasis added).

⁴ HL *Hansard*, Vol 137, Col 47, 16 August 1945, quoted in House of Lords Library Note, *The Salisbury Doctrine*, LLN 2004/05, p 22.

⁵ D Carter, "The Powers and Conventions of the House of Lords", *Political Quarterly*, Vol 74 (3), July–September 2003, p 321.

⁶ M Leeke, *UK Election Statistics 1945–2003*, (House of Commons Research Paper 03/59), 1 July 2003; Centre for Comparative European Survey Data, *British Election Studies Information Site* (<http://www.besis.org>)

⁷ D Butler and G Butler (eds), *Twentieth Century British Political Facts 1900–2000*, (Basingstoke: Palgrave, 2000), p 228.

⁸ R Rogers and R Walters, *How Parliament Works*, 5th edition, 2004, p 222 quoted in R Kelly, *House of Lords: Conventions* (House of Commons Library, Standard Note: PC/4016), 5 May 2006, p 4.

1.10 As Tony Wright MP put it in the recent Commons debate to set up this committee,

The current conventions—at least, the central one: the Salisbury-Addison convention—were forged during the post-war Labour Government, who had a huge popular majority while the Conservative party had a huge entrenched majority in the House of Lords, based on the hereditary peerage. We have only to remember that context to realise that simply to codify those conventions now would not tell us much about the relationship that should exist between the two Houses in very altered circumstances.⁹

1.11 These altered circumstances include, among others, the context of House of Lords reform in which this inquiry is set, and the increasing propensity of the electoral system used for the House of Commons to distort the voting preferences of the public.

2. *Can “manifesto bills” be properly identified? Is a manifesto an appropriate basis for codification?*

2.1 It is our belief that legislation cannot easily be identified—either affirmatively or negatively—as a direct transposition from a manifesto. We agree with the contention made by the Leader of the House of Commons in the debate on the Motion to set up the Joint Committee. Mr Straw said, “they [manifestos] are always couched in rather general terms—they raise expectations, but do not do much more than that.”¹⁰

2.2 As the Leader of the House of Commons has already pointed out to the Committee, manifestos (along, we submit, with political and ideological divides) have changed out of all recognition since the Salisbury-Addison Convention’s inception in 1945. We suggest that the detail now put before the electorate cannot, after a given election, constitute (as the original Salisbury doctrine implied) matters on which the country has expressed “firm, deliberate and sustained” convictions. This stands in stark contradistinction to the very clear polarisation of political opinion that occurred on the issue of nationalisation in the immediate aftermath of the Second World War.

2.3 Equally, manifestos are not—and, in our view, can never be—detailed *enough* to constitute a reliable, still less a justiciable basis on which to draft legislation.

2.4 An inflated status for the detail of manifestos could, in any event, raise serious and difficult questions for any government about circumstances under which they choose *not* to implement a given commitment, or in some way to contradict such a commitment. It is not unheard of for governments to change their minds. For example, the Labour Party’s commitment in their 2001 manifesto to make the House of Lords more “democratic and representative” remains unfulfilled.

3. *Have there been any breaches of convention in this area?*

3.1 There has, in our view, been a recent breach of the convention but it is our contention that this breach was on the part of the Government, not that of Peers. Recent debates on Lords amendments to the Identity Cards Bill (now Act) showed that it is the opinion of a number of Members of both Houses that the terms for *reliance* on the Convention can be breached.

3.2 These wrangles were predicated on the Government’s contention that their proposals for a *compulsory* Identity Card scheme should be granted passage through the Lords on the basis of their manifesto commitment to rolling out the scheme “initially on a *voluntary* basis”¹¹. In the regularly expressed view of the House, Lords amendments to remove the compulsion brought the legislation into line with the manifesto commitment. Lord Foulkes of Cumnock speculated in the subsequent debate that moving to compulsion was to “go beyond and improve on our manifesto commitments”¹², yet this is clearly a point of debate—and one which had not been put before the people in a general election, such that the electorate could direct the House as to how best to treat Government “improvements” to their stated commitments. It is our contention that such “improvements” may be no improvement at all.

3.3 It is hard to see how consensus could be found on codification of a convention whose interpretation is so subjective. As the Leader of the House of Commons has said, manifestos are typically couched in general terms to provide vision and direction, even a programme for a Parliament. In our view, a legislative programme envisioned in such a tentative and deliberately non-legal document cannot be taken as the incontrovertible basis for fully transcribed legislation drafted at a later date.

⁹ HC Deb, Col 456, 10 May 2006.

¹⁰ HC Deb, Col 445, 10 May 2006.

¹¹ Labour Party, *Britain Forward Not Back, 2005 General Election Manifesto*, p 53.

¹² HL Deb, Col 1231, 15 March 2006.

4. *How can the convention be codified? If it is codified, how can it be enforced?*

4.1 Expert evidence has already been given to the Committee, which indicates the extent to which conventions are a product of their time, and of specific political circumstance.

4.2 Given that flexibility is an essential feature of the relationship between the two Houses, the matter of how to codify a convention should, perhaps, be the matter of most concern for the Committee and has already been the subject of some confusion within government. The former Leader of the House of Commons, Geoff Hoon MP, had envisaged that codifying the Salisbury Convention “would have to be done by statute, and would be a complex process.”¹³ Yet, the Committee has resolved—rightly in our view—to “assume that codification will not involve increased oversight of Parliament by the courts.”¹⁴ Further, Mr Hoon’s successor as Leader of the House of Commons advised Members that it would, in his opinion, “be a grave error to put any description of the convention into legislation, because that would embroil the higher courts in the powers of this House (the Commons) in relation to the other place (the Lords).”¹⁵

4.3 On this issue, we agree with both the new and the previous Leader of the House of Commons: codification would have to occur in statute and would be a grave error.

4.4 Our constitutional settlement—unlike that of our European counterparts—is one in which no piece of legislation is considered a “higher”, constitutional law. As such, the rights of individuals are not protected in any higher body of law (save for the European Convention on Human Rights and common law) over the potential for legislators to make incursions on those rights. At the very time when the Government and Her Majesty’s Opposition are giving favourable consideration to the erosion of European Convention rights (as incorporated in domestic law in the Human Rights Act 1998) for the individual, we oppose any attempt to codify in statute a restriction on either part of Parliament’s ability to defend those rights.

4.5 A constitutional settlement can either have *both* restrictions on the rights of the legislative and executive branches and enshrined rights for the individual, or it can have neither. Adding into law the principles of the Salisbury Convention would not just be “complex”, as Geoff Hoon suggests, but riven with difficulty; it would require Parliament (and in particular the Lords) to legislate to restrict itself, at a moment when Members on all sides and in both Houses recognise that power is accruing in ever greater measure to the Executive, not least through the use of Secondary Legislation, which we will come on to examine. Additionally, in light of the Committee’s acknowledgement that the inquiry “is set in the context of a debate about House of Lords reform”,¹⁶ we venture that the Committee should consider Lord Carter’s warning that codification of the Lords’ conventions into law:

“could result in the ultimate irony of disputes over the respective powers of the elected House of Commons and a reformed House of Lords being finally decided by unelected judges.”¹⁷

4.6 On the matter of enforcement, we have outlined already the problems associated with defining the vague aspirations of a manifesto document as commitments to specific and detailed legislation. The Committee has envisaged already—and we have agreed strongly with it—that there should be no further oversight of Parliament by the Courts.

4.7 Unless the government intend that the new Supreme Court should act as interpreter of the United Kingdom constitution, much as the Supreme Court does in the USA, it is surely unthinkable that parliamentary arrangements could be subject to external legal adjudication.

4.8 In this light, we have to ask who would oversee and enforce any codification of the Salisbury Convention? Even if the Convention were codified in the *Companion to Standing Orders*—or in the Standing Orders themselves—the House’s recent decision to accept the recommendations of the Select Committee on the Speakership of the House of Lords, and to reject the late Lord Williams of Mostyn’s assertion “that the Speaker should act as ‘guardian of the Companion’”,¹⁸ means enforcement could not rest with the Lord Speaker. In any event, the Committee has assumed “that codification will not involve giving new powers to the Lord Speaker.”¹⁹ If an enforcement role will not be conferred on the courts and not on the Lord Speaker, who then should be vested with the power to overrule the will of one part of Parliament in favour of the other? Surely not the Prime Minister!

¹³ G Hoon, “Lords reform is long overdue. But elections could make us like Italy”, *Independent on Sunday*, 5 March 2006.

¹⁴ Joint Committee on Conventions, *First Special Report*, HC 1189/HL 189, p 4.

¹⁵ HC Deb, Col 444, 10 May 2006.

¹⁶ Joint Committee on Conventions, *First Special Report*, HC 1189/HL 189, p 3.

¹⁷ D Carter, “The Powers and Conventions of the House of Lords”, *Political Quarterly*, Vol 74 (3), July–September 2003, p 321.

¹⁸ HL Select Committee on the Speakership of the House, *The Speakership of the House of Lords*, HL92, para 9, p 6.

¹⁹ Joint Committee on Conventions, *First Special Report*, HC 1189/HL 189, p 3.

 SECONDARY LEGISLATION

INTRODUCTION

Secondary legislation seems to us to have taken on a very considerable importance. The Commons Procedure Committee notes the increased volume of secondary legislation in modern times and has several times suggested that the Commons initiate a sifting committee much like the Lords' Select Committee on the Merits of Delegated Legislation. The 2000 and 2003 Reports propose a Joint Committee to undertake this task for the Houses, yet this recommendation has yet to be heeded by the Government.

In light, however, of the sheer volume of secondary legislation there is to scrutinise, we take note of evidence given by Dr Alexandra Kelso to the Commons Select Committee on Modernisation, in which she identifies the difficulty in finding MPs who are willing to be members of the Delegated Legislation Committee and concludes,

there can be a great deal of hand wringing [that] so much of our lawmaking comes through the secondary legislative process, but until a sufficient number of MPs are willing to step up and actually do something about it you can have as many discussions about it as you like but they are not going to get anywhere.²⁰

In this light it seems especially important that Peers are given proper powers of scrutiny, and, if necessary, rejection over secondary legislation as it is they—without the constraints placed on MPs' time by constituency commitments and so forth—who are best placed to look at the impact of secondary legislation thoroughly. In addition, the processes for scrutinising European legislation (a cause of much of the burden of secondary legislation) in the House of Commons are at present so woeful that consideration by the House of Lords, in our view, remains a vital part of the scrutiny package. Proposals for a Joint Committee of both Houses to consider matters related to the European Union (made by the Government to the Commons' Modernisation Select Committee in their inquiry on *Scrutiny of European Business*), which would of course anticipate much of the secondary legislation likely to be brought to Parliament as a result of European measures, have yet to be implemented.

We agree with the Royal Commission's Recommendation 35, which suggests

There is a strong case for enhanced Parliamentary scrutiny of secondary legislation. The reformed second chamber should make a strong contribution in this area.²¹

We take this opportunity explicitly to reject, however, the Royal Commission's *Recommendations 41 and 42*

Where the second chamber votes against a draft instrument, the draft should nevertheless be deemed to be approved if the House of Commons subsequently gives (or, as the case may be, reaffirms) its approval within three months.²²

Where the second chamber votes to annul an instrument, the annulment should not take effect for three months and could be overridden by a resolution of the House of Commons.²³

The Royal Commission's proposals for the better scrutiny it rightly advocates would, to our mind, provide the Commons—and by extension the government—with the ability to overturn Lords decisions without due consideration, in a period as short as 24 hours. This would, in our view, be a process better characterised as a rubber stamp than a properly improved process of scrutiny.

While the matter of rendering delegated legislation amendable by Parliament is outwith the remit of this Committee, we suggest that constructive discussions about the role of either House in scrutinising Statutory Instruments is impossible without some reference to this persistent anomaly. We believe it should be possible for both Houses to debate, amend and, ultimately to reject secondary legislation.

House of Lords conventions in relation to the Commons on secondary legislation are currently codified thus in the Companion to the Standing Orders and Guide to the Proceedings of the House of Lords (2005):

“The House of Lords has only occasionally rejected delegated legislation. The House has resolved ‘That this House affirms its unfettered freedom to vote on any subordinate legislation submitted for its consideration’.” (paragraph 8.02)

²⁰ Dr A Kelso, Corrected Transcript of Evidence to the Commons Select Committee on Modernisation, Q54, 17 May 2006, HC 1097-ii.

²¹ Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm 4534, January 2000, p 69.

²² Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm 4534, January 2000, p 77.

²³ Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm 4534, January 2000, p 78.

5. *Is this an accurate codification? Is it adequate?*

5.1 This statement seems to us accurate, in that it is an incontrovertible truth that the House rarely rejects secondary legislation. Any further codification should accentuate Peers' right to divide the House on secondary legislation and should be seen within the context of:

5.1.1 the dramatically increased use and importance of secondary legislation in relation both to domestic primary legislation and to European legislation

5.1.2 the need to review the processes by which both Houses scrutinise secondary legislation

5.1.3 the respective abilities of Members of both Houses to deal with the sheer volume of secondary legislation put before it, and in particular to identify so-called "gold-plating" in the implementation of European legislation.

6. *Have there been breaches of convention in this area?*

6.1 It is difficult to identify breaches of a convention, which says both that the House *has* not often rejected (rather than *should* not reject) secondary legislation and that it has the right to do so. The convention would only be breached if the House rejected a considerable volume of delegated legislation in a short period of time, which it would, in our view—and within the terms of the convention as codified—be entirely within its rights to do.

7. *Is there a convention that the House of Lords does not reject delegated legislation, with perhaps definable exceptions? Does it depend on prior warning, perhaps when the enabling legislation was considered? Does it depend on whether the Commons have already approved the instrument in question? Does it depend on the views of the scrutiny committees?*

7.1 If there is such a convention, it is surely one which the House has broken from time-to-time. There have been two instances in which the House of Lords has rejected an affirmative instrument; the first on 18 June 1968: Southern Rhodesia (United Nations Sanctions) Order 1968; and the second on 22 February 2000: Greater London Authority (Election Expenses) Order 2000. A motion for an address praying against a negative instrument (Greater London Authority Elections Rules 2000) was agreed to by Peers on 22 February 2000.

8. *If there is such a convention, how could it be codified? In its codified form, how could it be enforced?*

8.1 Defining exceptions to such a convention (and we do not acknowledge, in any event, its existence as a convention so much as a habit)—whether on the basis of the timetable for previously passed enabling legislation, the view of the Commons or some other criterion—would, in our view, attract all of the same problems attendant on codifying (whatever its merits) the Salisbury-Addison convention.

9. *Would codification have indirect consequences in practice? For instance, might it make the House of Lords less willing to create new delegated powers?*

9.1 Yes, it seems clear to us that the House would be inclined to exercise far more caution over creating new delegated powers than it has hitherto.

9.2 Crucially, Peers may feel less inclined to give delegated legislation sufficient scrutiny if there is not even a theoretical right to reject measures with which the House disagrees. We endorse the evidence of the Select Committee on the Merits of Statutory Instruments

In our view, given that Parliament cannot amend secondary legislation, there is a case for either House urging amendment on the Government in debate: if the Government do not undertake to change their policy, it must then be open to the House to reject that item of secondary legislation. Otherwise scrutiny of the policy in the instrument by the House and its Committees is of limited usefulness.²⁴

9.3 As Donald Shell argues,

The kind of scrutiny the House of Lords can bring to bear is different from that of the Commons. And scrutiny to be effective must be backed up with a modicum of power.²⁵

²⁴ HL Select Committee on the Merits of Statutory Instruments, *Memorandum: Conventions on secondary legislation—evidence to the Joint Committee on Conventions*, Ev 135, 24 May 2006 (emphasis added).

²⁵ D Shell, "A proper second chamber is needed now more than ever", *Parliamentary Brief*, June 2006, p 11.

9.4 The cross-party group which published *Breaking the Deadlock*, supports our view that,

The fact that vetoes do not happen does not mean that the Lords' power is worthless—indeed it may simply indicate that government takes the chamber's views properly into account before statutory instruments are introduced.²⁶

10. *Do different considerations apply to certain categories of order, eg those subject to "super-affirmative" procedure?*

10.1 The "super-affirmative" procedure refers to that commonly used on orders made under the Regulatory Reform Act 2001 whereby ministers lay orders before both Houses, which each have 60 (concurrent) days to report on the proposal through the auspices of a special committee in each House. At the end of the 60-day period the minister takes account of the committee's representations and may make amendments. The committees then have a further opportunity to report before the order proceeds through the usual affirmative procedure.

10.2 We would welcome the increased use of the "super-affirmative" procedure in relation to secondary legislation but are of the view that the increased scrutiny enjoyed by Parliament under that process should be in addition to, rather than instead of, the ultimate right of rejection. Further, such consideration under super-affirmative procedure would presumably require committees to be set up for each new Act passed in which delegated powers are given or for new committees to be set up on some other basis. While this increased scrutiny would certainly be welcome, it would be utterly absurd for the House to undertake this more rigorous process if it were then deprived of the ability to deploy any "teeth" by rejecting measures which ministers refused to amend as they had been asked, or to the effect of a reasonable compromise.

10.3 The Legislative and Regulatory Reform Bill, currently before the House of Lords, deals specifically with the scrutiny of secondary legislation in our bicameral system and sets out the various categories of order. It would be perverse to undermine its carefully discussed provisions at this juncture by effectively removing one House from the process. We again emphasise the need for these arrangements to be flexible and evolutionary to meet changing circumstances.

The issue of rendering delegated legislation amendable by Parliament is outside the remit of this committee.

10.4 As we have made clear above, we think this matter should be considered by both Houses as a matter of urgency, albeit outwith this Committee.

REASONABLE TIME

The convention that Government business in the Lords should be considered in reasonable time is not currently codified, save that it appears in the report of the Royal Commission and the first report of the Joint Committee on House of Lords Reform (HL Paper 17, HC 171, Session 2002–03).

11. *Is there such a convention?*

11.1 By definition, given the Lords' deference to the elected House, if legislative measures are introduced in the Lords in a timely fashion, or indeed re-introduced following rejection of amendments by the Commons, such disputes will be resolved—by convention in the Commons' favour—in good time.

11.2 We submit, however, that "a timely fashion" is rightly a fluid concept. First, evidence from the Clerks and the Conservative Party as to how long Bills spend *in* the House, while instructive, disguise what we consider to be the real issue; that is, how many days' scrutiny each Bill gets in the House.

11.3 Secondly, several factors must surely play a part in determining the amount of time legislation spends being actively scrutinised in the second chamber, not least the amount of time it has spent—relative to the number of clauses in, and the controversy of, the Bill—in the House of Commons. Where Bills have been strictly programmed in the Commons, and it is clear that large parts of the proposed legislation have not had sufficient scrutiny in the Commons, the second chamber—however composed—should surely be at liberty to make sure that proper scrutiny takes place in their part of process.

11.4 Thirdly, the length and complexity of Bills should clearly be taken into account when determining what is a "reasonable time" for proper parliamentary scrutiny. By definition, Bills of a length comparable to the recent Company Law Reform Bill or to the Charities Bill are always going to require an appropriately lengthy period of scrutiny in the second chamber.

11.5 Furthermore, it is worth noting that the Government is more than capable of causing its own delays to legislation. The Charities Bill [HL], for example, passed out of the House of Lords on 8 November 2005, but has not been timetabled for a Second Reading in the Commons until 26 June 2006.

11.6 We suggest that the notion that legislation should be considered in reasonable time is an entirely valid one, but note that even the Government has rowed back considerably from its original manifesto position on this issue. The Committee might reflect on how much of the electorate had regard, when casting

²⁶ Kenneth Clarke et al, *Reforming the House of Lords—Breaking the Deadlock*, UCL Constitution Unit, January 2005, pp 16–17.

their vote at the last general election, to the Labour Party's commitment to legislate for a 60-day time limit on consideration of Bills in the second chamber. We suggest further that consensus as to what is a reasonable period on *particular Bills* would most sensibly be arrived at by a Joint Business Committee of the two Houses. Such a Committee could seek cross-party consensus immediately after the Queen's Speech on:

11.6.1 draft Bills which would be best candidates for pre-legislative scrutiny

11.6.2 the optimum spread for Bills to be introduced in the two Houses, distributed evenly through the Session, and

11.6.3 implications for the carry-over of specific Bills, in the light of the above.

11.7 In 2002, the then Leader of the House of Commons, Robin Cook, initiated just such an informal meeting after the Queen's Speech.

11.8 We believe that this would be a much more practical and acceptable way for the Government to fulfil its commitment to the electorate.

12. *Has it been breached?*

12.1 Given the terms above, the convention *can* only be breached in two circumstances:

12.1.1 Peers' refusal to yield to the will of the elected House.

12.1.2 Government delays in tabling amendments in the Lords.

12.2 It is our view that the latter is much more regularly the cause for delay than the former.

13. *Could it be codified? In its codified form, how could it be enforced?*

13.1 The Government has committed in its manifesto to legislate on this matter. We oppose this move on the grounds we have laid out for resisting further oversight of Parliament by the courts, in the absence of a proper, written constitutional settlement.

13.2 A time limit could be written into the Standing Orders of the House, but as these are observed to the extent, and in the manner by which, the House itself decides, there seems little utility in so doing.

13.3 Were a specified period of delay codified, it could be written into the Parliament Acts, in order that legislation passed by the Commons after 60 days' consideration by the Lords would automatically enter into force. We would reject any such amendment to the Parliament Acts.

The Labour manifesto for the last General Election contained a commitment to "legislate to place reasonable limits on the time bills spend in the second chamber—no longer than 60 sitting days for most bills".

14. *Would codification of the convention in the form of a statutory time limit be practical? How could it be enforced? What would be its practical consequences, including indirect consequences?*

14.1 In our view, a statutory time limit would not be practical, as inevitable exceptions would need to be adjudicated on by the courts, which is a matter on which we have already elucidated considerable concerns.

14.2 It would clearly be a disaster for the quality of legislation if the imposition of a 60-day time limit meant that in some cases whole sections of Bills went unconsidered by either House.

14.3 As the Leader of the House said in evidence to this Committee, "scrutiny although it can sometimes be uncomfortable actually benefits governance and our democracy".²⁷ As such, it would seem absurd to undermine the House of Parliament which has in recent times become the prime scrutiniser of legislation, as calls on MPs' time outside the Chamber have become ever more onerous.

15. *Would 60 sitting days be a practical limit? If not, what time would?*

15.1 In the 2003–04 session, of the 29 Government Bills put through the Lords, 16 were considered in 60 or fewer days. That is to say nearly half took longer. Of the 28 Government Bills in 2002–03 session, nearly a third took longer than 60 days. Very few Bills in either session took longer than 90 days, but we would in any event submit that a time-limit could only be linked to the time actually considering a Bill, rather than to the time a Bill spends merely in a particular House. The Fraud Bill, for example, was in the House of Lords for 122 sitting days²⁸ yet received only five days' debate on the Floor of the House. Clearly, therefore, there was no question of a filibuster, but simply that the Government business managers gave precedence to other Bills.

²⁷ Joint Committee on Conventions, *Oral Evidence*, 13 June 2006, Q9.

²⁸ Clerk of the Parliaments' written evidence to the Committee, Annex 3, Ev 95.

15.2 Any time-limit on proper parliamentary scrutiny would be arbitrary, and could subject the House to a sort of inverse filibustering whereby the Government could get its way simply by causing delays in the parliamentary process.

16. *Would there need to be provision for exceptions, or for extending the time limit? How could this work?*

16.1 Yes, absolutely. In the event that a time-limit were codified, it should be extendable by a resolution of both Houses.

EXCHANGE OF AMENDMENTS (“PING-PONG”)

Ping-pong is a shorthand way of describing the procedures used by both Houses for dealing with amendments proposed to legislation by the other House.

INTRODUCTION

It is our view that ping-pong is more an integral part of the legislative process than it is a convention governing that process. Given that the Lords defers by convention to the elected House, there is, by extension and by definition, a convention that the Lords do not insist on amendments to which the Commons has disagreed in perpetuity. It would be difficult to identify a convention, however, as to exactly *how many* times amendments might be exchanged.

Further, there are three distinct situations in which ping-pong procedures come into play:

- (a) where controversial decisions are taken in the middle of a Session;
- (b) where amendments shuttle between the two Houses at the end of a Session and disagreement could mean the Bill is lost unless carry-over is invoked or where the provisions of the Parliament Acts apply; and
- (c) where amendments shuttle between the two Houses at the end of a Parliament and where a Bill will be lost in the “wash-up” if agreement is not reached except where the provisions of the Parliament Acts apply.

Clearly, until the Government agrees to introduce fixed-term Parliaments, the end of a Parliament cannot be as easily foreseen as the end of a Session. As a result a codification of the procedures—and, in particular, any consideration of how *many* times the Lords may insist on amendments disagreed to by the Commons—would need to take clear account of which of the three sets of circumstances are at play.

It seems to us, for example, that the Lords is in a better position to insist on its position where it concurs with public opinion and at the end of a Parliament than where it rails against public opinion or seeks to thwart the endeavours of a government with a fresh mandate in the Commons. The original Salisbury convention, as elucidated by the House of Lords Library, that “the House of Lords [has] an obligation to reject, and hence refer back to the electorate, particularly contentious Bills”²⁹ seems salient. Of course, what is and what is not contentious is a matter of judgement, and cannot be codified into a strict set of “rules” as to when the House is and is not “allowed” to reject government proposals.

In terms of good management of time, any restrictions placed on the “ping-pong” process by way of codification ought to be on the *government* not on either House. Officers of both Houses have most trouble facilitating the ping-pong process when the Government introduces amendments at short notice. We therefore recommend that a *minimum* notice period of 24 hours for any government amendments should be considered.

The pressures of time, particularly at the end of a Parliament, impose huge burdens on the Officers of both Houses. It is a tribute to the competence of the Clerks that this flurry has rarely caused serious error. However, there was one occasion during the passing of the Rent (Agriculture) Act 1977, when the then Lords Clerk placed Lords Amendments in the wrong place in the Bill before it returned to the Commons. The Commons agreed to the Lords’ amendments but agreed them in that erroneous context. The Act had received Royal Assent before the error was realised and a short amendment Act had to be introduced in the following Session to rectify the mistake. What, however, might have happened if a similar folly had occurred at the end of a Parliament? Might the subsequent government (if of a different party) have refused to make the Act workable?

While the constitution of Conciliation Committees is outwith the remit of this inquiry, it is our view that if there are problems with the present process, we would suggest these are best dealt with by the appointment of a Joint Committee of both Houses to come up with compromise arrangements where either House has insisted on its position a set number of times.

Such committees were part of parliamentary practice from the 16th to the early 19th centuries, but fell out of use in the course of the developing struggle between the two Houses in the late 19th century. In a more settled relationship between the two Houses it would make sense to reconvene them.

²⁹ House of Lords Library Note, *The Salisbury Doctrine*, LLN 2004/05, p 1.

We believe that the present Commons Reasons Committee is an anachronism, which fails to provide any meaningful dialogue between either the Houses or the parties. We would favour its abolition in favour of a serious process designed to resolve persistent dispute between the Houses and achieve co-operation between the two parts of Parliament in a common endeavour to hold the executive to account.

17. *What would be the consequences of codifying ping-pong?*

17.1 It seems to us that codifying the procedure without clear account of the sets of circumstances outlined above could encourage governments to introduce Bills later in a Session so that where an exchange of amendments occurs prior to Royal Assent, the House is bounced into accepting Commons amendments or to acquiescing where the Commons persists in disagreeing with Lords amendments.

18. *What would codification cover?*

18.1 Codification would presumably cover the present protocols for the actual mechanics of an exchange of amendments, the procedures for dealing with amendments packaged by the Commons, along with some identification of the number of times the Lords should be able to insist on amendments to which the Commons has disagreed.

18.2 We would suggest that codification, if it is to occur, should concern itself with setting out some clear “rules of the game” for the tabling, in particular, of government amendments with a view to ensuring that each House has appropriate notice of the amendments, or amendments in lieu, which the other wishes to make before it is expected either to debate or to vote on them.

19. *Is codification necessary?*

19.1 Codification is in our view entirely unnecessary, and would risk setting in stone procedures and protocols which should be, as they are now, flexible in order that exchanges between the Houses can take account of the prevailing political circumstances. Among these circumstances are the subject of the Bill in question, public support for the Lords’ view over the Commons, and—in due course—the composition of the House.

20. *What effect has packaging of Lords amendments had on the operation of ping-pong?*

20.1 We welcome the packaging of amendments on closely related issues, as a way to improve the efficiency of exchanges between the two Houses. However, we are very much of the view that packaging should be a matter for the House on a case-by-case basis and endorse the recommendation of the House of Lords Procedure Committee that

Packages from the Commons should be considered by the House only if they are confined to single or closely related issues, not disparate issues joined together simply for reasons of convenience.³⁰

21. *How far can the Lords push ping-pong before the practice is considered to have been pushed too far?*

21.1 The “House of Lords’ awareness of its own lack of legitimacy”³¹ certainly contributes to its present attitude toward insisting on its amendments. The legitimacy of the House’s actions can be seen to be contingent, however, on the views of those outside. Research by the Constitution Unit shows that a considerable proportion of the public believe “it is *at least sometimes justified* for the House of Lords to vote against a government bill”. Public support for the House of Lords’ rejection of Government Bills increases both where there is little public support for the Bill and where there are a considerable number of rebels on the government side in the House of Commons, to some 66% and 70% respectively.³²

21.2 Further, the Constitution Unit found that a majority (56%) of Labour MPs considered that the House of Lords is justified in rejecting non-manifesto legislation, and 60% see Lords’ intransigence justified where a significant minority of Labour MPs have already opposed the Bill in the Commons.³³

21.3 Clearly, as the House of Lords is not in the habit of rejecting Bills outright, it is in the final exchange of amendments that Peers can insist on changes to legislation which reflect the thinking of rebel MPs in the Commons but which had hitherto been thrown out as a result of the Government’s disproportionate majority.

³⁰ House of Lords Procedure Committee, *1st Report of Session 2004–05*, (HL48), (London: The Stationery Office, 2005), p 4.

³¹ M Russell, *Reforming the House of Lords: Lessons from Overseas* (Oxford: Oxford University Press, 2000) p 138.

³² M Russell, *Views from Peers, MPs and the Public on the Legitimacy and Powers of the House of Lords*, (Paper to seminar in the Moses Room, House of Lords), 12 December 2005, p 3.

³³ *ibid.*

21.4 It is impossible to codify definitively at what point the Lords should abandon its “capacity to work in partnership [with the Commons] to defeat government measures where there is public concern”³⁴ or disquiet about the merits of Ministers’ proposals.

Alternative procedures, eg reconciliation committees, are outside the scope of this inquiry.

21.5 As we have indicated, we believe that disputes between the Houses should be examined by a Joint Committee, charged with seeking consensus on their resolution.

OTHER KEY CONVENTIONS

22. *Are there other conventions which this Committee ought to consider?*

22.1 The Committee might be well advised to examine the existence of three further conventions on which we set out our views below.

22.2 the propensity (or lack thereof) of the Lords to divide on Second and Third Reading

22.2.1 We believe that the House should not vote down entire Government Bills at Second Reading, as to do so would run contrary to its role as a revising chamber. We can think of only one instance when such a Bill has been rejected at this early stage, and that was by the contrivance of Government and Opposition sides on the European Elections Bill in 1998, in order to expedite use of the Parliament Acts.

22.2.2 We believe that the House should not reject whole Bills at Third Reading either, but we strongly believe that the House must maintain its unfettered right to amend at Third Reading, particularly in light of the Government’s penchant for rewriting whole Bills in their committee stages.

22.3 the criteria on which the Government decides in which House it will introduce its Bills

22.3.1 We believe this a matter which should be dealt with by a Joint Business Committee of both Houses to ensure both effective scrutiny and timely consideration of government business.

22.4 the financial privilege of the House of Commons

22.4.1 This principle is, of course, embodied in the Parliament Acts in any event. We do not believe the matter of supply is in serious question as a preserve of the House of Commons, certainly while the composition of the second chamber remains as it is.

22.4.2 That said, the Leader of the House of Commons, in his evidence to the Committee, worried that the House of Lords had sought to “circumvent the financial privilege of the Commons”³⁵ by setting up the Finance Bill sub-committee of the Economic Affairs Committee. We feel bound to point out that this House of Lords committee does not consider *supply*, in terms of rates of taxation and the like. Its remit is:

to consider aspects of the Finance Bill 2006 from the point of view of tax administration, clarification and simplification³⁶

22.4.3 Given that administration of the tax system, and particularly of the tax-credit system has been of such major public interest in recent months, we consider that the House is doing a service in scrutinising the Executive on this matter. While the Committee does not seek to adjudicate on matters of supply, we cannot understand—and certainly do not share—the Leader of the House of Commons’ concern that the Lords is infringing on Commons privilege.

David Heath MP
Wallace of Saltaire

22 June 2006

³⁴ *ibid*, p 4.

³⁵ Joint Committee on Conventions, *Oral Evidence*, 13 June 2006, Q42.

³⁶ Sub-committee on the Finance Bill, *House of Lords Economic Affairs Committee website*, (http://www.parliament.uk/parliamentary_committees/lfinbill.cfm)

Witnesses: Mr David Heath, a Member of the House of Commons, Liberal Democrat Shadow Leader, House of Commons, and *Lord Wallace of Saltaire*, a Member of the House of Lords, Deputy Leader of the Liberal Democrats, House of Lords, examined.

Q147 Chairman: Good morning, Lord Wallace and Mr Heath. Welcome to the Joint Committee. Our normal Chairman, Lord Cunningham, sends his apologies that he is unable to be himself present today because he has to be in the United States. We are delighted that you are able to be with us. We

have, of course, received a copy of your written submission. Could I ask, before we move to questions, if there is any opening statement that either of you or both of you would wish to make?

Mr Heath: Chairman, thank you for inviting us this morning. We do appreciate the opportunity to give

27 June 2006 Mr David Heath, MP and Lord Wallace of Saltaire

evidence. I think that our written statement suffices and we would be better advised to move directly on to questions, if that is your will.

Q148 Chairman: Can we therefore begin, if we may, with one or two general questions before moving to specifics and if I may myself ask a couple of questions of you? First, in your submission you make the point that the Salisbury-Addison Convention was, apart from all the other factors, an agreement reached between two parties of which you were not one, and that was a long time ago. There is almost an inference in your submission that therefore the Liberal Democrat Party does not seem to feel any need to accept that even the Convention must necessarily exist, given the length of time since two other parties chose to reach an agreement as to how they would work relative to each other. Would you care to comment on that?

Mr Heath: William may wish to talk a little bit about the present circumstances. I think it is a simple statement of fact that we were not party to the agreements. One does not necessarily feel beholden to agreements to which you were not party. It is undoubtedly the case that circumstances at the time at which the conventions were reached is very different from the political situation which we have today. I think on two grounds, first of all, that we were not party to any such convention and, secondly, because of the change in circumstances, we feel that they are of limited applicability today. William may like to say a little more about the changed circumstances.

Lord Wallace of Saltaire: I have to say when I read the library memorandum on the source of the Convention, I was struck by how far into the past one has to go to understand the context. We have, after all, just come out of a 130-year period in which a Second Chamber dominated by Conservative hereditaries was faced with an elected chamber which fairly regularly had a non-Conservative majority. The original Salisbury Convention and much more the Salisbury-Addison Convention were both negotiated in that context. The Salisbury-Addison Convention was also negotiated in the very clear light of a Labour manifesto in 1945, which listed specifically an industrial programme for nationalisation, which was against everything that the Lords, as a Conservative dominated House, had always stood for: the defence of property, landed property and private property. Therefore, it was a particularly obvious and symbolic issue on which to negotiate. I think one also has to say that the status of a Labour manifesto at that point was very different from the status of a Labour manifesto now. The Labour Party was a mass party. Its party conference passed the terms of the manifesto with trade unions voting on a mass vote and a party membership which was well over a million. Thus, the leaders of the Labour Party were representing, as they saw it, the voice of the people. Manifestos today for all parties are actually written by the Leader with a small group of young people and not negotiated

with the party conference any longer. We are in a different world with smaller parties and much more complex and much less precise manifestos.

Q149 Chairman: I will ask you one other general question, if I may. You make the point in your submission that the conventions developed to try to define the relationship between the two Houses but today, in your judgment, the main issue is not so much the relationship between the two Houses but the control by the legislature over the Executive or the increased power of the Executive. To what extent, in general terms, do you believe that that in any way challenges the legitimacy of the conventions or is relevant to the question of their codification, which this committee has to address?

Lord Wallace of Saltaire: We are puzzled as to why the House should want to codify an historical convention, which was negotiated to cover entirely different circumstances from those in which we are now. Since 1999, we have had a Second Chamber which has no natural majority. If I may stress, we have 189 Crossbenchers, so this is not just balanced among the parties but a substantial non-party element, which I assume will continue when we have completed the reform. I hope we are now coming to a period where we can agree a settled relationship, a rather more civilised relationship, between an elected chamber which has the clear primacy and a Second Chamber which is a revising chamber. But we are also concerned, as a party, that the balance between the Executive and Parliament has now shifted, particularly when one party has a large majority in the House of Commons. The number of Members of the House of Commons who are, so to speak, King's friends, to use the 18th century expression, who are either in paid employment by the Government or are Parliamentary Private Secretaries, has substantially increased. So we do feel that the power of the Government has increased and ought to be diminished, as far as the relationship between the Executive and Parliament is concerned.

Mr Heath: Chairman, I think that there is a useful phrase in Professor Bradley's memorandum to you where he talks about shared political understanding. There is a strong argument in a shared political understanding between both Houses about issues such as the primacy of the elected House, and the right of an elected government to get business through at the end of the day. Equally, there should be a shared political understanding of the legislative process, the proper role of scrutiny, the right of the revising chamber to do its job in terms of revision. I think it is very hard to see how that can be achieved by statute. We enter into a whole area of justiciability. I think it is better to approach it from a view that there is a legislative process which everybody understands and in which everybody has a part. There may be variations in that legislative process between both ends of the House. I find it very hard to see how one can look at it in isolation in one House, isolated from the process in the other House, or in terms of the practices of the House of Lords in isolation from its composition. I am not inviting the committee to go beyond its terms of

reference, but I do think, to use the term, that is the holistic view of the legislative process that we are required to look at.

Q150 Lord Elton: For as long as there are, and it is likely to be a long time, up to 100 Members of the House of Commons who are ministers, PPSs, whips or otherwise in fee to the Government, there is always going to be a considerable government influence beyond the numerical influence of its votes in the House of Commons. That is magnified of course by the desirability for sitting Members to preserve their membership of the House when facing election, possibly without the support of the ruling party. Changes in that relative power between Government and the House of Commons are pretty dramatic at times of general elections. Our remit is to look at the balance between the two Houses. Can you relate the question of the balance between Parliament and Government to the balance between the House of Commons and the House of Lords? Should there be an element of flexibility in the latter relationship to compensate for changes in the former?

Mr Heath: I think this comes back to my view that we are talking about the entire legislative process rather than part of it. I entirely agree with your view that the presence of a very large payroll within the Commons inevitably does colour the level of scrutiny and the types of scrutiny that legislation receives in the Commons. I think what the House of Lords has historically done, and to good effect, is to recognise and build on areas where dissent has been expressed in the Commons beyond that which is the normal business between Government and Opposition. There have been a number of instances recently, and certainly throughout history, where substantial numbers of government members, for instance, have indicated that they are not happy with a government position. The Government still has a majority in the Commons because it is in the nature of government in the Commons to do so, but where that is the case, I have found that that the House of Lords is very quick to pick up that level of disquiet which is expressed both in government benches and on Opposition benches, and to reflect that in the way that it approaches amendments to the Bill in question in the Lords.

Q151 Lord Elton: Could I put my question again in a rather more succinct form? Do you think that the relationship between the two Houses should be fixed when the relationship between Government and both Houses is changeable?

Mr Heath: I think, in the absence of written constitutional measures, that everything within the relationship between the Executive and the legislature is fluid. That includes the relationship between the two Houses. I think we benefit from that, as I say, if we do not pursue this, as some of us would wish, with a written constitution which would actually enshrine certain safeguards into the process.

Lord Wallace of Saltaire: I would like to add to that that since the 1860s, there has always been an element of confrontation between the two Houses

when the Lords was objecting to a popularly-elected government attempting to push through its programme. I hope we are now reaching a point where we can move from confrontation to co-operation as the normal style between the two Houses. That is why both of us and our party want very much to talk about the legislative process, one in which both Houses are engaged and in which the House of Lords acts as a complement to the Commons.

Q152 Mr Spellar: Lord Wallace talked about the clear primacy of the Commons. Can you think of any such way in which you could create a government, apart from having a majority and therefore a majority having confidence in the government in the House of Commons?

Mr Heath: No, and I would not wish to within our political system, and I am very content with that, but I do think that that general confidence in the government of the day does not necessarily extend to every dot and comma of legislation. There is quite proper scope for criticism and amendment of legislation in both Houses.

Q153 Mr Spellar: Given that the fact you have a government is by having a majority in the House of Commons, all these other points about how many PPSs there are and all the rest of it, is actually irrelevant because Members of the House of Commons are able, on a vote of confidence, to sustain or to overturn a government, and therefore it is no position, surely, of an unelected House or of the Upper Chamber, assuming we accept primacy of the Commons, to overturn that?

Mr Heath: Let us postulate a suggestion that perhaps a Bill might pass through the Commons on the vote of the principal opposition party with a majority of government backbenchers opposed to that measure? Would that not suggest that the House of Lords has a right to intervene in that measure and to express a view? I think it does.

Q154 Mr Spellar: Surely the question is about whether the government no longer has a majority in the House of Commons and then it is quite open the following day for the opposition to put a confidence motion in the House of Commons. It is not a position, surely, of the House of Lords to adjudicate on that. Lord Strathclyde said quite clearly that if the government has a majority in the House of Commons, a government has a majority in the House of Commons. Surely that is the core point? The rest of this is fairly superfluous.

Lord Wallace of Saltaire: There is an enormously important difference here between bills as a whole and amendments to bills. The House of Lords, by very strongly established convention, does not reject bills as a whole. We do feel entitled, on occasions, to insist on amendments to those bills. I think that distinction is relatively clear. It is not challenging the government as such. If one looks at the confrontations that we have had in recent years, the amendments with the Lords insisting have very often

had constitutional issues behind them, which seem to me to be appropriate to a revising chamber, which in no way challenges the primacy of the Commons.

Q155 Mr Spellar: If you say “insist on amendments”, do you mean insist the government reconsiders or do you say actually “to the point of breakdown”?

Mr Heath: The role of the revising chamber is to insist on reconsideration. That is quite clear, but not to have that power is an argument for a unicameral system, which I do not share.

Q156 Lord McNally: I do not think I am misrepresenting them in saying that both our Chairman and Lord Carter at earlier sessions have produced the statistics of how the Lords treated the Government pre-1999 and in the years since somehow to imply that a Labour Government has been given a rougher ride by the House of Lords. Do you not think, and of course this is a leading question, that this is comparing cheese and apples in that the partially reformed Lords is an entirely different body and that if there were to be a change of government, any change of government, that government would find the same treatment from the present House of Lords because in pre-1997 Cook-Maclennan, the Labour-Liberal Democrat study group, advised a House of Lords permanently that would have no majority. That is the new and permanent factor which should be examined. Would you not agree with that?

Lord Wallace of Saltaire: Very strongly; the Lords is now very different from when I was nominated in 1995. There are a number of reasons for that. From 1995–97, we were operating in the Commons with only a very small majority for the Government, so rather more negotiation went on within the Commons than has gone on since 1997, with a succession of governments with large majorities. We do now have a nominated House with a range of people from very different backgrounds. I was reflecting the other day, for example, that there are now more people with active trade union backgrounds nominated to the Lords than elected to the Commons. That is a real transformation from the Lords of old. We have a relatively clear developing sense in the Lords about what it is appropriate for us to do in considering amendments and statutory instruments and the like, and how far it is appropriate for us to ask the Commons to think again, and at which point we should stop.

Q157 Lord McNally: That is really to follow the point that John Spellar has made, that a House of Lords with no government majority is by will of the House of Commons because in theory each government could make its own majority in the Lords. By keeping, as it were, a hung House of Lords, does that not put responsibilities on that House of Lords to use that privilege rather sparingly?

Mr Heath: I think the House of Lords has, by convention and tradition, always used that sparingly, but it is instructive to look at the sorts of

measures, the class of measures, where there have been prolonged disagreements between the two Houses, and they have very firmly fallen into the constitutional and civil rights areas. I am talking about the Criminal Justice Act 2003 and identity cards, where the Lords were trying to preserve the manifesto commitments of the Government against its will. When we look at the terrorism bills, these are all areas where one would normally assume that the Lords has a responsibility, beyond its normal position of revision, in safeguarding what is, after all, an unwritten constitution in protection of the system. I think there is no doubt whatsoever of the legitimacy of the Lords in taking that view. The legitimacy of its composition is another matter and one to which we must not stray in this committee, I believe.

Q158 Simon Hughes: When we heard from our Conservative colleagues, they argued that the Salisbury-Addison Convention should not apply to any proposal to alter substantially the role of the House of Lords. Is it your view that that has been or is the present position in relation to the Convention?

Lord Wallace of Saltaire: It is our strong and settled view that the Salisbury-Addison Convention was a historical negotiation between the Labour Party in the Commons and the Conservative Party in the Lords, and not relevant to the entirely different circumstances which we are now in, several generations later.

Mr Heath: I found Lord Strathclyde’s contention that Salisbury-Addison applied in every case other than the case of the reform of the House of Lords to be a purely self-serving suggestion. I cannot see any logical construction that could be put on that. Either it exists or it does not exist. If there is an exception, it is for a broader range of constitutional measures rather than simply that which directly affects the interests of Members of the Upper House.

Q159 Simon Hughes: In the past, when by implication you accept that the Convention did exist when the balance between the Houses was different, did it apply when there was a minority government in the House of Commons?

Lord Wallace of Saltaire: The circumstances would then be entirely different because the question of how the minority government managed to get its manifesto through would involve negotiation within the Commons. I am struck by the difference of style between the two Houses. We have to negotiate within the Lords because there are four loosely-arranged groups from which one assembles a majority in the Lords, so the whole style in which we approach legislation has to be different. In the Commons, when a government has a substantial majority, it does not have to compromise; it does not have to negotiate. It can push things through. When it comes to the Lords, we have to behave differently because of the way we are composed.

Q160 Simon Hughes: If you look back at the 1974 Wilson Government, which obviously was only there for a short time but it was clearly a minority

government, your view would be that the Convention, even if it generally existed then, did not apply during that administration?

Lord Wallace of Saltaire: It was a different Lords from where we are now, so I do not think you can compare one with the other.

Q161 Simon Hughes: My last question is about manifestos. Has it ever been possible, since the 1945 example which you gave earlier, for a government to say, "This is what we said in our manifesto. Therefore, it is clear that these are the matters to which the Convention applies", or has that become an increasingly obscure argument and difficult to make?

Mr Heath: I think it is an extremely important argument to make. Manifestos, as has already been suggested, have grown enormously in scope. A passing reference in a manifesto does not, in my view, constitute what should be a binding convention upon both Houses to allow through legislation which would otherwise be abhorrent. Unless you are to require schemes to be produced in a quite different way with very clear labelling of those limits within it, which are clear manifesto commitments and have the force of contract, as it were, with the electorate, then I think you are in a very difficult area of legislation. I would argue very strongly that to make manifestos justiciable is something which we should avoid at all costs as a satisfactory way forward. If manifestos were to include clearly labelled items, which were manifesto pledges for the purposes of the Convention, then you would entirely alter the structure of the manifesto. The point that William made earlier about the fact that manifestos are very often produced by an individual without reference to their political party, and that very often large parts of manifestos are strongly opposed by the people standing for that party at an election, is relevant. You could imagine the circumstances in which one person wrote a manifesto and then, a few months after an election, became the party leader and repudiated most of what he had written. If that were the circumstance, would the manifesto still hold? I do not know. It is an entirely hypothetical situation, but I think, frankly, we cannot enter into the circumstances where manifestos are considered to have the force of law in terms of any sort of ongoing conviction. Having said that, where a clear commitment is made by the government elected with a majority in the Commons, then I believe that the Upper House does have a responsibility to take seriously and not to oppose the essence of the bill at Third Reading. That is simply the way that the two Houses work. That is a common political understanding, but it does not preclude substantial amendments, in my view, nor should it.

Q162 Viscount Bledisloe: Before I put my principal question, I would just like to follow up on Mr Heath's first answer to Mr Hughes. Is it not plain that when Salisbury made his self-denying ordinance, so to speak, that what he was saying is: we will obey these rules because otherwise we

recognise that in fact we will either abolish the House of Lords or emasculate it beyond recognition? Is that not therefore the logic for saying that the Convention cannot apply to a measure which goes back on that, so to speak, and does seek either to abolish the House of Lords or emasculate it beyond recognition, because that is the *quid pro quo* of the Convention?

Mr Heath: I think that that is a beguiling argument but, as I say, first of all because I do not recognise that such a convention is necessary within the context of our Parliament, and I thought I had said that, and, secondly, I think that the pistol to the head is not necessarily the best way of producing sensible and grown-up government and a sensible and grown-up legislative process, my argument to that would be that we need to look at the whole decision process. The one thing I might add is that in considering the conventions at the moment, and we will probably come on to this when we discuss ping-pong later, there is a world of difference between a bill introduced early in the session and that which is coming up against the buffers or against a dissolution of the House. I hope we will have an opportunity perhaps to come on to that because I think there is relevance to the context in which a bill is being discussed as to how one proceeds.

Q163 Viscount Bledisloe: My more basic question was this. The Wakeham Commission said that the Second Chamber should think very carefully before challenging clearly expressed views of the House of Commons on any issue of public policy. That clearly recognises that they should not normally do so but that there will be circumstances in which they do so and can do so. If you are to have a Salisbury-Addison Convention independent of that more general principle, that clearly means that in certain circumstance they should not do so, even after thinking very carefully. Lord Wallace made the point, in relation to the time when the Convention was enunciated, that the Labour Party had just got in on a manifesto which included nationalisation, which was the fundamental doctrine on which the party had been elected. Do you consider that if there is to be a Salisbury-Addison Convention continuing, it should be restricted to basic issues on which it can be said: yes, that is why the government was chosen, as opposed to the opposition and as opposed to a mere mention of some bill somewhere down on page 95 of their election manifesto. Should it be something of which you could say: that is what the electorate spoke about?

Mr Heath: I think that very clearly is the point that I was making earlier, that there is a world of difference between "we will do the following" and a passing reference somewhere, as you say on page 95, that implies that something might be done, an indeterminate something, and then a bill is produced which may have good points and may have bad points but has at least one or two points which the House of Lords feels makes bad law. I think it must be within the rights of the House of Lords to draw attention to that fact.

Lord Wallace of Saltaire: The wording of the 1945 Labour Party manifesto could not be clearer: “The Labour Party submits to the nation the following industrial programme”, and then it enumerates the transfer of fuel and power into public ownership, et cetera. I looked at the 1997 Labour Party manifesto for a comparably clear promise. The only one I found that was in quite such stark language is the commitment to call a referendum on the single currency.

Q164 Ms Stuart: Can I tease you out a little bit more about your views on the manifesto and that it would be quite ridiculous in a sense in the modern world in the way they are drafted by a small clique of people who do not represent the mass parties any more? Can I draw from that that you would hold a similar view of coalition agreements?

Mr Heath: Yes, it would be very difficult to identify a single manifesto from a post-electoral coalition agreement. Again, where there is a clearly expressed view by a majority in the Commons, then the House of Lords should have regard to it. We have never made any bones about that. Our concern is codifying something as being a manifesto bill and expecting someone to adjudicate on that. We have not even touched on who might adjudicate under those circumstances. I do not think you can sensibly apply that to a post-electoral agreement.

Lord Wallace of Saltaire: We would be in different circumstances.

Q165 Ms Stuart: For the record, I think you need to be very careful what you say here. You can watch countries where there are protracted coalition agreements. In Germany it took them three months. It is a massive document which is incredibly precise as to what the two parties have agreed to in order to form a government. If we ever were to get into such territory, I would anticipate something similar and it would be a fairly protracted process where the two parties would define quite precisely what it is they have agreed to do jointly. Would we then give the Second Chamber the right to say, “We are not bound by this”?

Lord Wallace of Saltaire: We are not talking about the right of the Second Chamber. We are both talking about a legislative process in which both chambers are engaged, out of which members of the parties in both chambers co-operate with each other. If we did move to coalition government with a coalition programme, there would be, as you say quite rightly, a clear and detailed programme of legislation of the sort which we have not had recently from the incoming government, and members of the Second Chamber, members of the coalition parties and others would take account of that in the way in which members of the Second Chamber do their best to take account of a number of other political factors.

Q166 Lord Higgins: By way of postscript to what you said a moment or two ago, may I say this? Clearly if the manifesto says “We will nationalise the steel industry”, we are pretty clear that is a manifesto

commitment, but, generally speaking, they vary from that to being totally obscure. I suppose one could have some arrangement whereby manifestos have to have an asterisk saying, “This is a manifesto commitment”? That will really confuse the electorate.

Lord Wallace of Saltaire: With a maximum of 15 asterisks to be distributed, perhaps?

Q167 Lord Higgins: Or perhaps something smaller but that, in a sense, is where we are drifting. Can I come back to what is emerging from the earlier discussions on this and which I think helpfully comes out from your paper. Let us try to spell it out a little more in terms of one syllable. The terms of reference say that the Convention is a relationship between the two Houses of Parliament—that is something we have to consider—and in particular the Salisbury-Addison Convention. Is it not the fact that the Salisbury-Addison Convention is not actually a convention between the two Houses of Parliament at all? It is a convention between the government of the day and the House of Lords. In particular, and I am trying to spell it out a little more clearly, this is not a convention between the two Houses. What has emerged over history, as you have mentioned, is a deal between the two major parties so that whichever of them wins, they will be in a position where they are able to push their manifesto commitment, whatever it may be, through the House of Lords? The terms of reference lead us to the view that there is a convention between the two Houses on this, and there is not. Is that right? I put it in those terms to ask you the question.

Lord Wallace of Saltaire: We are now in different territory post-1999. After all, the Salisbury-Addison Convention was between a Labour Government with a popular majority in the Commons and a Conservative Opposition with an entrenched majority in the Lords. That situation has now disappeared in the first stage of the Lords’ reform. It may be interesting to speculate what the situation might be if we were to have a Conservative Government with a majority in the House of Commons and without a majority in the Lords, as would now be the case if we continue with the current convention that no party should have a majority in the Lords. A Conservative Government would then have to negotiate with the Lords. We are quite a long way from the circumstances then prevailing.

Q168 Lord Higgins: Should we be saying, in the response to our terms of reference, that the Salisbury Convention is not one of the conventions between the two Houses?

Lord Wallace of Saltaire: I think you should. I think the important conventions which make the relationship between the two Houses manageable are, first, that the House of Lords should not reject whole bills from the Commons, either at Second or Third Reading, and that the House of Lords does not interfere with Supply. Given that and the one statutory back-up, which is the Parliament Act, together those three elements constitute a very clear

primacy for the House of Commons, and on that basis I think we all understand how the relationship between the two Houses can proceed.

Q169 Lord Higgins: I am still trying to spell it out a bit more. Should we simply say: We have been asked to consider this as an example of conventions between the two Houses but we do not regard it as such?

Lord Wallace of Saltaire: I would hope that you would do so. I think, as we were suggesting, that the Salisbury-Addison Convention belongs to a period when it was seen, particularly by the Labour movement, as one used to call it, to be a matter of confrontation between the people and the peers, and the Salisbury-Addison Convention represented a limitation on that confrontation, but we are now in a world in which the two Houses operate together. There are certain advantages in large countries of having a second chamber to take some of the weight off the first chamber, and we need a different set of conventions to cover our very different circumstances now, so the Salisbury-Addison Convention does not apply.

Q170 Lord Higgins: The present arrangement does work in favour of the two major parties, regardless of which of them is elected.

Lord Wallace of Saltaire: It depends how one interprets manifesto commitment and the right of the Commons to overrule the Lords. As we have both stressed, we understand the conventions as being that the Lords should not reject whole bills but that the Lords is entitled to oppose and insist on amendment, not every day but under exceptional circumstances, and in particular when we wish to insist that there are constitutional issues at stake in some of the details of a bill.

Q171 Simon Hughes: I have one very small tying-up point, a slightly self-interested point, if I may. Lord Wallace, slightly mischievously, suggested that manifestos are now written by one person with a few researchers. Will he just confirm that as far as he knows and I know and we know there is in each party a constitutional process for agreeing them, but the key point is that they are not agreed by conferences of parties or any large numbers of people; they are agreed by a small party elite in all cases?

Lord Wallace of Saltaire: Yes, and I think we all need to be a little humble about the transformation of British politics in which we are living. When I first joined the Liberal Party, it had I think 350,000 members. No party now has that number of members. The way in which Parliament relates to parties and the public has, I think, changed quite radically over the last 30 or 40 years. We no longer have mass parties representing the classes versus the masses, or whatever one had in the 1940s and 1950s, and in reconsidering the nature of the legislative process and our relationships with parties outside, non-governmental organisations outside, and the public as a whole, we perhaps need to recognise how much the world has changed since 1945, 1947 and 1950.

Q172 Chairman: We will move on to the second theme of secondary legislation. Your evidence a few moments ago appeared to be suggesting that not only should the Salisbury-Addison Convention not be codified, but one of the reasons for not codifying it is because it no longer existed, which will come as a dramatic revelation to the Government, I am sure. When we come to secondary legislation, your paper is almost as radical in the sense, unless I have misread it, that you appear to be suggesting that in modern circumstances it is positively desirable that the Upper House should, from time to time, vote against secondary legislation and that there should not be seen to be a convention to preclude this. Have I misread your paper or is this in fact your view?

Lord Wallace of Saltaire: You have not misread our paper. There again, we are in a very different world from where we were 50 years ago. The sheer weight and quantity of secondary legislation has grown enormously over the last two decades. It does seem to us appropriate that one of the tasks of a second House should be to examine the weight and quantity of secondary legislation in detail. Furthermore, since the Second Chamber is unlikely to have quite as much in terms of constituency responsibilities as the First Chamber in any revised form, the rather dry and technical work which the Select Committees on Statutory Instruments and Delegated Legislation, et cetera, all do is probably more appropriate for a Second Chamber. Again, I would understand the Convention as being that the Second Chamber should not regularly send back statutory instruments and secondary legislation, but that, under exceptional circumstances, it is appropriate for it to do so.

Q173 Chairman: To be clear, are you saying that it should remain only under exceptional circumstances, or are you in practice saying that, not necessarily all the time, that it should not be unusual for the Upper House to vote on, and possibly reject, secondary legislation? Should it just be in exceptional circumstances?

Lord Wallace of Saltaire: This is very much a matter of how conventions will develop. In the nature of things, conventions do develop over the years. If you look at the conventions which cover collective cabinet government, for example, they have changed quite substantially over the last decade. We cannot entirely write down what a reformed Second Chamber will do in 10 to 15 years' time. I think that the current understanding, the current mood, of the Second Chamber is that this should be a power used sparingly but it is a power that ought to be held in reserve.

Mr Heath: I think the principal problem with secondary legislation is not the power to reject, which I certainly would expect to be used extremely sparingly, but the absence of the power to amend. I make that absolutely plain. We face a greatly enhanced amount of secondary legislation in both Houses. It is often produced, it would appear, in haste. It is sometimes imperfectly produced. I personally have drawn attention to three errors in secondary legislation, all of which were required to be

passed by the committee in question, despite the minister accepting the fact that there was an error, and we then had to go through the same process with an amended piece of secondary legislation a few weeks later once the civil service had recognised the mistake.

Q174 Chairman: We have excluded from our own terms of reference the question of amendment of secondary legislation, but I have heard what you said.

Mr Heath: I understand that and therefore I will not expand on the point, but I do feel very strongly that, rather than the convention, we should be addressing the procedure in terms of secondary legislation. I would illustrate that point, for instance, with the fact that over the last couple of years effectively all primary legislation for Northern Ireland has been done through secondary legislation without amendment. I think that that is an entirely unsatisfactory position. The House of Lords would have been entirely proper, I think, in rejecting that which should be amended in order to ask the Government to consider again whether it could come back with an amended piece of legislation. It would have been the only mechanism by which the House of Lords could have demonstrated the fact that it was imperfect legislation.

Q175 Lord McNally: I note the other factor, that more and more government bills are drafted in a way that puts the balance enormously in favour of secondary legislation. Without discussing the capacity to amend, only having the nuclear option of rejection restricts us badly in a circumstance where we are having to deal with much more because of the structuring of bills.

Mr Heath: Many bills are not very much more than skeleton bills containing virtually Henry VIII powers for the government of the day to bring forward almost anything it wishes to under that umbrella. I think that that therefore means that that which applies to primary legislation increasingly needs to apply to secondary legislation.

Q176 Mr Brown: Gentlemen, last week, in giving evidence, Lord Strathclyde actually hinted to us that killing the GLA Orders of February 2000 was a mistake. Your party voted with the Opposition on that occasion. Do you regret the position you took on that or do you regret the statement that Lord Strathclyde has hinted at?

Lord Wallace of Saltaire: This had elements of democratic principle and constitutional propriety about it. We do not regret that. Again, may I stress that if you have a Second Chamber, it has to have some powers. I think your committee has to be a little careful to avoid slipping towards the argument of unicameralism when one says that the Second Chamber should not be able to send back some issues to the Commons. On this particular issue, we do not regret our position.

Chairman: We move to reasonable time.

Q177 Andrew Miller: In paragraph 11.6 of your evidence you state: "We suggest that the notion that legislation should be considered in reasonable time is an entirely valid one . . ." Could I start by asking you what you understand by the convention that the Lords consider government business in reasonable time?

Lord Wallace of Saltaire: It depends upon the weight of the legislation. If one is dealing with the Company Law Reform Bill or the Charities Bill, two bills which started in the Lords on this occasion, and they are extremely complex and technical, it seemed to us justified that the Lords should take considerable time upon them: 13 days in committee and 15 days in committee. For other bills which are shorter and less complex, we would expect the Lords to take less time on them. Our problem with the concept of reasonable time which the Government is pushing is that we are not aware of any significant number of occasions on which the Lords has taken an unreasonable amount of time in considering government legislation.

Mr Heath: I think there are several problems with this concept. I think we all agree that the House of Lords should not attempt to delay bills simply by prolonging their consideration unnecessarily, but, as William says, complexity of legislation is one factor that has to be taken into account. The second is the degree to which it has already been scrutinised by the Commons. This comes back to my point about the overall legislative process. If there are very large parts of the bill which simply have not been given scrutiny by the Commons, then it is entirely proper that the House of Lords should take time in order to meet the needs of scrutiny. The third element is the fact that consideration in the Lords, and indeed in the Commons, is very often determined by the business managers and the time at which they introduce it or allocate time for debate on a given subject. The overall time that a bill takes in either House bears no relationship to the amount of scrutiny it receives in terms of hours in committee, hours on report, hours at Third Reading. It seems to me that the latter is the important point, not the actual time from the time it is given Second Reading to the time it leaves the House.

Q178 Andrew Miller: You go on sensibly in your evidence to discuss pre-legislative scrutiny in the context of draft bills in particular. David, you and I have crossed paths recently on the Legislative and Regulatory Reform Bill, which we would both agree would have benefited from pre-legislative scrutiny.

Mr Heath: It is simply common sense.

Q179 Andrew Miller: But there were aspects of that bill that you were fundamentally opposed to that would not have been changed as a result of pre-legislation scrutiny because you would have been in a minority position. You would accept that, would you not?

Mr Heath: Actually, I do not think that there was any part of the bill to which I was fundamentally opposed. The way in which the Government proposed to

achieve its objectives was what I was fundamentally opposed to, and I think we have vastly improved it in the course of the process, but there we are.

Q180 Andrew Miller: The point I am moving on to is this. Is not the reality that the definition of “reasonable time”, whether at this end of the corridor or at our end of the corridor, in the eyes of the Opposition is a function of how much you dislike a particular measure, and there will always be a demand for more time on measures to which you fundamentally are opposed. It is not a question of whether it is in a manifesto or not in a manifesto; it is how much you oppose the measure.

Mr Heath: I think there is an element of truth in that because you will make more strenuous attempts to amend that to which you are opposed than that with which you agree. I think that it is a perfectly proper position for an opposition party to require time, and indeed that is recognised to a certain extent in the way we do business in the Commons, and I suspect in the Lords.

Q181 Andrew Miller: So 60 days ought to be enough?

Mr Heath: What does the 60 days mean? Does it mean 60 days on the Floor of the Chamber? If the government managers choose to have a Second Reading on day one and the remaining stages on day 60, I do not consider that to be proper scrutiny of the bill, and so it is what happens in between that matters. That is why we have argued very strongly that the grown-up way of doing this is to have a business committee, which looks, at the beginning of the session, at the totality of the bills that the Government wishes to put on to the statute book by the end of the session and comes to a broad agreement about the time that is likely to be necessary to scrutinise each one. That will take into account the complexity but it will also take into account the degree of controversy in a bill and where it can be effectively blocked out between both Houses so that there is a degree of certainty about the process. We approach these things in a grown-up way. We would not have the great mystery of why bills disappear for large parts of their time like the Charities Bill did, on which we had the Second Reading yesterday, which for some reason disappeared for months and months between the two Houses. We have a degree of certainty all round. I think that is in the interests of Government because it then has a clear view of how its business will be progressed. It is also in the interests of opposition because it means that we have a clearer idea of the amount of time that will be allocated to different areas and we can influence that at an early stage so that those bills which we believe need more time for scrutiny get more time for scrutiny. It is the process that most European legislatures in one form or another go through, and we for some reason historically have not.

Q182 Andrew Miller: With that caveat, 60 days in the Upper House would be ample time?

Lord Wallace of Saltire: We do not see why the 60 days is necessary, given all the evidence that you have before you from the Clerks of the two Houses. This is

not a problem. The average timetable in the Second Chamber is less than 60 days. However, those that have taken longer have, in most cases, been technical bills and in one or two cases have been bills with particular constitutional sensitivity on which I hope we all agree, as both parliamentarians and democrats, that it is rather more important to build consensus amongst the interested parties than to rush things through quickly. I think we might also agree that rushed legislation on non-urgent issues—the Poll Tax, the Dangerous Dogs Act—has not always been the most successful. It has sometimes been better for Parliament to take a certain amount of time to make sure that it has got something right and that it has carried the public with it.

Mr Heath: If the Government could also cure its propensity for introducing almost entirely new bills in the House of Lords, if the bill has been passed through its Commons stages, and we then get a plethora of amendments which introduce entirely new material in the Lords, sometimes not even at an early stage of the report but at later stage of report, I think that that also would be of great benefit to both Houses on the scrutiny.

Q183 Lord McNally: Can either of you recall at any time within our party the tactical decision being taken: we are going to filibuster in the Lords? Can you think of any example of a bill that has been filibustered either by ourselves or any other individuals or groups in the Lords?

Lord Wallace of Saltire: No. I can think of only one occasion on which I have acted for reasons not connected with the actual progress of a bill, and that was on an occasion when the Labour Chief Whip in the Lords came up to me and said, “I have a lot of very frustrated people who have been called in here for a vote and there has not been one”. So I went into the Chamber and made sure we called a division, for which he was very grateful! That is an entirely different matter than the suggestion that any of us in the House of Lords would deliberately attempt to delay legislation. We do not.

Mr Heath: I am always amazed at the brevity of proceedings in the Lords on quite serious matters. Generally speaking, the Lords apply their minds with a degree of succinctness, except in the cases of sexual offences and badgers. Other than that, generally speaking, it is extremely brief.

Chairman: The same principle applies to this joint committee! We now move to the final section of our deliberations, ping-pong.

Q184 Baroness Symons of Vernham Dean: Would you be kind enough to look at your evidence on page Ev 64. You say that the Lords is in a better position to insist on its position where it concurs with public opinion and at the end of a Parliament. I have two questions on that. When we tried to clarify the point about insisting earlier, I think it was Mr Heath who said what was meant was “insist that there be reconsideration”, but later Lord Wallace used the word “insist” as in actually insisting on the amendment being agreed to. Can we clarify what you mean by ‘insisting’ in this context? Do you mean

insist, reconsider, because that power is there already, or do you mean insist—no you really must give us the amendment?

Mr Heath: It is very tempting to say that it depends on the disagreement and I think that is a realistic response in some ways. You will know that in our evidence we suggested that we need a different way of arriving at a solution to ping-pong, which is again a more grown-up way of doing business, a proper conciliation committee, which I think is the right way of doing it so that you do not have one House defeating the other House; we reach a common view, if that is possible. Sometimes it will not be possible and at that point eventually, unless a general election intervenes, it will be the elected House that must eventually take precedence, but I think that it is proper to try to arrive at a conciliated view.

Q185 Baroness Symons of Vernham Dean: We already do that.

Mr Heath: No, we do not.

Q186 Baroness Symons of Vernham Dean: We have a compromise?

Mr Heath: I have been involved in several of these over the last few years doing Home Affairs and Constitutional Affairs. We really did not have a conciliated view. We have a nonsense in terms of procedure in the Commons of the Reasons Committee, which simply consists of half a dozen people going behind the Speaker's Chair and the minister reading out a spurious reason for objecting to the Lords' amendment and it being sent back. That is not in any way conciliation. We then have a prolonged period of ping-pong between the two Houses where things simply go backwards and forwards until eventually we have a Home Secretary—it is normally the Home Secretary—at the end of his tether, calling in all parties and saying, "We have to do something about this, and we are going to do this". It is conciliation at the point where tempers are frayed, where the chances of a meeting of minds are at their least likely, and it is not a good way of producing good legislation, in my view. I think a more reasoned approach would be to say, "We have looked at the proper reasons that have been debated in the Lords for a particular amendment. Look at how they might be accommodated within the Government's view and without the Government losing the purpose of its bill". That would be a more rational way forward and one that I would strongly recommend.

Q187 Baroness Symons of Vernham Dean: Then the word "insist" is a bit of a moveable feast in that sense. I understand that. Can we then go on to the rest of the sentence where you say: "... where it concurs with public opinion and at the end of a Parliament ...". Do you mean by that that both those conditions are necessary or do you mean that they are two examples of conditions, which might be the grounds for insistence?

Mr Heath: I think either might be a ground for a more consistent approach.

Q188 Baroness Symons of Vernham Dean: It is really "or" rather than "either"?

Mr Heath: Let us deal, firstly, with the end of a parliament. It then goes back to: were the Salisbury Convention to exist, then it would be based on the Salisburian doctrine which suggests that where there is no possibility of reconciliation, then the people must decide. If there is a general election in the very near future, then that is exactly what happens, and a newly-elected government would have every right then, I think, to bring back this legislation and say, "We have put this to the people and we will have to sign it". I think that is a specific example, but where the Lords can properly take the view, and this is a very subjective view and I accept that, that it is expressing a very large body of public opinion, then I think it is on sounder ground to insist for a longer time on the basis of its amendments.

Q189 Baroness Symons of Vernham Dean: And how does the Lords discover that public opinion? Does it do it because, as we all know, on the contentious issues there is masses of opinion polling? However, opinion poll results can change from week to week. Does it do it through the media? Are we talking here about formal opinion polling or are we talking about the BBC or the popular press? What are we to understand as being the legitimate expression of public opinion which should overrule an elected government?

Mr Heath: Can I answer that by saying I do not think it should overrule the elected chamber. We have said all along there is a stronger ground for insistence to the point of conciliation or to the point of the elected chamber having its way. We have said all the way along the line that we believe at the end of the day in the primacy of the elected chamber, but where the House of Lords has a reasonable expectation to express a view. It is very easy to take this expression too far and I do not want to because I would not want to get into a position where the House of Lords when it is approaching the next Criminal Justice Bill was required to take opinion poll soundings before it expressed a view. That is not the intention of this phrase and I do not want to build too much weight upon it, simply to say that there have been occasions when it is a reasonable view that the House of Lords is expressing a view which is consonant with public opinion. Under those circumstances it is perhaps better able to insist that the Government reconsider, or at least take proper consideration of the Lords' point of view than it would were it clearly out of kilter with public opinion.

Lord Wallace of Saltaire: We are in rather different circumstances when we are discussing a bill in the middle of a session from when we are doing the wash-up either at the end of the session or in the chaotic circumstances of an election having suddenly been called. I hope that you would agree that where in the middle of a session the Lords has wished to continue insisting, the confrontations in recent years have primarily been over civil liberties and constitutional issues of that sort. I think it is

entirely fair in a political system without a written constitution that the second chamber should see itself as having a particular role in protecting that.

Q190 Baroness Symons of Vernham Dean: I do not think that is a contentious point.

Lord Wallace of Saltaire: Good.

Baroness Symons of Vernham Dean: I think the point about different timing is the commonsense point, if I may say so. If you run close to the end of the life of a government, I think your point holds more water. What I was worried about was whether it was an either/or here and we were actually talking about public opinion being what should influence the Lords because I think we have got some pretty recent examples where perhaps public opinion being thought to influence government has given rise to all sorts of other questions about the legitimacy then of decisions. I make no comment on whether or not those are right and proper in the context but they have nonetheless raised issues, and how you measure public opinion is I think a very difficult point, and I am glad that Mr Heath qualified it in the way that he did.

Q191 Simon Hughes: Just one small point, on page 16 you say in the introductory paragraph: "Given that the Lords defers by convention to the elected House there is, by extension and definition, a convention that the Lords do not insist on amendments to which the Commons has disagreed in perpetuity." Do we imply from that there is neither a convention nor agreement about how many times there can be an exchange of views on any amendment and that there has been no agreement, and certainly no convention as to the current process, which seems to get quicker and quicker with less and less time for consideration. That has never been agreed by the parties, it has only been driven by the governments of the day insisting on a timetable of its own creation.

Mr Heath: Absolutely right and driven by programme motions which were intended originally to be an avenue for co-operation between the parties and have turned out to be a device by the government without the agreement of the other parties to curtail or accelerate the debate. I think one of the things that I would like to come from this Committee, if it is considered within the terms of reference in this particular area, are much clearer understandings between the two Houses of the process of consideration of amendments passing from one House to the other, because I think the idea that an amendment can come from the House of Lords and within an hour or so be considered by the House of Commons, Opposition parties having no opportunity whatsoever to amend whatever the Government chooses to put down as an amendment in lieu at that stage, with almost no debate in the Commons (normally in the first instance we had three hours but this was cut to one hour in total for any Lords' amendments irrespective of how many Lords' amendments come back on a single Bill) is not a process that would suggest respect between the two Houses for their points of view. My perfect

world would be not only to have a conciliation committee which seeks to resolve the process between the two Houses but also to have a process which allows proper consideration of the amendments reaching us from the other House and which allows us to respond appropriately to them. That is impossible within the programme motions which the Government has chosen to use for its business over recent years.

Sir Malcolm Rifkind: Your responses have given rise to five requests to intervene, you will be pleased to know. I hope you will be pleased to know! Lord Higgins?

Q192 Lord Higgins: You have just raised precisely the point which I myself wished to raise. It seems to me that the convention is that the House of Commons scrutinises legislation, it then comes to us and we revise it if necessary, which is why we are described as a "revising chamber", but the effect of programming motions in the Commons has effectively undermined that convention. It is the case that huge chunks of legislation are not considered at all in the Commons. They do not give themselves enough time to do so, and in a rather strange exchange with Baroness Amos on the floor of the House in column 511 on 19 June she seemed to think it was alright if the Commons decided what they would focus on and then we would sort out the rest. On top of that of course, it has been the case that after the Bill has been through the Commons vast chunks of amendments come down—and I have in mind in particular the Pensions Bills for which I was leading on the Opposition side—which have had no scrutiny whatsoever in the Commons. To that extent we are becoming the primary legislative chamber and on some bills I suspect, if one looks at the statistics, that is precisely what we are doing, and surely it is important that this Committee should spell out the way in which that fundamental convention about the relationship between the two Houses is now being undermined. Would you agree?

Mr Heath: Absolutely. I think it comes back to the point that I have made time and time again about the whole legislative process being what we should be looking at rather than just one part of it. It has been increasingly the case in certain bills. Let me make an exception because I think it does depend on the characters involved and there have been committees on which I have served where we can claim to have done justice. I finished a bill last week, the Fraud Bill, where we had time to properly consider the points we would wish to make and where the Whips had no problems in ensuring that we had adequate time and where the personnel involved in the committee made sure that they did not overextend their contributions. That worked well. There are other very important, very large bills where we have simply not had time in committee to deal with it, not because anyone was taking an exceptional amount of time but simply because not enough time had been allocated to the committee stages for a big bill. There is also the issue which you very properly describe of the Government bringing in substantial amendments, sometimes entire new parts of a bill, at

a late stage, either at a late stage in the Commons proceedings at report stage or bringing them in when the bill passes to the Lords. I think speaking as a Commons man, my biggest concern is our report stage which has become more and more constricted and this, after all, is the one time when every backbench member in the Commons has the opportunity to influence a decision and yet actually they have very little opportunity because the very restrictive time means only a very limited number of groups are actually considered and they are considered principally through the voices of the frontbench spokesmen rather than any other contributions which any other Member may wish to make. That as a process puts a huge additional responsibility on the House of Lords because it has become the primary legislator in that case, and the only House that can provide proper scrutiny, and that which you have scrutinised for the first time then comes back to us for cursory examination effectively as a revising chamber, and that is not a good legislative process.

Q193 Lord Higgins: I wanted just to follow it for a moment. Baroness Amos is saying, "Okay, well, we ought to know the Commons spend more time in committee than the Lords do," as if that would be surprising.

Mr Heath: So what?

Q194 Lord Higgins: One, so what, and, two, anyway it overlooks the fact of what is happening at report stage in both Houses and the fact that we of course also have a third reading stage where amendments are considered. So the other thing I think which worries me very much is there is a danger that the Parliamentary draftsman in these circumstances does not bother to look at the nitty-gritty until it has arrived in this House.

Mr Heath: There is certainly a subjective perception that that is the case. We very often are told that things have not been drafted but they will arrive as if by magic when the bill comes to the House of Lords. I object to that on two grounds. I object to it in terms of legislative process and I object to it as a Member of the elected House because I think it is my right and duty to see legislation at some stage during its process and, effectively, we are denied that right by the way that the bills evolve as they are brought through the two Houses.

Lord Wallace of Saltaire: The Lords, as you know, have just received a very thick Education Bill, substantial sections of which have not been scrutinised in the Commons. I hope that the Lords is going to give that a very thorough scrutiny. Some parts of it are very controversial and other parts of it are fairly technical, but they are all significant to the government of the country and we should return it to the Commons properly scrutinised and take adequate time on it.

Lord McNally: Without going back to the Salisbury-Addison Convention, one of the reasons why I am a heretic on it is that I was very closely involved in the 1974-79 Labour Government as a backbench boy and I can honestly say, although we thought of

many, many ways of getting through government business which were quite original, not once in my recollection did I ever hear Salisbury-Addison invoked: why do we not tell them that this is a manifesto commitment? I had not heard of the Salisbury-Addison Convention—

Sir Malcolm Rifkind: I thought you said you were not going back to the Salisbury-Addison Convention!

Q195 Lord McNally: This also relates to ping-pong and until Lord Hunt and Lord Carter and others started to work out ways of getting government business easier and more smoothly through the Lords. One of the recommendations on ping-pong was a kind of "three strikes and you are out", that the ping-pong should be a kind of madrigal between the two Houses but in the end the Lords would always give in. It is something I feel very strongly about. Surely the Lords must retain the right to say no because without that right to say no all the other negotiations between the two Houses become meaningless: discuss?

Lord Wallace of Saltaire: There are two different conventions at stake here. One is the principle often stated by governments with large majorities in the Commons that the Government must get its business through, and the other the convention that it is the duty of the House of Lords to make sure that legislation as it emerges is well-considered and coherent legislation which has a consistent underlying rationale. Negotiation between the two Houses over amendments to legislation therefore seems to us to be appropriate. I know it is outside the terms of this Committee to discuss how one might build a more modern and civilised process for negotiating when it is between the two Houses but again, to repeat, we hope that post 1999 the relationship between the two chambers has now changed and is now being established on a more co-operative basis. An effective legislative process which produces for the country well-considered and coherent legislation is one which should emerge from both chambers, the two chambers having agreed on what the final settlement should be.

Mr Heath: Only to say a purely mechanical process, as was described by Tom there, looking at three pings or three pongs, and that is it, does nothing to encourage either side to listen to what the other side is saying, and I think that is not the way we should be behaving.

Q196 Viscount Bledisloe: As I understand it, you considered that this very rapid ping-pong when it is not necessary is counter-productive and diminishes the opportunities for sensible, grown-up discussion?

Mr Heath: Yes.

Q197 Viscount Bledisloe: Was not a very good example of that the recent Identity Cards Bill? During the last two stages of ping-pong, everyone knew that, in fact, a compromise was being negotiated on the basis of Lord Armstrong of Ilminster's amendment but yet nobody stopped the ping-pong process, and so we went through token

rejections of Government proposals merely because that had to be done to keep the time alive for negotiations. Would it not be much better if people slowed the process down when there really was a negotiation instead of having this flim-flam of ping-pong disguising the fact that real negotiation is going on?

Mr Heath: I would always favour rationality over expedition.

Lord Wallace of Saltaire: Fast government very possibly is as bad for a country as fast food is!

Sir Malcolm Rifkind: Enough aphorisms for one day! Lord Elton?

Q198 Lord Elton: The conciliation committee is presumably meant to be the final stage and prior to that an actual disagreement, a rational disagreement between the Houses should have been established which means that we retain an interest, do we not, in the procedures in the House of Commons on House of Lords' amendments even were we to accept the idea of a conciliation committee? You made it clear that you think there is something wrong which enables numerous and long and technical amendments to be dealt with very swiftly on the floor, and I take it therefore that you would recommend that there should be a convention restricting the Government's use of timetable motions at that stage? Would you in so doing treat differently Lords' amendments to clauses which the Commons had considered and Lords' amendments to clauses in the Bill which the Commons had not considered?

Mr Heath: I think that is a very interesting question. If one were to take an entirely proper approach to this, there would be a case for recommittal in the Commons of Lords' amendments which we had not seen the subject matter of at all, and were there to be unlimited Parliamentary time then that would certainly be what I would advocate. I understand being pragmatic that there is a limit to the extent to which that is possible, although I think that there are circumstances when it would certainly improve the legislation by being recommitted probably back to the standing committee which considered the original legislation in the Commons so that we could do a proper line-by-line word-by-word examination of what was now proposed. I think if we were to do that then we would be dealing with all parts of the Bill in an equal and proper way. I hope I am not avoiding the question in saying that although I believe that to be in principle the way forward, I can see practical difficulties involved in terms of timing of government business to achieve that. I think a far better way for it to be dealt with is not to introduce all these sections of bills halfway through the Parliamentary procedure.

Q199 Lord Elton: So you think there should be a convention but that it could not be as rigorous as you would wish it to be?

Mr Heath: I suspect that is my answer. I will give it further consideration but I think that will probably be my answer.

Q200 Lord Elton: You have not answered on differentiation between amendments to well-considered Commons clauses and clauses which the Commons has not seen at all. Would you treat them the same or differently?

Mr Heath: No, I think they are different and, as I say, I think in a perfect system ones which the Commons had never seen would be recommitted.

Q201 Lord Elton: Then it comes to the conciliation committee. Who is it to be made up of because very often they are highly technical, specialist matters which are being dealt with in our House in the light of a long debate from people with much information? Presumably, what one would really want is a meeting of minds between the people who dealt with the final stages of the Bill in each House as opposed to the people who were appointed because they have time.

Mr Heath: Yes, I think the last thing we want is a select committee for conciliation with no particular interest in the subject matter of the bill. I was thinking in terms of a specific committee for that bill under those circumstances which include those who have taken a particular interest in it at the departmental stages.

Sir Malcolm Rifkind: A final question, Lord Tyler?

Q202 Lord Tyler: My question relates to ping-pong but I am just picking up a phrase that Lord Wallace used just now to think of the more general significance of all the evidence you have given us this morning and the written evidence. You say you want to seek a more modern and civilised process. I am struck by the reference you make in 11.7 in your written evidence to the informal meeting that Robin Cook, the then Leader of the House, convened of a sort of business committee which has also featured in your evidence. Since I am the only remaining participant, sadly, tragically, since Eric Forth and Robin Cook were the other two main participants, can I just ask you if you think that precedent, which incidentally was recommended by the Modernisation Select Committee in the Commons, it was not just Robin's bright idea, should really be expanded? The implication is that it should be expanded into a joint business committee. Would that have a role in ping-pong? Would that have a role in trying to decide whether a conciliation committee should be set up? What sort of role do you think that should have? Bearing in mind that I think joint committees, in this Committee anyway, would receive a welcome (how can we not; we are one?) is there not a good precedent there for a much more holistic approach, I think it was David Heath's point earlier, to make sure that the whole process through Parliament is better organised?

Mr Heath: I think I would not see a role for a business committee in dealing with ping-pong. I do not think that would be its role because I would see it more in terms of forward planning. Basically, to put it in crude terms, pinning up a wall chart or calendar and the Leader of the House coming forward with the business that the Government would wish to get through in terms of the number of

bills; the Opposition parties having the opportunity and crossbenchers having the opportunity of expressing a view as to what they considered to be a complex measure, what they considered to be controversial measures, what the likely time requirement would be for considering them and setting out, by agreement, in broad terms the progress of the Government's programme through the session through both Houses. I think that there is a more specialised area which concerns the business committee dealing with the day-to-day business of the Commons and, by analogy, the Lords, but I think that certainly my view is that a lot would be gained by having a common understanding, to use the phrase again, of the way in which the structure of the Parliamentary year is set out, the bills that would be under consideration, and the approximate length of time we would expect to allot to each one. That would be capable of amendment in the context of events and additional pieces of legislation coming forward or particular difficulties being reached within a piece of legislation, but again doing as much as possible by agreement so that we do not have these sudden panics about Government legislation and messing about towards the end the session, and we do have a very much clearer understanding of how much time is likely to be required. I think that will also help the Parliamentary draftsman, to come back to an earlier point, recognise at what point they need to have their legislation ready and so we can avoid, as far as possible, large amounts of new material being brought in at an inappropriate stage in the process. To come back to the phrase I used earlier, I simply think that is a more grown-up way of doing business. Had Robin stayed in the position, I think he would have wanted to have grown that

process, instead of which we have the programme motion in our House which is not, frankly, a matter for agreement between anybody other than the denizens of the Government Whips' Department and the Leader of the House and has caused more friction rather than less friction, I think, by so doing. It has simply become a new form of guillotine.

Lord Wallace of Saltaire: A joint business committee would avoid some of those occasions where for extended periods the Lords is less busy than expected and then all of a sudden lots of bills are thrown at us. By holding us to a programme it absorbs, it seems to us, part of the process of modernising the way in which the British Parliament operates with legislation, all the way through from pre-legislative scrutiny to conciliation committees where the two Houses disagree. That is the process towards which all of us, I say, in both chambers should be moving.

Q203 Lord Tyler: A tiny supplementary, since we have not had any extension of that informal process, it was a one-off, is that part of the explanation for the more recent log-jam we have had at the end of sessions and the end of Parliament since then?

Mr Heath: I think it is part of the reason and it also encourages, frankly, when you have a degree of anarchy in the management of business, the Opposition parties not to be as helpful as they might otherwise be.

Sir Malcolm Rifkind: Thank you, gentlemen. If there are no further questions can I thank you both for your written submission and for the very full and interesting way in which you have responded to the very many questions to which you have been subjected. Thank you very much.

Tuesday 4 July 2006

Members present:

Cunningham of Felling, L, in the Chair

Lord Elton, L	Mr Russell Brown
Fraser of Carmyllie, L	Mr Wayne David
Higgins, L	Mr George Howarth
McNally, L	Sarah McCarthy-Fry
Symons of Vernham Dean, B	Sir Malcolm Rifkind
Tomlinson, L	Mr John Spellar
Tyler, L	
Wright of Richmond, L	

Memorandum by the Clerk of the Parliaments

JOINT COMMITTEE ON PARLIAMENTARY CONVENTIONS

1. Brief responses on the four issues in the Joint Committee's terms of reference are set out in Part I. These responses are then expanded in Part II (on specific conventions) and Part III (on the practicalities of codifying conventions).

2. A basic feature of conventions is that they evolve over time. The convention that bills are read three times is so old that it has become an established rule. But recent conventions, with which the Committee is concerned, are too new to have become fixed. They are still evolving, as times change. What this paper seeks to do is to give a snapshot view of the conventions as they appear now. If they are then codified, and fixed in their present form, they in effect cease to be conventions and become rules. Most rules however require enforcement and sanctions; there are no sanctions with conventions.

PART I

Salisbury/Addison Convention

3. The Salisbury Convention stems from the understanding reached in 1945 between Viscount Cranborne (Leader of the Opposition and from 1947 Marquess of Salisbury) and Viscount Addison (Leader of the House) whereby the Opposition would not oppose government legislative proposals which had formed part of the Labour Party Manifesto at the preceding General Election.

4. In practice, the convention has come to mean that:

- (a) the House of Lords does not oppose a manifesto bill (a bill fulfilling policies laid before the electorate at the preceding General Election) on second or third reading; and
- (b) the House will return the bill to the Commons.

The Lords accepts the rights of the Commons in the legislative process and confines points of disagreement to matters which can be resolved by exchanges between the Houses or, failing agreement by that means, by the Parliament Acts. The Lords will not deprive the Commons of the opportunity for "ping-pong" by holding on to the bill until the end of the session.

5. The convention has also been held to cover wrecking amendments which destroy or alter beyond recognition a manifesto bill or manifesto provision within a bill. The House of Lords does not have a definition of a "wrecking" amendment, and the concept does not appear in the *Companion to the Standing Orders*. However, an amendment which negates the principle of the bill agreed at second reading would be contrary to the practice of the House.

6. The convention does not:

- (a) prevent amendments to manifesto bills with a view to improving them or making them more workable;
- (b) extend to any bill which has not been in the government party's manifesto at the last election;
- (c) extend to parts of manifesto bills which relate to non-manifesto issues; and
- (d) extend to bills where the policy content differs from the intentions expressed in the manifesto in respect of that policy.

Secondary Legislation

7. In the second half of the 20th century there was a loose convention that the Lords would not vote down statutory instruments (whether affirmative or negative). The reason for this was the fact that rejection of a statutory instrument by the Lords could not be undone by the Commons. The two Houses have equal powers and the Parliament Acts do not apply. However this convention was breached in 1968 when the Lords voted down the Southern Rhodesia (United Nations Sanctions) Order; and on 20 October 1994 the Lords asserted its right to ignore the convention by passing the motion “That this House affirms its unfettered freedom to vote on any subordinate legislation submitted to its consideration”. In 2000 the Lords rejected both an affirmative and a negative instrument relating to the Greater London Authority (see paragraphs 39–41).

8. It is normal now, but not invariable, for opposition to statutory instruments to take the form of non-fatal motions such as the amendment by Lord Thomas of Gresford on 15 February 2006 to add to the motion approving an Order “but this House regrets that the safeguards against misuse of the powers conferred by the Act are inadequate given the need for compliance with the obligations of the Human Rights Act 1998” (Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006). But there is no generally accepted convention restricting the powers of the Lords on secondary legislation.

Reasonable Time

9. The existence of the “reasonable time” convention was noted in 2000 by the Royal Commission¹ and reiterated in 2002 by the Joint Committee on House of Lords Reform.²

10. The convention is that the Lords considers Government Bills in reasonable time. There is no tradition of filibustering, and self-regulation encourages orderly progress on all bills. Timetables for Government bills are regularly agreed through the usual channels. But what is “reasonable time”? The chief factor in deciding this is the convention already mentioned in paragraph 4, that the Lords will return (or send) Government bills to the Commons, and will do so in sufficient time for the bills to be considered there.

11. It is noteworthy that the unusual decision of the Lords to delay the passage of the Constitutional Reform Bill [HL] in 2004 by referring it to a Select Committee was accompanied by an agreement to carry it over into the next session so that the Commons would not be prevented from debating it.

12. The *Companion to the Standing Orders* lays down minimum intervals to be observed between the stages of bills. These were adopted in the 1970s and are accepted by all parties as an indication of what is a reasonable timetable. When more prolonged timetables are adopted, this may be because time is needed by the Government to decide policy changes or to draft difficult amendments, or it may be at the request of the opposition parties. The recent trend to commit bills to a Grand Committee has also increased the number of days required to finish Committee stage, because daily sittings are shorter.

13. Although the Labour Party manifesto in 2005 proposed a ceiling of 60 sitting days for Lords’ consideration (a proposal which had its origins in the White Paper on Lords Reform in 1968³) it is not self-evident that 60 days and “reasonable time” are synonymous. The average time for Government bills to pass the Lords from the beginning of this session to 25 May has been 61 sitting days; 13 have taken longer than 60 days without any suggestion that this was unreasonable. The Fraud Bill [HL], for instance, took 122 days because it suited all parties.

Exchange of Amendments (Ping-Pong)

14. The Parliament Acts establish the relative powers of the two Houses in the legislative process; and the extent of the limitations on the House of Lords’ legislative powers made by these Acts has been confirmed by the recent judgment of the Law Lords in relation to the Hunting Act.⁴

15. Apart from the Parliament Acts, the procedures for reaching agreement on legislation, and the consequences of failure to reach agreement, are governed by custom and practice, rather than by Standing Orders in either House. The procedures are described in *Erskine May* and the *Companion to the Standing Orders*.

16. The timetabling of the final stages of legislation, after a bill is returned to the first House by the second House, is a matter for negotiation between the Usual Channels. It is difficult to identify any firm conventions on timetabling, but paragraphs 63–4 give a summary of proceedings on some of the more contentious bills in recent years. They indicate that the number of exchanges between the two Houses on individual bills is

¹ *A House for the Future*, Royal Commission on the Reform of the House of Lords (January, 2000; Cm 4534), paragraph 4.20.

² First Report (December 2002, HL Paper 17), paragraph 12; and Second Report (May 2003, HL Paper 97), paragraph 15.

³ The White Paper (Cmnd 3799), which the Lords accepted, said that “The House of Lords would have a period of 60 parliamentary days in which to consider a bill” (paragraph 53). After this period, the provisions of a revised Parliament Act would bite.

⁴ *Jackson and Others (Appellants) v Her Majesty’s Attorney General (Respondent)* [2005] UKHL 56.

tending to rise (three bills have gone through five complete rounds of exchanges since session 2003–04—see Annex 4), and that the timetable for these exchanges is becoming more compressed, with many stages in both Houses being taken “forthwith”, rather than following one or more days’ notice.

17. In order to keep the exchanges going, it becomes necessary for one House or the other to offer compromise amendments. If this were not done, the bill could be lost (see “double insistence”, paragraphs 60–62 below). In some cases, the amendments offered “in lieu” have been criticised for being insubstantial.

18. This is an area of parliamentary practice where the two Houses’ procedures must interact very closely, and it is probable that any codification in the Lords could have an effect on procedures in the House of Commons.

Financial Privilege

19. The financial powers of the Lords are restricted in respect of bills of aids and supplies by the ancient rights and privileges of the House of Commons asserted in Resolutions of 1671 and 1678, and in respect of money bills by the Parliament Act 1911. Neither of these restrictions is based on convention. But the Committee may want to consider to what extent the practice of the Lords in respect of Commons privilege reasons (see paragraphs 69–72) constitutes a convention falling within its remit.

The Practicality of Codifying Conventions

20. Codification of a convention could take one of two forms:

- (1) setting down an agreed understanding of a convention; or
- (2) replacing a convention by a written substitute which would no longer be of the nature of a convention.

These two approaches are discussed below (see paragraphs 73–85). Both were also discussed in section 8 of the Report made in July 2004 by a group of Labour peers chaired by Lord Hunt of Kings Heath (see Annex 2).

PART II

THE SALISBURY/ADDISON CONVENTION

The Convention itself

21. The Salisbury Convention stems from the code of behaviour proposed by the Leader of the Conservative Opposition in the Lords (Viscount Cranborne, and from 1947 Marquess of Salisbury) in respect of the Labour Government’s legislative programme in 1945. Viscount Cranborne set out this approach in the debate on the King’s speech in August 1945:

“Whatever our personal views, we should frankly recognize that these proposals were put before the country at the recent General Election and that the people of this country, with full knowledge of these proposals, returned the Labour Party to power. The Government may, therefore, I think, fairly claim that they have a mandate to introduce these proposals. I believe that it would be constitutionally wrong, when the country has so recently expressed its view, for this House to oppose proposals which have been definitely put before the electorate.” (HL Deb 16 August 1945, col 47)

22. But this restraint did not extend to the detail nor to non-manifesto bills. As the Marquess of Salisbury reminisced in 1964:

“Because of the large Labour majority in the Commons in 1945, it was therefore possible for us who belonged to the opposition to make it our broad guiding rule that what had been on the Labour Party programme at the preceding General Election should be regarded as having been approved by the British people. Therefore . . . we passed all the nationalisation Bills, although we cordially disliked them, on the second reading and did our best to improve them and make them more workable at committee stage. Where, however, measures were introduced which had not been in the Labour Party Manifesto at the preceding Election, we reserved full liberty of action.” (HL Deb 4 November 1964, col 66)

23. The nub of the Opposition’s approach was that they would not oppose at second or third reading a bill which implemented a manifesto commitment, but they would amend the detail and return the bill to the Commons.

24. Lord Carrington, observer at first hand of the way in which this restraint was applied, described the convention as applying to any wrecking amendment to a manifesto measure:

“Cranborne had to allow some robust words and tactics, but still retain sufficient control to prevent the passing by the Opposition of ‘wrecking’ amendments—as opposed to those which could perhaps draw a good deal of the poison from a Bill without seeming to destroy it utterly.

There was, of course, argument about what constituted a wrecking amendment and what did not: but, by and large, the Salisbury strategy worked and the Salisbury convention—of no wrecking amendments—was observed. To this day the convention continues . . . Later in life I applied the same convention myself.” (*Reflections on Things Past: The Memoirs of Lord Carrington* (1988) pp 77–78)

25. The current Leader of the Opposition in the Lords has stated that the restraint exercised in respect of manifesto bills extended to the tabling of wrecking amendments to core manifesto items. (HL Deb 24 January 2001, cols 294–295). In the same debate, the present Marquess of Salisbury (then Viscount Cranborne) summarised his grandfather’s convention: “The convention says that the House will not vote at Second Reading against a manifesto bill or pass a wrecking amendment during the remaining stages. After consultation with the Learned Clerks, I understand that, in the final analysis, it is for this House to determine what constitutes a wrecking amendment.” (Col 272)

26. It is generally acknowledged that the practice of not opposing at second or third reading a manifesto bill has been observed since 1945. Observance of that limb of the convention which includes wrecking amendments has for the most part, but arguably not entirely consistently, been observed. Thus for example in 1976 the Opposition did not support an amendment to leave out the aircraft industry from the Aircraft and Shipbuilding Industries Bill, but they did support an amendment to leave out ship-repairing. Both had been manifesto commitments. Recent examples of possible “wrecking” amendments (to the two Criminal Justice (Mode of Trial) Bills in 2000, Sexual Offences Bill in 1998–99, and Civil Partnership Bill 2004–05) were not in respect of manifesto bills.

Continued Validity

27. The Salisbury Convention began its life as a code of behaviour for the Conservative Party in the House of Lords during the post-war Labour government. It constrained that party from using its overwhelming majority in the House to frustrate the government’s key legislative proposals while allowing freedom of manoeuvre on the detail and on non-manifesto items. The fact that it came to be viewed as a convention is a measure of its attractiveness to the House, before the advent of life peers and the eventual departure of most hereditary peers began to even up the numbers. By voluntarily choosing not to exercise full freedom of action in respect of manifesto items, an unreformed House retained considerable scope for action elsewhere. In particular, it avoided constitutional conflict during periods of Labour government.

28. It could be argued that the fact that no single party any longer has an absolute majority in the House has now rendered the Convention obsolete. Indeed the Liberal Democrats in the House of Lords—who were not party to the original understanding in 1945 anyway—have declared that they no longer consider it valid (HL Deb 23 May 2005, col 273). (The understanding did not extend to cross-bench peers who did not exist as a recognisable group in 1945.) But others have held that the convention remains valid notwithstanding any alteration in the composition of the House because it is founded on the principle of electoral mandate which in turn reflects the supremacy of the House of Commons as the embodiment of that mandate.

29. The Royal Commission on Reform of the House of Lords took the latter view and recommended:

“Recommendation 7: The principles underlying the ‘Salisbury Convention’ remain valid and should be maintained. A version of the ‘mandate’ doctrine should continue to be observed: where the electorate has chosen a party to form a Government, the elements of that party’s general election manifesto should be respected by the second chamber. More generally, the second chamber should be cautious about challenging the clearly expressed views of the House of Commons on any public policy issue. It is not possible to reduce this to a simple formula, particularly one based on manifesto commitments. The second chamber should pragmatically work out a new convention reflecting these principles.”

30. In its 2nd Report the Joint Committee on House of Lords Reform (HL Paper 97, 2002–03) echoed the Royal Commission when it commented:

“A reformed House might look upon its relations with the Commons with a fresh, more assertive stance. We therefore consider that the manner of maintaining these conventions requires careful attention and could form one part of the continuing programme of reform.”

31. The Joint Committee may wish to consider whether the convention, originally a code of conduct for an overwhelmingly large and hereditary Conservative opposition, remains valid for a House which is composed differently both in basis of membership and party balance. It may also wish to consider how the manifesto mandate would apply in a hung Parliament, in which a coalition Government was elected on the basis of more than one manifesto.

Nations and regions

32. In the debate on the motion to establish the Joint Committee the question arose whether the convention applied to commitments made in party manifestos prepared and published for the electorate in one of the nations or regions eg Wales. Are undertakings of this kind, published and discussed at local level, manifesto commitments which give any UK legislation in fulfilment of those undertakings the protection

of the Salisbury Convention, bearing in mind that most UK legislators will not have read those manifestos? It is unclear whether the convention applies to a commitment made in a manifesto published at regional level.

Election of members

33. If the members of the House of Lords continue to be appointed and in a way which continues to ensure that no government of whatever political colour will enjoy a majority, the convention can be maintained because the argument of the supremacy of the popular mandate will still apply. The introduction of an elected element would undermine this as the House could begin to claim an electoral mandate. It can be argued that the greater the proportion of elected members the stronger the mandate. If the Lords were elected by a proportional system they might even claim a superior mandate.

34. It might still be possible to claim that for the purposes of the convention it is the manifesto programme which is mandated, not the claim of legitimacy of either or both Houses to act upon it. But this distinction may be a hard one to make. Thus the number of elected members and the mode of election may be crucial for the survival of the convention. For example the preservation of an appointed element in the Lords and a system of staggered elections for the remainder so that only a minority of membership is elected at any General Election is one way of protecting the convention. There may be others. All in all it is likely to be difficult to ensure that any definition of the convention now would survive a significant change in the composition of the Lords.

Manifesto issues

35. The Salisbury Convention may have been adhered to since 1945, but a self-denying ordinance based on the contents of a political party's general election manifesto is not ideal. As the Royal Commission said:

“... there are substantial theoretical and practical obstacles to putting any formal weight on manifesto commitments. Only a tiny minority of the electorate ever reads party manifestos; and as it is most unlikely that any voter will agree with every sentence of any manifesto, it is rarely possible to interpret a general election result as evidence of clear public support for any specific policy. In any event, manifestos are political documents, not legal texts, and proposed legislation designed to implement political commitments will usually be far more detailed than, and therefore different from, what was in the manifesto.”

36. On the whole, manifestos are neither detailed nor comprehensive statements of intent for the coming parliament. Much of an administration's eventual legislative programme will simply not be covered. If the convention is to be codified, some greater clarity may be needed either in the limits of the convention or in the detail of the manifesto.

SECONDARY LEGISLATION

37. Neither the Parliament Act 1911 nor the Parliament Act 1949 makes provision about secondary legislation. The Statutory Instruments Act 1946 makes provision about the laying of affirmative and negative instruments, but it is each delegating Act which specifies the parliamentary procedure to which the delegation is subject. There are in short, four levels of procedure, with both Houses given identical power:

- (i) no proceedings at all (ie the instrument is made without being laid before the House);
- (ii) the instrument must be laid but no parliamentary action on it can affect its status;
- (iii) the instrument must be laid but may be annulled by resolution within 40 days; and
- (iv) a draft of the instrument must be laid before and approved by the House before it may be made by the Minister.⁵

Most delegations are subject to one of these procedures but certain Acts making specific delegations make different provision to suit their circumstances. Some instruments are subject by their parent Act to proceedings in the Commons only, such as those dealing only with taxation.

38. Parliament has made explicit statutory provision about the powers of the two Houses in relation to secondary legislation: their powers are identical. There is a specific mechanism to reject negative instruments, and affirmative instruments require consent before they may be made. The late Earl Russell, referring to these powers in 1994, said “the right to consent must include the right to dissent”.⁶

⁵ The Act also provides further, less common, variations on these procedures: all are described in *Craies on Legislation*, Greenberg (Ed), 2004, chapter 6.

⁶ HL Deb 20 October 1994, cols 379–80.

Erskine May and the Companion

39. The statutory provision on the powers of the House is supplemented by statements of practice in *Erskine May*⁷ and the *Companion*. The *Companion* states:

The Parliament Acts do not apply to delegated legislation. So delegated legislation rejected by the Lords cannot have effect even if the Commons have approved it. Neither House of Parliament has the power to amend delegated legislation. The House of Lords has only occasionally rejected delegated legislation. The House has resolved “That this House affirms its unfettered freedom to vote on any subordinate legislation submitted for its consideration”. Delegated legislation may be debated in Grand Committee, but must return to the floor of the House if a formal decision is required.⁸

The “unfettered freedom” resolution was agreed to without a division on a motion moved by Lord Simon of Glaisdale on 20 October 1994.⁹ Although agreeing with the terms of the motion, both Conservative and Labour front benches spoke on that occasion of the restraint which the House needed to show when exercising the freedom.

Divisions

40. As well as looking to the *Companion*, the past behaviour of the House may be helpful in trying to define a convention. Until 1955, no division took place on a motion relating to a statutory instrument. Between 1955 and the end of the 1998–99 session (in which the House of Lords Act 1999 was passed) there were 71 divisions on statutory instruments. Of these 71, the Government of the day lost one of the 42 votes on fatal motions and nine of the 29 votes on non-fatal motions. From the reform of the House in 1999 to the end of session 2004–05, there were 26 divisions on 24 items of secondary legislation. Of these 26, the Government lost two of the 11 votes on fatal motions and five of the 15 votes on non-fatal motions. (The annual number of divisions on fatal and non-fatal motions is set out at Annex 1.) Throughout both of these periods, many more motions critical of Statutory Instruments were moved and withdrawn than were divided upon.

Rejection of secondary legislation

41. The items of secondary legislation rejected by the House are as follows. The House has rejected two motions to approve affirmative instruments:

- Southern Rhodesia (United Nations Sanctions) Order 1968.¹⁰
- Greater London Authority (Election Expenses) Order 2000.¹¹

The House has agreed to a prayer to annul a negative instrument:

- Greater London Authority Elections Rules 2000.¹²

In addition, following adverse reports from the Delegated Powers and Regulatory Reform Committee and its Commons counterpart, the following proposal for a draft regulatory reform order was not proceeded with:

- proposal for the draft Regulatory Reform (Registration of Births and Deaths) (England and Wales) Order 2004.¹³

Motions on the order paper

42. Given the reluctance of the House to vote to reject secondary legislation, the House has devised motions to express criticism without challenging the instrument directly (“non-fatal” motions), such as that moved recently by Lord Thomas of Gresford to add to the motion approving an order “but this House regrets that the safeguards against misuse of the powers conferred by the Act are inadequate given the need for compliance with the obligations of the Human Rights Act 1998”.¹⁴ In January 1991 the Procedure Committee considered the use of non-fatal motions (which had until then attracted criticism¹⁵) and its conclusions are set out in the *Companion*:

There are two ways in which Members of the House can table amendments or motions on a statutory instrument to express criticism without challenging the instrument directly.

First, an amendment or motion may be moved regretting some aspect of a statutory instrument but in no way requiring the government to take action. This provides an opportunity for critical views to appear on the Order Paper and be voted upon which would otherwise simply be voiced

⁷ 2004 (23rd) edition pages 685–6.

⁸ Paragraph 8.02.

⁹ HL Deb 20 October 1994 cols 356–383.

¹⁰ 18 June 1968.

¹¹ 22 February 2000.

¹² 22 February 2000.

¹³ Delegated Powers and Regulatory Reform Committee, 3rd Report (2004–05).

¹⁴ Prevention of Terrorism Act 2005 (Continuance in force of sections 1–9) Order 2006, taken in the House on 15 February 2006.

¹⁵ Eg HL Deb 24 July 1990 cols 1396–1404.

in the debate. Such motions are invitations to the House to put on record a particular point of view. Even if carried, the motion or amendment has no practical effect: the House passes the instrument in any event.

Secondly, a motion or amendment may be moved calling on the government to take some specific action. Such motions have been used to invite the government to amend subordinate legislation, thereby avoiding the need to vote on the legislation itself.

It is usual for such motions to be moved at the same time as the substantive motion on the legislation.¹⁶

The *Companion* does not discourage the tabling of fatal motions: indeed every prayer to annul an instrument, the usual form of motion to debate a negative instrument, is a fatal motion. Fatal motions on secondary legislation are in order if compliant with statute: a prayer to annul a negative instrument (fatal) has to be redrafted into a non-fatal motion to revoke (or other such motion) if taken after the expiry of the 40 days' praying time.

Effect of rejection

43. If the House rejects an item of secondary legislation, the Government may lay a new instrument so long as it is not identical to that rejected.¹⁷ The new instrument must not be identical because the *Companion* states:

It is contrary to the practice of the House for a Question once decided to be put again in the same session.¹⁸

Very similar orders were laid after the defeats in 1968 and 2000, where the second order laid was agreed to without a division.¹⁹ Although the subject of comment in the Chamber as to its propriety, the practice accords with the advice of the Clerks. In addition, if the House rejected such a second or subsequent instrument, the Government could transfer the provision in the instrument to a bill introduced in the Commons, to which the Parliament Acts would then apply, so securing the primacy of the Commons, if after some delay. (The Government have not had to resort to such a mechanism.) The Royal Commission on the reform of the House of Lords agreed with this position, stating that rejection of a statutory instrument "in practice . . . would not trigger a constitutional crisis".²⁰

Existence of a convention

44. The Royal Commission referred to "the convention that the House of Lords does not reject Statutory Instruments".²¹ There is no clear founding authority for any such convention and the statistics on divisions challenge the assertion. It was recently described as an agreement, now abandoned, between the front benches of the two principal parties with neither the back and cross-benches', nor Liberal Democrats', agreement.²² In this respect it must be for the political parties to advise the Committee of their understanding of the position. The *Companion* states the position as: "The House of Lords has only occasionally rejected delegated legislation."²³ The power of the House to reject secondary legislation is one which the House has rarely exercised, not one which it does not exercise.

Possible consequence of change

45. The House has, since setting up the Delegated Powers Committee in 1992, devoted increasing attention and resources to the scrutiny of delegations and their exercise. When the House considers the delegations in each bill, it does so in the context of the power and ability of the House to scrutinise and control the exercise of the delegation. The potential of the House to reject, but not amend, secondary legislation is a consideration in this. If the powers of the House were changed, the new powers would be the background to the judgment on the appropriateness of Parliament delegating its authority to legislate. The

¹⁶ paragraphs 8.03–8.06.

¹⁷ When the House rejects a negative instrument, although no question needs to be put on any subsequent instrument, the second instrument would nonetheless be registered under a different title so as to help identification.

¹⁸ Paragraph 4.114.

¹⁹ In the latter case, the Government changed their policy to accord with the view expressed on division by the House, though without needing to amend the order.

²⁰ *A House for the Future*, Report of the Royal Commission on the Reform of the House of Lords, 2000, Cm 4534, paragraph 7.39.

²¹ *A House for the Future*, Report of the Royal Commission on the Reform of the House of Lords, 2000, Cm 4534, paragraph 7.11.

²² Leader of the Opposition, Rt Hon. Lord Strathclyde, *Redefining the Boundaries Between the Two Houses*, Politeia, 30 December 1999, page 9.

²³ paragraph 8.02.

House agreed to the substantial delegation provided in the Deregulation and Contracting Out Act 1994, and the even greater delegation in the Regulatory Reform Act 2001, only after agreement as to the House's right of veto over proposals under the Act. The Procedure Committee's report on the 1994 Act concluded:

It should be open to any Lord to table a motion in respect of the report of the Committee on the draft Order. Such a motion should be placed on the Notice Paper immediately before the Minister's motion to approve the draft Order (this would require amendment of SO 38), and would be amendable; the two motions should be debated together. If the outcome were a resolution of the House to the effect that the Order should not be approved, the motion to approve the Order should not be moved, though without prejudice to the right of the Minister to bring his proposals back before the House in the form of a Bill.²⁴

When reporting on the Regulatory Reform Bill in 2000, the Delegated Powers Committee said:

Paragraph 8 of the Explanatory Notes to the bill states that "on no occasion has a Minister ignored an adverse report from either Committee; the proposed order has always been re-cast or withdrawn accordingly. The Government intends to continue this practice in its use of regulatory reform orders." Clearly this is important and welcome, and a practice that the House may wish to see embodied in an undertaking by the Government. But we attach even more importance to the power of the House to pass a motion hostile to a draft deregulation order. It seems to us implicit from the Government's memorandum that they would expect such a motion to be final.²⁵

As in 2000–01, the Government have pointed to a similar right of veto by a Committee, or either House itself, of draft orders under the Legislative and Regulatory Reform Bill, as a safeguard against inappropriate use of the power proposed to be delegated by that bill.²⁶

46. Likewise, the House has agreed to certain provisions in bills only on the understanding that the right to reject the secondary legislation remains. A recent example is the passage of section 43 of the Criminal Justice Act 2003 (applications by prosecution for certain fraud cases to be conducted without a jury), agreed to only after the bill was amended to provide for that section's commencement by affirmative instrument.²⁷

REASONABLE TIME

Time currently taken for consideration of bills

47. During the current Session, the average time taken for consideration of all public bills has been 61.3 sitting days (from First Reading to Third Reading; "ping-pong" stages are *not* included). The average time taken for Government bills (excluding the Finance Bill, Consolidated Fund and Appropriation Bills) has been 62 days. During the 2003–04 Session, the average for each Government Bill was 57 days; in 2002–03, the average was 48 days. Annex 3 includes tables showing the time taken on non-financial Government bills in each of the three Sessions 2002–03, 2003–04 and 2005–06.

48. The time currently taken to consider bills varies considerably, sometimes for reasons unconnected with the Lords. The Fraud Bill in the current Session, for example, was before the House of Lords for a total of 122 days, but the delay was caused by policy discussions rather than time taken on the floor of the House. Even when bills are considered at some length, it is not always the case that such length might be considered "unreasonable": although the Company Law Reform Bill, with 884 Clauses and 15 Schedules, received a record 13 days consideration in Grand Committee, the Minister, Lord Sainsbury, commended those who took part for achieving "a highly productive and efficient rate of 22 amendments per hour for 52 hours".²⁸ Conversely, certain "emergency" bills have passed rapidly through the Lords, notwithstanding the provision of minimum intervals in the *Companion*.

Minimum time for consideration

49. If the rules on minimum intervals are followed, the shortest period of time in which a bill of any complexity can be considered (assuming one day in Committee and one day on Report) is 26 days. A larger bill, which might be considered for four days in Committee and two days on Report, might take 34 days (see Table 1 for illustrations).

²⁴ Procedure Committee, 2nd Report (1993–94), Annex paragraph (n)(xiv).

²⁵ Delegated Powers Committee, 2nd Report (2000–01), paragraph 15.

²⁶ HC Deb 9 February 2006 col 1059.

²⁷ See, eg, HC Deb 20 November 2003, col 1030.

²⁸ HC Deb, 25 April 2006, col GC100.

Table 1

TIME TAKEN FOR CONSIDERATION OF A BILL

<i>Stage</i>	<i>Minimum interval before next stage</i>	<i>Sitting days—minimum</i>	<i>Sitting days—more consideration</i>
Introduction and 1st reading	two weekends	Day 1	Day 1
2nd reading	14 days	Day 6	Day 6
Committee (day 1)		Day 14	Day 14
Committee (day 2)			Day 16
Committee (day 3)			Day 18
Committee (day 4)	14 days		Day 20
Report (day 1)		Day 22	Day 28
Report (day 2)	three sitting days		Day 30
Third Reading		Day 26	Day 34

The above table is illustrative only and assumes:

- introduction on a Thursday;
- one day Second Reading;
- one day in Committee for the minimum example; four days in Committee for the “more consideration” example (bill not considered on consecutive days);
- one day on report for the minimum example; two days on Report for the “more consideration” example (bill not considered on consecutive days);
- one day Third Reading;
- no recesses; and
- no Friday sittings.

What is “reasonable”?

50. The Labour Peers Working Group on Reform of the Powers, Procedures and Conventions of the House of Lords, chaired by Lord Hunt of Kings Heath, and the Labour party manifesto of 2005, suggested that the “reasonable time” convention could be codified into a rule that consideration in the Lords should take no longer than 60 sitting days. However, a significant number of bills currently take longer than 60 sitting days without there being any suggestion of unreasonable delay.

51. In addition, it is possible to commit a bill to a Select Committee;²⁹ this procedure would almost inevitably result in a bill taking longer than 60 sitting days. Similar considerations apply to the recommitment of bills, in whole or in part. Recommitment allows the House to consider significant new proposals or to reconsider parts of bills which have been significantly amended at an earlier stage.

52. Bills committed to Grand Committee may need a longer overall time to pass through the Lords, as the working day in Grand Committee is shorter than in Committee of the Whole House. But Grand Committees, in spite of their duration, have made it possible for more bills to be considered in Committee and so have made an important and positive contribution to “reasonable time”.

Issues for consideration in connection with codification

53. The following are issues which might arise in considering a codification of the convention on “reasonable time”:

- Should any “reasonable time” convention apply to all bills, or should the time allowed vary according to length and/or complexity?
- Should there be flexibility to allow for the consideration of significant new material inserted by the Government?
- Should any time limit take account of the need for parliamentary committees to report on (eg) Human Rights and Delegated Powers and for the Government to respond to reports of those committees?
- Should bills committed to Grand Committees be subject to different overall time limits to bills committed to a Committee of the Whole House?

²⁹ The Constitutional Reform Bill was committed to a Select Committee on 8 March 2004. The Committee reported on 24 June 2004.

- Should the time allocated for a bill in the House of Commons have an effect on the time allowed for scrutiny in the Lords?
- How would the overall timetable provisions be enforced, and what would be the consequences of failure to meet the timetable (if, for example a stage had to be postponed as a result of the non-availability of a Minister or a key opposition Member?)
- If a firm convention were established, what provision would be needed to relax it in exceptional cases?

“PING-PONG”

Procedural Conventions

54. The exchange of amendments to public legislation between the two Houses of Parliament is based on the premise that both Houses must agree on every word of a bill before it can receive the Royal Assent and become an Act of Parliament. Although this concept is simple, the procedures by which the Houses reach agreement (or not) can be extremely complex.

55. Once a bill has passed through both Houses, a list of amendments made in the second House is compiled, and the bill is returned to the first House seeking its agreement to the amendments.

56. The first House then considers the second House’s amendments. It may either:

- agree to them,
- disagree to them,
- amend them, or
- propose alternatives to them.

57. If it agrees with all of the amendments made by the second House, the bill is ready for Royal Assent. If it does not, it returns the bill to the second House indicating its disagreement, or setting out alternative propositions. These propositions may relate to individual amendments or to “packages” of related amendments.

58. Exchanges between the Houses continue until agreement is reached, or a stalemate occurs, in which case the bill is lost.

59. All of the procedures set out in paragraphs 55–58 are governed by convention rather than Standing Orders of either House. They are described in *Erskine May* (23rd edition pp 630–640).

“Double insistence”

60. A further important convention governs the point at which stalemate is deemed to have been reached, resulting in a bill being lost. This convention, often referred to as “double insistence” is set out in the Companion in these terms:

“If one House insists on an amendment to which the other has disagreed, and the other insists on its disagreement, and neither has offered alternatives, the bill is lost”.

61. This statement is qualified in *Erskine May* (p 639) as follows:

“... there is no binding rule of order which governs these proceedings in either House, and, if there is a desire to save a bill, some variation in proceedings may be devised in order to effect this object.”

62. The convention on double insistence has evolved to take account of “packages” of amendments. If a package of amendments is under consideration, an alternative proposition, by either House, on one of the amendments making up the package will avoid the application of the double insistence rule. So double insistence can only be reached if both Houses insist on their own version of the whole package. This point was clarified in a joint statement by the Clerks of the two Houses in 2004 (HL Deb 21 July 2004, col. WS19), and followed developments in the procedure of the House of Commons (where amendments were first “packaged” at these stages).

Duration and Timetabling of “ping-pong” exchanges

63. Annex 4 sets out in a table all exchanges on Public Bills since 1974–75 where the House of Lords has insisted on its amendments, or has made alternative proposals, on one or more occasions. The table shows, in each case, the number of stages after Third Reading in the second House (“ping-pong stages”). A bill which starts in the Commons has its first ping-pong stage in the Commons (“Commons Consideration of Lords Amendments”). In the case of a Lords starter, the first ping-pong stage is “Lords consideration of Commons amendments”.

64. Annex 5 sets out the timetables for the longest sets of exchanges on bills in the last three Sessions. The intervals between the various ping-pong stages vary widely, from several days to under two hours. The proceedings on the Prevention of Terrorism Bill 2004–05, where nine ping-pong stages took place during a

single sitting spread over two days, were, of course, exceptional, and the other two bills are more typical. It is worth noting that where there is less than a clear day's interval between two ping-pong stages, it is impossible to produce a printed list of amendments and motions for the House to consider. It is necessary for manuscript lists of amendments etc. to be produced and photocopied. Where the interval between ping-pong stages is measured in hours, rather than days, this problem is exacerbated.

COMMONS FINANCIAL PRIVILEGE

Bills of aids and supplies and money bills

65. The financial powers of the House of Lords are limited, first by the ancient "rights and privileges" of the House of Commons, and secondly by the terms of the Parliament Acts 1911 and 1949.

66. The Commons' "rights and privileges" in respect of bills of aids and supplies (such as Consolidated Fund Bills and Finance Bills) were asserted in Commons Resolutions of 1671 and 1678. The supply is granted by the House of Commons and such bills may not be amended by the House of Lords.

67. Under the Parliament Acts, a money bill³⁰ may be presented for Royal Assent, without the consent of the Lords, provided that (a) the bill was passed by the Commons and sent up to the Lords at least one month before the end of a Session, and (b) the bill was not passed by the Lords without amendment within a month after it was sent to them. The Lords may offer amendments to such a bill, provided that the bill is passed within a month, but the Commons are not obliged to consider any Lords amendments.

68. The practice of the House of Lords in respect of bills of aids and supplies and money bills is, therefore, not based on convention. In the case of bills of aids and supplies it is based on firmly established constitutional principles, enshrined in the Resolutions of the Commons. In the case of money bills, the practice of the House is constrained by statute law.

Commons financial privilege in respect of other bills

69. The Lords may, however, offer amendments to Commons bills (other than bills of aids and supplies or money bills) which, when they come to be considered by the Commons, may be deemed by them to infringe their financial privilege.

70. The Commons may waive their privilege, but, if they disagree to a Lords amendment on the ground of financial privilege alone, they attach a "privilege reason" for disagreeing to the amendment. This will state that the amendment involves a charge upon public funds, or a charge by way of national or local taxation, or that the amendment alters in some way financial arrangements made by the Commons. The reason concludes by saying "and the Commons do not offer any further reason, trusting that the reason given may be sufficient". In such cases, the Lords do not insist on their amendment,³¹ but they may offer amendments in lieu if they wish.

71. The practice of the Lords in relation to privilege reasons is well-established, and is codified in the Companion to Standing Orders. In recent years, there have been several examples of the Lords sending bills back to the Commons with amendments in lieu of earlier Lords amendments which have been disagreed to on grounds of privilege. In Session 2003–04, this happened on three bills:

- On the Hunting Bill, there was disagreement between the two Houses on the substance of the bill. A large package of Lords amendments was disagreed to by the Commons, and some of the amendments within the package were disagreed to on grounds of privilege. These amendments were altered in minor ways, although the other amendments making up the package were insisted upon. The mover of the amendments made it clear that the alterations were made to avoid breaching the convention about privilege amendments.
- On the Armed Forces (Pensions and Compensation) Bill, an amendment was disagreed to by the Commons on grounds of privilege. A modified version was then sent back by the Lords, which in turn attracted a privilege reason. The reason was debated in the Lords, but no further amendment in lieu was proposed by the Lords.
- On the Pensions Bill, an amendment was disagreed to by the Commons on grounds of privilege. A slightly modified version of the amendment was then sent back by the Lords. This in turn attracted a privilege reason. A further amendment was tabled in the Lords, with another slight modification. This was disagreed to on a division.

³⁰ A "money bill" is defined by the 1911 Act as a bill endorsed with the signed certificate of the Speaker of the House of Commons that it is a bill which, in his opinion, contains only provisions dealing with national (but not local) taxation, public money or loans for their management. The Speaker's certificate is conclusive for all purposes.

³¹ The last occasion on which the Lords insisted on an amendment to a bill in the face of a privilege reason was in 1931.

72. It is for the Commons, not the Lords, to decide whether a Lords amendment infringes Commons financial privilege. However, Members of the Lords who seek to table amendments which would obviously infringe financial privilege are advised by the Public Bill Office accordingly and encouraged not to proceed. This practice is consistent with the invariable practice of the House in inserting a “privilege amendment” in any bill starting in the Lords which otherwise would infringe Commons financial privilege.

PART III

THE PRACTICALITY OF CODIFYING CONVENTIONS

Setting down an agreed understanding of a convention

73. The idea of codifying a convention, in the sense of setting down an authoritative form of words, while retaining its status as a convention, might be regarded as self-contradictory. There are, however, already examples in the House of Lords, where several conventions are set out explicitly in the Companion to the Standing Orders. The main ones—explicitly described as conventions—are as follows:

“It is a firm convention that the House normally rises by about 10 p.m. on Mondays to Wednesdays and by about 7 p.m. on Thursdays.” (Paragraph 3.01)

“By convention, Consolidated Fund Bills and Appropriation Bills are not printed for the Lords, nor are provisional order confirmation bills unless subsequently amended on consideration on report.” (Paragraph 6.19)

“By convention, Members of the House who are not Lords of Appeal take no part in judicial proceedings.” (Paragraph 10.11)

74. The text of the Companion is approved by the Procedure Committee, which has a majority of backbenchers but also includes the Leaders and Chief Whips, so these three descriptions of conventions may be regarded as supported by all sides of the House. They do not however reflect any specific decisions to codify existing conventions. The second and third conventions listed are so well established that there is no argument about their content or their observance. The first convention was explicitly introduced in 2002 pursuant to the following recommendation of the Procedure Committee, which arose out of a report by a group of peers set up by the Leader of the House:

“21. Group recommendation (h) proposed that a Standing Order should be drafted to ensure that the House should not begin new business after 10pm on Mondays to Wednesdays or after 7pm on Thursdays (and presumably Fridays). The Procedure Committee does not endorse this recommendation because a Standing Order would not allow enough flexibility. We recommend instead that it should become a firm convention of the House, underpinned by guidance inserted into the Companion to Standing Orders, that the House normally rises by about 10pm on Mondays to Wednesdays.”³²

75. In practice the House has, since the adoption of the new “firm convention” at the start of the 2002–03 session, risen after 11 p.m. on 53 occasions. So the recording of the terms of a convention in an agreed form may have introduced clarity as to the nature of the convention (though the inclusion of the word “normally” leaves room for argument as to its exact meaning) but may be considered not to have ensured its observance. Ironically, the inclusion of the word “firm” may, by conceding that a convention may not be hard-and-fast, have weakened rather than strengthened it.

The Australian experience

76. Following the dismissal of the Australian government by the Governor-General in 1975, much thought was given to the codification of constitutional conventions in Australia. A Constitutional Convention of politicians, originally set up in 1973 to consider, and build bipartisan support for, amendments to the constitution, met in 1983 to “recognise and declare that the following practices should be observed as conventions in Australia”. A brief description of the Australian experience may be helpful to the Joint Committee.³³

77. The Australian Constitutional Convention commissioned opinions from academics and practitioners on what the conventions were, and in the light of that work there was drafted a set of 34 practices to be “recognised and declared”. The draft was discussed by the Convention. None of the practices concerned the relationship between the two Houses of the Australian Parliament. Most related to the role and powers of the Governor-General and Prime Minister. Twenty-four were agreed without a vote, two were agreed by a

³² 5th report from the Procedure Committee, session 2001–02, made on 10 July 2002 and agreed to by the House on 24 July 2002.

³³ The account which follows is based on articles by C.J.G. Sampford “Recognize and declare”: an Australian experiment in codifying constitutional conventions (*Oxford Journal of Legal Studies*, Vol. 7 No. 3 pages 369–420), and by Charles Sampford and David Wood *Codification of constitutional conventions in Australia* (Public Law 1987 pages 231–44).

majority, and eight were referred back for further consideration. A revised list of 18 practices was considered and adopted by the Convention in 1985. Sampford and Wood commented as follows on the work of the 1985 session of the Convention:³⁴

“Given the shaky support that some conventions had received in 1983, more consideration was given to the appropriate criteria for recognition and declaration. The Standing Committee [of the Convention] generally required clear supporting precedents and the likelihood of broad political agreement. Nonetheless, where general agreement was anticipated, some practices without clear precedent were recommended (although the committee were wise not to specify too precisely which conventions they considered new). Some of the most interesting innovations and/or new interpretations involved attempts to narrow the Governor-General’s discretion and to shift responsibility under conventions from the Governor-General to the Prime Minister. Prime Ministers defeated in the House or at elections should advise the Governor-General, such advice to be published and almost always followed. Where the Prime Minister is defeated in the House and an alternative government possible, the Prime Minister should advise the commissioning of a new government rather than the calling of a new election. However, as agreement had been impossible on the Governor-General’s powers, no conventions were produced in regard to them. When the Constitutional Convention met again, this failure was specifically noted in an amendment to the resolution adopting the conventions.”

78. The evidence of the Australian experiment suggests that codification can work where there is general cross-party agreement. But it may be of limited applicability to the conventions being considered by the Joint Committee. The Australian conventions which were agreed were generally ones constraining the behaviour of one person, the Prime Minister or the Governor-General. Conventions constraining the behaviour of the House of Lords as a whole do not rely on any one person to ensure their observance, which creates difficulties both in settling their exact nature and in ensuring their observance. There is no difficulty with long-established conventions such as the one that Members of the House who are not Lords of Appeal take no part in judicial proceedings, but conventions in relation to legislation and delegated legislation are not of that nature. Indeed, at the time when the Opposition front benches recognised an obligation not to try to defeat an affirmative instrument, there were sometimes divisions pressed by backbenchers. The independence of backbench and Crossbench Members is perhaps demonstrated by the fact that the proposal to set up this Joint Committee, though agreed through the usual channels, was opposed in a division by 95 Members.

79. A particular difficulty in codifying legislative conventions in the House of Lords relates to identifying the people who should be bound by them. It is unlikely to be possible to codify these conventions in a useful way if the obligation is placed simply on the House as a whole. The success of the Salisbury/Addison convention over many years may be thought to reflect the fact that it imposed an obligation on the Leader of the Opposition, who was in a position to deliver on it. By contrast there is no clarity as to who in particular is bound by the “firm convention” that the House should normally rise by 10 p.m.³⁵ Any attempt to codify the length of time which the House could spend on considering a Government bill would face the difficulty that it is for the Lord in charge of a bill to propose a date for the next stage, and in practice there are sometimes long gaps, either because of pressure of other business or because a bill is not ready for its next stage.³⁶

80. The Hunt Report proposed that the Salisbury/Addison Convention should be the subject of “an agreement on the convention to be reached by all major groups in the House which would then approve the agreement by resolution. This agreement would commit the Lords to Salisbury/Addison. If successful, such agreement would become part of the Companion to the Standing Orders of the Lords.” This would certainly be workable but it is unclear what would be achieved. Particularly if there were a subsequent change in the composition of the Lords, it may be doubted whether all Members (especially those appointed or elected by some new means) would feel bound by it.

Replacing a convention by a written substitute

81. The second approach to codification involves replacing a convention by a written substitute which would no longer be of the nature of a convention. In the context of the House of Lords the two main devices which could be used are Standing Orders³⁷ and legislation. Both of these are entirely practical,³⁸ but might have unexpected or undesirable consequences, and might not yield the intended result.

³⁴ *Loc cit*, pages 234–5.

³⁵ Difficulties can arise when an unexpectedly large number of Members wish to speak in a Second Reading debate (which could be time-limited but customarily is not), or when multiple ministerial statements are made. But there have also been very late sittings as a result of the agreement of the usual channels to continue a Committee or report stage until a particular point in the bill is reached.

³⁶ Lord Cope of Berkeley gave some examples in the debate on the motion to establish this Joint Committee: *HL Hansard*, 25 April 2006, column 76.

³⁷ The Standing Orders of the House of Lords are very far from a complete procedural code, and often changes of practice and procedure are made by means of decisions of the House which are not embodied in Standing Orders. But Standing Orders are normally the means of giving effect to decisions where a degree of formality is required (for example the main provisions which will govern the election of a Lord Speaker) and would be appropriate if conventions were to be codified in what was intended to be a binding way.

³⁸ A proviso is that legislative time would need to be found for any statutory codification.

82. Because conventions are unwritten, and reflect a generally accepted understanding of how the constitution should operate, there is normally little room for legalistic interpretation of their meaning. That would change in relation to any convention which was codified in an enforceable way, and there would immediately need to be much more clarity of drafting than hitherto. The Salisbury/Addison Convention provides an example. Where it has given rise to differences is in relation to dispute about particular provisions in Government bills, and whether or not the Government had a mandate for those provisions. But these disputes have not weakened the application of the Convention in other cases—there is no question of the Opposition dividing on the Second Reading of a mandated bill—so the penumbra of uncertainty has been acceptable. It would not, however, be acceptable in a Standing Order, still less in a statute.

83. For reasons similar to these, the Hunt Report rejected this approach to the Salisbury/Addison Convention in favour of their recommendation described above.

84. In relation to the rejection of delegated legislation, the enactment of legislation would amount to the abandonment of any conventions in favour of a more restricted set of powers for the House of Lords. Since the exercise of those powers would perhaps not be seen as being subject to any restraint, the reduction in power might need to be quite significant if frequent clashes between the two Houses were to be avoided.³⁹

85. The use of legislation, rather than Standing Orders, could introduce a new dimension in the form of possible intervention by the courts. Historically the courts in England and Wales have been wary of intervening in the internal workings of Parliament, and the introduction of any such role might be uncomfortable for both sides. The fact that the basic processes of legislation—such as the three readings of a bill—are nowhere formally codified means that it could be technically quite difficult to draft an enforceable statute codifying legislative conventions.⁴⁰ A possible further practical disadvantage is that proceedings on a bill could be affected by concurrent litigation. The Committee may therefore wish to consider the legislative route only where it confers a practical benefit which codification through Standing Orders would not.⁴¹

Annex 1

NUMBER OF DIVISIONS ON SECONDARY LEGISLATION

<i>Year</i>	<i>Fatal motion</i>	<i>Non-fatal motion</i>
1955	●	
1956		
1957		
1958	●	
1959		
1960		
1961		
1962		
1963	●	●
1964		
1965	●●	
1966	●●	
1967	●●	
1968	●	
1969	●	
1970		
1971		
1972	●	
1973	●●	●●
1974		
1975		
1976		
1977	●	●●
1978	●	●
1979	●●●●	
1980	●●●●●●●●	

³⁹ The Parliament Act 1911 allows the House of Lords one month to pass money bills. In recent years Consolidated Fund Bills have often reached the House of Lords less than one month before they are needed, and there would have been significant consequences if the House had used its full formal power of delay.

⁴⁰ The Parliament Act 1911 did something similar, but in a way which has not normally created opportunities for intervention by the courts.

⁴¹ In particular, a reformed House could unilaterally repeal a codification of a convention which was enshrined only in Standing Orders.

<i>Year</i>	<i>Fatal motion</i>	<i>Non-fatal motion</i>
1981	●	
1982	●●	
1983		●
1984		●
1985		●●
1986		●●
1987		
1988		
1989		
1990		●
1991		●
1992	●	●
1993	●●●	
1994	●●	●●●
1995	●●●●	●●●●●
1996	●●●●●●●	●●●
1997	●	
1998	●	●
1999		
2000	●●	
2001	●●●●●	●●●
2002		●
2003	●●	●●●●●●●
2004	●●	●●●
2005 (to end of session)		●

Annex 2

EXTRACT FROM THE REPORT ON REFORM OF THE POWERS, PROCEDURES AND CONVENTIONS OF THE HOUSE OF LORDS BY THE LABOUR PEERS GROUP (CHAired BY LORD HUNT OF KINGS HEATH), JULY 2004

8. CODIFICATION OF THE CONVENTIONS

If clear understanding of the Parliament Acts is important, the same is true of the conventions which play such a key part in guiding and defining the Lords relationship with the House of Commons.

Is Codification Required?

Earlier in this paper, we argued that the growing assertiveness of the current House, and the likelihood of further reform of its composition, demanded more clarification of the appropriate powers of the Second Chamber, including the current conventions.

The most important of these conventions is known as the Salisbury/Addison Convention. Its practical effect is that the Lords will not assert its right to vote against a manifesto bill at Second or Third Reading or pass a wrecking amendment. The Salisbury/Addison convention is partnered by a second convention, which says that the Government is entitled to have its business considered without unreasonable delay.

These conventions are so important, that there ought not to be any doubt or ambiguity as to their application in all circumstances. Interestingly, the present Marquess of Salisbury, when Leader of the House (as Viscount Cranborne) argued that the Salisbury/Addison Convention has been raised in the language of politics into a constitutional convention. He said:

“That means that it is definitely part of our constitution” (The Politeia Anniversary Lecture—4 December 1996)

He then spoke about how a reformed House might choose to renounce the convention:

“After all, by definition a reformed House of Lords would take power and authority from the House of Commons, and, as I said a moment ago, being tempted to use it, might succumb to temptation.”

Legislation or Party Agreement

We have considered two ways of formalising the Salisbury/Addison Convention. One is full entrenchment through legislation. This would be consistent with our desire to ensure that the powers of the Lords are clearly understood. However, the drafting of such legislation would present challenges with the possibility of legal disputes over interpretation of party manifestos.

We therefore recommend a method of embedding the convention short of legislation. This is for an agreement on the convention to be reached by all major groups in the House which would then approve the agreement by resolution. This agreement would commit the Lords to Salisbury/Addison. If successful, such agreement would become part of the Companion to the Standing Orders of the Lords. This course would avoid the risk of disputes over interpretation of party manifestos being decided by the judiciary. However, if this latter method proved unworkable, the legislative option would have to be seriously reconsidered.

Other Conventions Requiring Legislation

On the other conventions, our recommendations would bring clarity as follows:

Legislation to be considered in reasonable time—Proposals made to time-limit bills in the Lords (see earlier section on Parliament Acts)

Secondary legislation—Proposals to substitute a delaying power for the current veto (see later section on secondary legislation)

Annex 3**TIME TAKEN ON GOVERNMENT BILLS****GOVERNMENT BILLS—SESSION 2002–03**

<i>Bill</i>	<i>First Reading</i>	<i>Third Reading</i>	<i>Sitting Days</i>
Anti-Social Behaviour	24 June 2003	12 November 2003	54
Arms Control and Disarmament (Inspections)	14 November 2002	30 January 2003	36
Communications	5 March 2003	8 July 2003	69
Community Care (Delayed Discharges etc)	16 January 2003	17 March 2003	37
Courts	28 November 2002	19 May 2003	86
Crime (International Co-operation)	19 November 2002	17 March 2003	62
Criminal Justice	21 May 2003	17 November 2003	75
Electricity (Miscellaneous Provisions)	6 February 2003	10 April 2003	41
European Parliament (Representation)	4 February 2003	7 April 2003	40
European Union (Accessions)	5 June 2003	4 November 2003	61
Extradition	26 March 2003	12 November 2003	98
Fire Services	4 June 2003	3 November 2003	61
Health (Wales)	9 January 2003	25 March 2003	46
Health and Social Care (Community Health and Standards)	9 July 2003	18 November 2003	47
Income Tax (Earnings and Pensions)	12 February 2003	25 February 2003	8
Industrial Development (Financial Assistance)	8 April 2003	6 May 2003	8
Licensing	14 November 2002	11 March 2003	60
Local Government	11 March 2003	10 September 2003	76
National Minimum Wage (Enforcement Notices)	21 November 2002	30 January 2003	32
Northern Ireland Assembly Elections	17 March 2003	19 March 2003	3
Northern Ireland Assembly (Elections and Periods of Suspension)	13 May 2003	14 May 2003	2
Northern Ireland (Monitoring Commission etc)	8 September 2003	15 September 2003	6
Police (Northern Ireland)	5 December 2002	30 January 2003	24
Railways and Transport Safety	1 April 2003	3 July 2003	49
Regional Assemblies (Preparations)	27 January 2003	28 April 2003	49
Sexual Offences	28 January 2003	17 June 2003	76
Waste and Emissions Trading	14 November 2002	6 March 2003	57
Water	19 February 2003	9 July 2003	79
<i>Average number of sitting days on each Bill:</i>			<i>48</i>

GOVERNMENT BILLS—SESSION 2003–04

<i>Bill</i>	<i>First Reading</i>	<i>Third Reading</i>	<i>Sitting Days</i>
Age Related Payments	9 June 2004	1 July 2004	15
Armed Forces (Pensions and Compensation)	10 May 2004	15 September 2004	51
Asylum and Immigration (Treatment of Claimants, etc)	3 March 2004	6 July 2004	67
Child Trust Funds	4 February 2004	4 May 2004	44
Children	3 March 2004	15 July 2004	73
Civil Contingencies	25 May 2004	16 November 2004	66
Civil Partnership	30 March 2004	1 July 2004	47
Companies (Audit, Investigations and Community Enterprise)	3 December 2003	14 July 2004	113
Domestic Violence, Crime and Victims	1 December 2003	25 March 2004	58
Employment Relations	30 March 2004	8 September 2004	63
Energy	27 November 2003	20 April 2004	68
European Parliamentary and Local Elections	17 December 2003	1 March 2004	32
Fire and Rescue Services	16 March 2004	20 July 2004	68
Gender Recognition	27 November 2003	10 February 2004	36
Health Protection Agency	27 November 2003	29 April 2004	75
Higher Education	1 April 2004	22 June 2004	38
Horsrace Betting and Olympic Lottery	3 February 2004	14 September 2004	97
Housing	13 May 2004	3 November 2004	64
Human Tissue	29 June 2004	3 November 2004	40
Hunting	16 September 2004	15 November 2004	24
Justice (Northern Ireland)	4 December 2003	10 February 2004	32
National Insurance Contributions and Statutory Payments	29 January 2004	6 April 2004	37
Patents	15 January 2004	6 April 2004	46
Pensions	21 May 2004	15 November 2004	67
Planning and Compulsory Purchase	10 December 2003	25 March 2004	52
Public Audit (Wales)	27 November 2003	11 May 2004	80
Scottish Parliament (Constituencies)	5 May 2004	13 July 2004	39
Statute Law (Repeals)	16 December 2003	6 July 2004	101
Traffic Management	17 March 2004	8 July 2004	60
<i>Average number of sitting days on each Bill:</i>			<i>57</i>

GOVERNMENT BILLS, SESSION 2005–06 (TO 25 MAY)

Charities	18 May 2005	8 November 2005	53
Children and Adoption	13 June 2005	29 November 2005	56
Civil Aviation	11 October 2005	28 March 2006	90
Commissioner for Older People (Wales)	25 May 2005	15 February 2006	100
Company Law Reform	1 November 2005	23 May 2006	101
Commons	27 June 2005	18 January 2006	68
Compensation	2 November 2005	27 March 2006	75
Consumer Credit	19 July 2005	21 March 2006	89
Council Tax (New Valuation Lists for England)	5 December 2005	8 March 2006	45
Criminal Defence Service	23 May 2005	24 October 2005	42
Equality	18 May 2005	9 November 2005	54
EU (Accessions)	28 November 2005	7 February 2006	34
Fraud	25 May 2005	29 March 2006	122
Identity Cards	19 October 2005	6 February 2006	56
Immigration, Asylum and Nationality	17 November 2005	14 March 2006	58
London Olympic Games and Paralympic Games	7 December 2005	14 March 2006	46
Merchant Shipping (Pollution)	25 May 2005	26 October 2005	42
National Insurance Contributions	19 December 2005	20 March 2006	42
National Lottery	20 January 2006	23 May 2006	62
Natural Environment and Rural Communities	12 October 2005	27 March 2006	88
NHS Redress	12 October 2005	1 March 2006	72
Northern Ireland	27 April 2006	8 May 2006	5
Racial and Religious Hatred	12 July 2005	24 January 2006	63
Regulation of Financial Services (Land Transactions)	21 July 2005	5 December 2005	36
Road Safety	24 May 2005	10 January 2006	78
Terrorism	10 November 2005	1 February 2006	41

Terrorism (Northern Ireland)	1 December 2005	14 February 2006	36
Transport (Wales)	18 October 2005	14 February 2006	63
Work and Families	19 January 2006	8 May 2006	52
<i>Average number of sitting days on each Bill:</i>			<i>61</i>

Annex 4

EXCHANGES BETWEEN THE HOUSES ON PUBLIC BILLS

Note: (1) This includes all cases where the Lords have insisted on amendments, or made alternative proposals, at least once.

(ii) This shows each stage following the Third Reading in the bill's second House.

	HC	HL	HC	HL	HC	HL	HC	HL	HC	HL	
1974–75											
Trade Union and Labour Relations (Amendment)	●	●	●	●							Bill lost
1975–76											
Aircraft and Shipbuilding Industries	●	●	●	●	●	●					Bill lost
1976–77 [None]											
1977–78											
1977–78											
Scotland	●	●	●	●							
Wales	●	●	●	●							
1978–79 [None]											
1979–80 [None]											
1980–81 [None]											
1981–82 [None]											
1982–83 [None]											
1983–84											
Housing and Building Control	●	●	●	●							
1984–85 [None]											
1985–86 [None]											
1986–87 [None]											
1987–88 [None]											
1988–89 [None]											
1989–90 [None]											
1990–91											
Criminal Justice	●	●	●	●	●						
1991–92 [None]											
1992–93											
1992–93											
Railways	●	●	●	●							
1993–94 [None]											
1994–95 [None]											
1995–96 [None]											
1996–97 [None]											
1997–98											
European Parliamentary Elections	●	●	●	●	●	●	●	●			Bill lost—enacted in 98–99 under Parliament Acts
Teaching and Higher Education [HL]		●	●	●	●	●					
1998–99											
Access to Justice [HL]		●	●	●							
Welfare Reform and Pensions 1999–2000	●	●	●	●							
Transport	●	●	●	●							
2000–01 [None]											
2001–02											
Animal Health	●	●	●	●							
Education	●	●	●	●							
Enterprise	●	●	●	●							
Nationality, Immigration and Asylum	●	●	●	●							
2002–03											
Criminal Justice	●	●	●	●	●	●					
Health and Social Care (Community Health and Standards)	●	●	●	●							
Licensing [HL]		●	●	●	●						
Local Government	●	●	●	●							
Sexual Offences [HL]		●	●	●							

	HC	HL	HC	HL	HC	HL	HC	HL	HC	HL
2003–04										
Armed Forces (Pensions and Compensation)	●	●	●	●						
Civil Contingencies	●	●	●	●						
European Parliamentary and Local Elections (Pilots)	●	●	●	●	●	●	●	●	●	●
Hunting	●	●	●	●						
Pensions	●	●	●	●						
Planning and Compulsory Purchase	●	●	●	●						
2004–05										
Constitutional Reform [HL]		●	●	●						
Prevention of Terrorism	●	●	●	●	●	●	●	●	●	●
2005–06										
Identity Cards	●	●	●	●	●	●	●	●	●	●

Enacted under Parliament Acts

Annex 5

EXAMPLES OF TIMETABLES FOR EXTENDED “PING-PONG”

EUROPEAN PARLIAMENTARY AND LOCAL ELECTIONS (PILOTS), SESSION 2003–04

	<i>Date</i>	<i>Interval before next stage (clear days)</i>
Lords 3rd Reading	1 March 2004	6 days
Commons Consideration of Lords amendments	8 March 2004	7 days
Lords	16 March 2004	less than 1 clear day
Commons	16 March 2004	1 day
Lords	18 March 2004	5 days
Commons	24 March 2004	less than 1 clear day
Lords	25 March 2004	3 days
Commons	29 March 2004	less than 1 clear day
Lords	30 March 2004	less than 1 clear day
Commons	30 March 2004	3.5 hours
Lords	1 April 2004	less than 1 clear day

PREVENTION OF TERRORISM, SESSION 2004–05

	<i>Date</i>	<i>Time</i>	<i>Interval before next stage</i>
Lords 3rd Reading	8 March 2005		
Commons Consideration of Lords amendments	9 March 2005		less than 1 clear day
Lords	10 March 2005	11.31 am–3.11 pm	less than 1 clear day
Commons	10 March 2005	6 pm–7.50 pm	2 hours, 49 minutes
Lords	10 March 2005	10.15 pm–11.26 pm	2 hours, 25 minutes
Commons	11 March 2005	1.20 am–3.06 am	1 hour, 54 minutes
Lords	11 March 2005	5 am–5.55 am	2 hours, 5 minutes
Commons	11 March 2005	8 am–9.37 am	2 hours, 8 minutes
Lords	11 March 2005	11.45 am–1.10 pm	2 hours, 20 minutes
Commons	11 March 2005	3.30 pm–5.7 pm	2 hours, 23 minutes
Lords	11 March 2005	6.30 pm	

IDENTITY CARDS, SESSION 2005–06

	<i>Date</i>	<i>Interval before next stage (clear days)</i>
Lords 3rd Reading	6 February 2006	6 days
Commons Consideration of Lords amendments	13 February 2006	20 days
Lords	6 March 2006	6 days
Commons	13 March 2006	1 day
Lords	15 March 2006	less than 1 clear day
Commons	16 March 2006	3 days
Lords	20 March 2006	less than 1 clear day
Commons	21 March 2006	6 days
Lords	28 March 2006	less than 1 clear day
Commons	29 March 2006	2 hours
Lords	29 March 2006	

Memorandum by the Clerk of the House of Commons

JOINT COMMITTEE ON CONVENTIONS

INTRODUCTION

1. The memorandum submitted by the Clerk of the Parliaments contains a comprehensive analysis and description of the conventions set out in the Committee's terms of reference, namely the Salisbury/Addison convention, the convention on secondary legislation, the convention that Government business in the Lords should be considered in reasonable time and the conventions governing the exchanges of amendments to legislation between the two Houses.

2. Of these four categories, all but the last relate exclusively to practice and proceedings within the House of Lords. It would, therefore, be inappropriate for me to comment on these, other than to confirm in general terms that the analysis by the Clerk of the Parliaments accurately reflects my own understanding of the conventions as they currently stand. The last category, that of the conventions governing the exchanges of amendments to legislation between the Houses (colloquially known as "ping-pong"), is a subject that clearly does involve House of Commons practice. This short memorandum, which is intended to supplement that of the Clerk of the Parliaments, will therefore focus primarily on "ping-pong". But I begin with a couple of general observations on the subject of conventions and their codification.

CONSTITUTIONAL CONTEXT AND CODIFICATION

3. The first point of a general nature that I would make is that conventions must be understood in the context of the constitutional and political circumstances in which they have been forged. That is shown particularly clearly in the Clerk of the Parliaments' account of the emergence of the Salisbury/Addison convention in 1945, when the Official Opposition in the Lords agreed not to oppose governments bills which had been foreshadowed in the Labour Party's General Election manifesto.⁴² But it also applies to the other arrangements that govern the relations between the two Houses; and it can even be regarded as applying to the major constitutional settlement of the legislative role of each House which was given the force of law by the Parliament Act 1911.⁴³

4. The Parliament Act 1911, which came about because of the conflict between the House of Lords and the Liberal Government of the day over a number of measures, including the bill to enact the Budget of 1909, lays down arrangements which regulate the situation in which there is an irresolvable dispute between the two Houses over a particular bill. However, as the Preamble to the Act makes clear, it was envisaged at the time that those arrangements were only being put in place until such time as the House of Lords was reformed and "constituted on a popular instead of a hereditary basis."⁴⁴ In other words, the arrangements were predicated on an unreformed House of Lords and were not necessarily thought to be appropriate to a different constitutional situation, that is to say one in which that House was differently constituted. This is not to suggest that the legal validity of the Parliament Acts would be put in question by a change in the composition of the upper House. But it does reinforce the point made in paragraphs 33–34 of the Clerk of the Parliaments' memorandum, with which I agree, that the principles on which the Salisbury Convention is based would inevitably be undermined by the introduction of an elected element into the upper House. The same consideration needs to be borne in mind in relation to any proposal to codify existing parliamentary conventions. The "practicality" of codification, referred to in the Joint Committee's terms

⁴² Memorandum of the Clerk of the Parliaments, paragraph 21.

⁴³ Subsequently, of course, amended by the Parliament Act 1949.

⁴⁴ Parliament Act 1911, Preamble.

of reference, is not merely a matter of reviewing the technical options; it is a matter of considering whether the settled and predictable constitutional circumstances exist which would provide the necessary context for codification.

5. “The primacy of the House of Commons” is stated in the Joint Committee’s terms of reference to be a precondition of the whole exercise. But constitutional stability has to be based on more than assertion. The primacy of the Commons is currently founded on three factors: its predominant authority in respect of matters of expenditure and taxation, re-asserted regularly during the history of Parliament and given legal form in section 1 of the Parliament Act; its ability to override the will of the House of Lords in respect of other legislative proposals, conferred by section 2 of the Parliament Act; and, underpinning both those, the superior authority properly accorded to a chamber whose Members are elected by and represent the will of the nation’s people over a chamber whose Members are not so elected. A form of codification which would be practicable and sufficient while those factors pertained might well be found to be inadequate if they were to change.

6. My second, less fundamental, general point concerns the technical difficulty of codifying constitutional conventions, an issue which is recognised in the memorandum from the Clerk of the Parliaments. Codification would involve producing a systematic collection of rules out of what are generally agreed and accepted usages. Not only would such a formulation depend upon a precise definition of each convention (itself a difficult task) but it would in effect remove its principal benefit, namely a certain flexibility or even variation of interpretation which nevertheless is not fatal to the ongoing “life” and political usefulness of any particular convention.⁴⁵

7. An example of that kind of flexibility can be seen in the differing practices of the two Houses in relation to one particular aspect of “ping-pong”, a subject I shall return to more fully later in this paper. While the House of Commons adopted the practice of dealing with amendments from the other House in clusters or “packages” (during the 1990s), the House of Lords continued to deal with each Commons amendment separately. Each of these approaches was based on sound but different approaches adopted by the parliamentary authorities and Government business managers in each House. By sticking to them, each House remained master of its own procedures in respect of the handling of amendments sent to it from the other. A set of rules about packaging would have restricted that kind of flexibility to the possible detriment of political responsiveness.

8. A further difficulty would be the need for adjudication once conventions had been turned into rules. Any set of rules which precisely defines what can or cannot be done must be adjudicated upon by someone. Within the House of Commons, Standing Orders and practices are interpreted and ruled upon by the Speaker; disputes about codified rules governing relations between the two Houses would suggest the need either for the establishment of some new parliamentary machinery or for some form of adjudication outside Parliament, possibly by a specially constituted court as is the case in countries with written constitutions like France or the United States.

9. Precedent exists for parliamentary machinery in the ancient form of “Conferences” between the two Houses in the case of disputed legislation which are recorded as taking place as early as in the sixteenth century. Although Conferences were called to consider matters other than Bills—for example to discuss matters relating to privilege—they were also called when the House in possession of a Bill sought to negotiate on the reasons for not accepting the amendments of the other. The summoning of a Conference could itself be a difficult business which led to disputes; each House was suspended while the Conference took place. Conferences died away as the volume of public business grew and as the party machine came to dominate in the House of Commons during the nineteenth century. The Reasons committees of both Houses are a legacy of this ancient procedure.⁴⁶

10. Codification could thus have serious constitutional implications, restricting the freedom of manoeuvre in the conduct of parliamentary business which is afforded by existing conventions. It could also imply considerable delay in the passage of legislation when the Houses could not agree. This is something which is accepted in systems where an extra-parliamentary body does the adjudication, but it does not sit comfortably with the often-cited parliamentary axiom which (in its simplest form) states that the elected Government of the day should get its business without unreasonable delay.

EXCHANGE OF AMENDMENTS BETWEEN THE HOUSES (“PING-PONG”)

11. I now turn from my general remarks about conventions and codification to the specific practices governing exchanges between the Houses on legislation, conveniently referred to as “ping-pong”. My memorandum does not cover the issue of Commons financial privilege, which can be a significant factor in these exchanges but which I understand the Joint Committee has decided to exclude from its deliberations.

⁴⁵ Bagehot considered that the most significant changes in constitutional arrangements were often of a “silent sort” ie conventions that grew up without any statutory basis. W Bagehot. *The English Constitution* [1867] Oxford, 1968 p xii.

⁴⁶ For a full description of the working of Conferences see J Hatsell *Precedents and Proceedings of the House of Commons*. 4 vols. London, 1818.

12. Commons procedure in respect of “ping-pong” is based on custom and practice, but practice has evolved in significant respects in the last decade or so, as described in the next paragraph . . . Although the underlying options—whether to agree, disagree, amend or propose amendments in lieu—appear straightforward, in practice the exchanges between the Houses can soon become exceedingly complex as the process of sending Amendments back and forth continues. It should also be borne in mind that “ping-pong” tends to involve more iterations in the case of a controversial bill (such as the Terrorism Bill of last session) which may also be under the pressure of a time constraint on Government.

13. Two modern practices have added to the complexity of the process. The first is that Lords Amendments are now routinely considered at the same sitting at which they are received from the House of Lords (“without notice”, in the technical sense). The ability to take Lords Amendments quickly has been greatly increased by improvements in technology which mean that new sets of business papers can be produced at short notice and the two Houses can exchange amendments and alternative suggestions much more rapidly than would have been conceivable a few years ago. The second fairly recent evolution in Commons practice (which I have referred to in paragraph 7) has been the consideration of Lords Amendments in “packages”, rather than individually, so that exchanges may contain subtle variations in the packages of alternative suggestions (amendments in lieu) sent back to the House of Lords. This practice has recently begun to find favour in the Lords as well, so that the exchanges of packages are ever more complex and rapid, increasing the risks associated with taking crucial decisions on important legislation without proper time for reflection or consultation.

14. These new modes of proceeding, which are being invoked with increasing frequency, cannot be said yet to have hardened into conventions (and it can be argued that it would be undesirable if they ever did); but they have gone a long way to undermine what would have been regarded, 15 years or so ago, as the conventions governing exchanges between the Houses. For example, it is still stated in *Erskine May* (23rd edition, p 631) that the procedure for considering Lords Amendments without notice is “generally reserved for amendments which are not material”; but that convention is now honoured more in the breach than the observance.

15. Similar considerations apply to the so-called “double insistence rule” (which is in fact a convention, since it is not laid down in the Standing Orders of the House). This is the understanding that a Bill is lost if one House insists on an amendment to which the other has disagreed, and the other insists on its disagreement, neither having offered alternatives. *Erskine May* describes the convention but then adds:

“It must be remembered, however, that there is no binding rule of order which governs these proceedings in either House, and, if there is a desire to save a bill, some variation in the proceedings may be devised in order to effect this object.”⁴⁷

Such “variations in proceedings” have in fact become quite commonplace in recent years with amendments in lieu (which are often unrelated to the real point at issue between the Houses) being repeated on successive occasions in only slightly varied form, and with the double insistence rule being treated as not applying to particular amendments which have been considered by the other House as part of a “package”.⁴⁸

16. Two alternative views can be taken about these procedural developments. They can be seen as destructive of sensible conventions which had developed over time and were intended to ensure that the propositions of one House were given proper and not unduly hurried consideration by the other; that the exchanges between the Houses were genuinely aimed at securing an agreed compromise; and that, if this was not possible, the exchanges were not unduly prolonged. Alternatively they can be seen as an instance of procedure evolving in a pragmatic and politically necessary direction, providing an element of flexibility to enable real political negotiation to go on behind the scenes rather than in the necessarily more cumbersome context of formal parliamentary exchanges. Whichever view is taken, it is difficult to see how it would at the moment be practical to codify any conventions relating to “ping-pong”. Current practice is not based on any codifiable principles; and any codification that was so based would be bound to remove some of the speed and flexibility which have characterised the proceedings of the House of Commons on Lords Amendments in recent years and which the House and the Government of the day evidently value.

Roger Sands
Clerk of the House of Commons

6 June 2006

⁴⁷ *Erskine May Parliamentary Practice* 23rd Edition p 639.

⁴⁸ This procedural development was accorded formal recognition in the joint statement which the Clerk of the Parliaments and I issued in July 2004. See paragraph 62 of his memorandum.

Witnesses: Mr Paul Hayter, Clerk of the Parliaments, and Sir Roger Sands, Clerk of the House, examined.

Q204 Chairman: Sir Roger, first of all our congratulations on your recent knighthood, a very warm welcome to you and also to Mr Paul Hayter, the Clerk of the Parliaments. We have informed you of the areas of our interest, as though you did not know since you were the first people to submit a memorandum to us, you have seen the likely questions and I will do my best to ensure that they are asked. As someone recently said to me, if the questions are good the answers will be interesting, and the reply was, “Yes, if the questions are asked they will.” So we will try to do that, but, first of all, before we get to questions, would either of you like to make an opening statement of any kind?

Mr Hayter: Can I make a short one?

Q205 Chairman: Of course.

Mr Hayter: Just to repeat something that I said in my evidence, conventions are not rules, they develop over time and they can be flexible. They are also unenforceable. I think if you try to fix them, they become rules and, in the process, they change their character. Conventions are guiding principles which are accepted by most of the people most of the time and which act as a guide to behaviour in changing circumstances. As the clerk of a self-regulating House, it is my job to advise members what the practice of the House is and how it can be applied to a given set of circumstances. There are many conventions within the Lords which help with this, but I think that there are very few between the Houses.

Sir Roger Sands: I have nothing to add to that, Lord Chairman, save to say that I do regard this as primarily a Lords’ show, and I shall, accordingly, be keeping quiet as much as possible, at least until it comes to ping-pong.

Q206 Chairman: So you are not going to get involved in ping-pong between you!

Sir Roger Sands: No, as far as possible not.

Q207 Chairman: You know the format. I would like to begin with questions about the Salisbury-Addison Convention. At the outset, can you tell us what you believe the Salisbury-Addison Convention means and if it is possible to apply it to particular situations and say whether you think it is ever breached?

Mr Hayter: I think there is really only one convention that matters from which other conventions, if any, flow, and that is the Salisbury-Addison Convention to which at present the Lords does adhere. Its essential feature is that the Lords will not reject a manifesto bill outright but will send it back to the Commons, assuming it started there, in time for differences of opinion to be resolved by exchanges between the Houses. Failing that, they are resolved by the Parliament Acts, and the Lords accept the ultimate primacy of the Commons. It all hangs together and I would say, with the difficulty of identifying what a manifesto bill is, that the convention is pretty clear and that it has not been breached.

Q208 Chairman: A number of people have said in memoranda that codification would require a method, presumably an agreed method, of identifying manifesto bills. Do you think that is correct?

Mr Hayter: The thing about manifestos is that they are very imprecise. It is possible to imagine a one clause bill implementing a simple and clear statement of intent in a manifesto. More commonly, the bill will be complex and the manifesto woolly. The closer the relationship between the bill and the statement of intent the more relevant the convention, but it is still only a convention. Because it is only a convention, I do not actually think that it is essential to try to nail down exactly what a manifesto bill is, and I note that in the original Salisbury statement by Lord Cranborne he referred to “proposals which have been definitely put before the electorate”, and I think one does need to put a bit of emphasis on the word “definitely”.

Q209 Lord Elton: Do you think it would be practical to codify this convention in particular and, if so, in what form?

Mr Hayter: It depends what one means by codification. I think that there is room for an agreed statement of where we are at the moment. If you had a unanimous report from this Committee, which is then agreed by both Houses, saying that the convention is as follows, then everybody would know from that point what the norm was. It does not mean to say that one cannot depart from the norm, but the clearer the norm is the more the House would have to justify, in the forum of public opinion, taking a different line.

Q210 Lord Elton: In what form would the code have to be for the decision as to whether a bill was a manifesto bill to become justiciable?

Mr Hayter: I hope it never will become justiciable. That is the essence of a convention that it is unenforceable. It is a question that should not arise, and, what is more, as soon as you mention the word “justiciable”, you have to say justiciable before whom?

Q211 Lord Elton: That is my next question?

Mr Hayter: My next answer is it should not be before any forum other than Parliament itself.

Q212 Lord Elton: So, if the code has no reference to enforceability, does that exempt it from justiciability in the courts?

Mr Hayter: I would think the answer to that question must be, “Yes.”

Q213 Chairman: So what you are saying, so that we are absolutely clear about this, is that the conventions are not enforceable inside Parliament or outside Parliament?

Mr Hayter: They are not enforceable at either place, but inside Parliament, if it is perfectly clear how people are expected to behave in a certain situation, then the force of internal opinion and also the connection between internal opinion and public

opinion will be a very heavy pressure on whichever group of people it is who are trying to depart from the norm, from the convention.

Sir Roger Sands: Perhaps I might supplement that, Chairman. I noticed that Philip Norton in his memorandum to the Joint Committee challenged the Committee to define its terms, as he put it; and, of course, codification, given the terms of reference of the Joint Committee, is the most important term which you are going to have to decide the meaning of. It could stretch all the way from the rather loose form that was envisaged in the report from the Labour Peers, which is effectively writing down an agreed version of where everybody thinks the conventions now stand, possibly to be supplemented by the Houses agreeing to it. That would be sufficient authority, I would think, for it to be mentioned in *Erskine May* and for it to be mentioned possibly in the *Companion*, but no more; and so the Speaker would find it very difficult to give rulings just on the basis of a codification in that form. Going on in order of severity, I suppose the second would be some sort of recognised standing orders, which in our House would then become something on which the Chair would rule directly, but in the House of Lords, even under the new dispensation, as I understand it, it would not be. I cannot believe that it would be acceptable for the Leader of the House to be advising the House on a fairly delicate matter like this. The third order of severity would be, of course, statutory codification, which I think is very difficult to envisage with the conventions as they now stand, but might, as I have hinted in my paper, become necessary if the composition of the House of Lords were to change. One might need a new Parliament Act and a new settlement—an extreme form of codification.

Q214 Lord Higgins: My Lord Chairman, if we were to agree unanimously what we believe the Convention to be, we would necessarily, would we not, have to deal with the issue of what is a manifesto commitment and so on, and we would remove any flexibility. It would effectively be codified at that point.

Mr Hayter: I have mentioned in my written evidence that a manifesto bill does not oblige the House of Lords to adopt everything that appears in that bill if it is either outside the commitment or contradictory to it. As I see it, the obligation is for the House of Lords to make sure that the bill gets back to the House of Commons so that the two Houses can argue about the detail. One is talking about overall principles rather than fine detail.

Q215 Lord Higgins: It has been suggested to us that this is not actually a convention between the two Houses at all; it is a deal which has been done by each of the major parties in relation to what action they will then take in the subsequent Parliament. Do you think it is a convention between the two Houses and, if so, how?

Mr Hayter: I think it has grown from being a convention between party leaders into a convention between the two Houses, yes, and it is certainly what

guides the House of Lords in the way in which it reacts to the changing circumstances of different bills, and, since the arithmetic in the House of Lords means that it is not up to one party to decide what happens, it is therefore essential that it is the House as a whole that is guided by something rather than the principal opposition party.

Q216 Lord Higgins: It is a convention, I believe, that we do not vote against second readings. What is the relation between that and the convention.

Mr Hayter: It is not a convention that we do not vote against second readings. It is a convention that we do not vote against second readings without giving notice. You will remember, there are different sorts of bills and there are the plenty of examples of notes on second reading. If it is a manifesto bill, one that is part of the Government's main programme, which went before the electorate at the time of the election, that Bill will not be rejected outright by the House of Lords except in totally exceptional circumstances. The European Parliamentary Elections Act was an exception and that was definitely done for the benefit of the Government rather than the reverse.

Q217 Lord McNally: Mr Hayter, when you referred to your understanding of the Salisbury Convention you specifically mentioned the Parliament Act, and that, surely, is the underpinner of the supremacy of the Commons but not the Salisbury Convention. The important thing about the relationship between the two Houses and the negotiations that go on is that the House of Lords, as now, has the right to say, "No", and the Commons knows that and that gives meaning to the negotiations. If the convention was that the Lords could not, in the end, touch a certain type of bill, the negotiations would be meaningless; we would have whatever was set down, two or three rounds of ping-pong, and the Commons would have its way. Surely, it is the Parliament Act which is the underpinner of the supremacy and, as you have rightly said, the way the Convention would work is that, because the Lords has the right to say, "No", the negotiations are usually quite fruitful and the Government in the end almost invariably gets its bill, but the right to say "No" is very important?

Mr Hayter: I would agree with all that. The Parliament Act is what provides for the supremacy of the House of Commons. As I mentioned when I was talking about the application of the convention, if the two Houses cannot resolve their differences by ping-pong, then ultimately it will have to be resolved by the Parliament Acts, and the convention is one means by which one avoids the Parliament Acts coming into play more often than they do, and that is evidently highly desirable, but it is the Parliament Acts, as a last resort, that settle the matter if it cannot be settled by other means.

Q218 Chairman: But what you said earlier led me to conclude that is wrong. You believe that the Salisbury-Addison Convention applies to all parties and groups in the House of Lords, not just to the two main parties.

Mr Hayter: I think it applies to the relationship between the House of Lords and the House of Commons, rather than between an individual party and Her Majesty's Government.

Q219 Sir Malcolm Rifkind: In relation to the Salisbury-Addison Convention, could I refer to paragraph four of Sir Roger's memorandum to this Committee where you say, Sir Roger, that "the practicality of codification is not merely a matter of reviewing the technical options, it is a matter of considering whether the settled and predictable constitutional circumstances exist which would provide the necessary context for codification". At a time when all agree the future composition of the House of Lords has clearly not yet been resolved, are we to read from that your view that the question of codifying Salisbury-Addison would have to take that uncertainty into account as to whether it was appropriate to uphold at this moment in time?

Sir Roger Sands: Yes. That was a delicate reference to the proposals which we know, they have been around, for a possible second stage reform of the House of Lords. My first reaction to the news of the setting up of this Joint Committee was that it would seem rather a strange way round to be doing things. That was a polite way of saying so.

Chairman: I had better just reiterate what I have said on previous occasions when I have been in the Chair. How people get into the House of Lords in the future is not part of the remit of this Committee.

Sir Malcolm Rifkind: Lord Chairman, that was not the point I was raising.

Chairman: No, I realise that.

Q220 Sir Malcolm Rifkind: I was not making any view as to how people should be chosen for the House of Lords, I was simply referring to the fact, as Sir Roger has indicated is indeed the case, that there is a legitimate point of view, which is expressed in his paper, that if you do not have several and predictable constitutional circumstances with regard to the convention, then it may not be wise to consider codification until you do?

Sir Roger Sands: Perhaps less flippantly, the background that I had in mind was this. For the period between 1945 and 1999, that is quite a lengthy period of time, I think, broadly speaking, everybody knew where they were between the two Houses; that is to say, when there was a Conservative majority in the House of Commons the House of Commons never had any bother with the House of Lords; when there was a Labour majority in the House of Commons the House of Commons had a certain amount of bother with the House of Lords but a good deal less than they would have had but for the Salisbury-Addison Convention, which quite clearly worked—it was observed and it was important to constitutional stability. Since the change in composition of the House of Lords in 1999, we entered a slightly different position, and I see that some people who have given evidence have said that that changes the whole basis of Salisbury-Addison. I would not myself argue that, I do not think, because there is still a lot of rationale for maintaining the

convention in that the House of Commons remains the one part of the Parliament which clearly represents the will of the people and is tested through elections. So there is still a basis for the convention being maintained, but the way it is being maintained and whether it would be maintained equally in a situation of a conservative majority in the House of Commons remains to be tested; we have not had that length of experience.

Sir Malcolm Rifkind: One final point. I think the importance of this in terms of our own terms of reference is that what Sir Roger has said in his minute is these are matters relevant, to use his own words, to the practicality of codification. Not the desirability but the practicality, we have been encouraged to believe, must take into account these uncertainties?

Chairman: Indeed.

Q221 Sarah McCarthy-Fry: I want to address my remarks to Mr Hayter and to pick up on something you said earlier on. Sir Roger has said that in evidence we have had previously it has been suggested that, because of the changing composition of the House of Lords since 1999, Salisbury-Addison has less legitimacy, but the point that, Mr Hayter, you made just now, if I understand you rightly, and I would like to clarify whether I did, was that because there was no overall majority in the House of Lords, in your view, Salisbury-Addison has more legitimacy now and is more useful. Do I understand you correctly?

Mr Hayter: I do not think I would go quite so far as to say that it has more legitimacy. I think that we are talking about what the convention is at the moment. Going back to the questions that Sir Malcolm was asking, as the House of Lords changes, so there is the possibility that the convention will change. To go to your question, the situation now is different from what it was in the 1940s, because we no longer have a permanent majority for one party. Therefore, it requires the consents of all parties, and, by and large, I think that that consent exists, even though I realise there are some quarters where it does not exist quite so strongly as in others.

Q222 Lord Wright of Richmond: In your opening statement, Mr Hayter, you referred to flexibility. Is there not an argument that writing down a convention actually damages its potential flexibility?

Mr Hayter: If it is recognised that by writing it down you do not say that it can never change, then, no, I do not think it is damaging. The accepted practice at any time, it is a great help if everybody knows what that accepted practice is, and I am suggesting that you could write down what the practice is at the moment and people would know that was the position from which they were starting, but the central feature is that they should be able to develop it as circumstances change. Bearing in mind that we are applying this to a whole House of Parliament, you have got to have something that convinces the majority of the members at any one time that they

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ought to follow a given course, because nobody can wave a big stick and say, “No, you are breaking the convention. Stop it.”

Chairman: The last question on this section from Lord Fraser.

Q223 Lord Fraser of Carmyllie: Does it do violence to the language to talk about codification in the context you are now saying, following Lord’s Wright’s question, that you can conceive of nothing really more than a writing down of what is believed to be acceptable practice? I am very troubled that we have got in our terms of reference specifically the word “codification”. It may be boring looking at this point of view, but I think codification means putting something in such a form that it becomes justiciable?

Mr Hayter: I think probably, somewhere along the line, somebody thought that might be a possibility. It is up to this Committee to decide whether they regard that as a genuine possibility.

Q224 Lord Fraser of Carmyllie: You think that is undesirable?

Mr Hayter: I do.

Q225 Chairman: Let us move on now to reasonable time. I guess I had better address this to you, Mr Hayter. Is there a convention that the Lords consider government business in reasonable time and, if there is, what do you think it means?

Mr Hayter: Yes, I think there is such a convention, but, as I pointed out in my paper, there is no definition of what constitutes “reasonable”. I would make a small qualification. Although there is a tendency to talk about this as being government business, really the House of Lords accepts that it will be House of Commons business, therefore perhaps “the Government” being the encapsulation of the House of Commons for these purposes. We try in the House of Lords very hard to ensure that the Government does not have more rights than anyone else; so I do not want to emphasise the word “government” too much in this, but, given that the Government has a majority in the House of Commons, it comes to the same thing, and I do think that the House of Lords recognises an obligation to this “in reasonable time”. I would say that this is, in fact, a spin-off of the Salisbury-Addison Convention. What is “reasonable”? Reasonable time is that time which will allow the bill to get back to the House of Commons in time for any toing and froing between the Houses and the bill to be enacted, if that is the will of Parliament, before the end of the session.

Q226 Chairman: Has “reasonable time” expanded in the recent past?

Mr Hayter: Yes. Perhaps I might be allowed just to draw attention to the meaning of the word “reasonable” by giving a good example of what can be described as unreasonable. I referred in my written evidence to the minimum intervals, which were the product of what happened primarily on the Aircraft and Shipbuilding Bill in 1976. This hugely contentious bill was brought from the Commons on

6 August. It had its second reading on 28 September. There were five committee days from 11 to 25 October, three report days from 1 to 5 November and third reading on 9 November. Ping-pong took place from 12 to 22 November, when the bill was lost at prorogation. It was a very unreasonable timetable, by any expression of imagination, imposed on the Lords, but although the bill was lost, time was not the cause. The Lords completed ten full days of consideration in 33 sitting days, that is excluding ping-pong, and what actually influenced the House at the time was the Salisbury-Addison convention, not the concept of reasonable time. The bill came up, the House of Lords felt an obligation to do what it could to get this bill through, and whether the timetable was reasonable or not did not figure. What has happened since that period? First of all, we have got a definition of what “reasonable” is to the extent that minimum intervals between stages have to be observed, and, in recent years, one or two things have happened which have caused the amount of time taken by the Lords over bills to increase. First, and I actually had to check this to make sure that my guess was correct, bills are longer. The average length of a government bill over the last two sessions, which has been 101 and 88 pages, is double that of 10 years ago: 56 pages in 1989–90 and 40 in 1995–96. So, the bills are longer; therefore there is more to be done. A very important change has taken place in the Lords, and that is that more members are taking part. Whereas 20 years ago it would be quite normal for committee stage to be conducted almost entirely by spokesmen from the front benches, now you get regular contributions from the back benches and no party feels an obligation to confine its contributions to one voice. Sometimes that is a shame, but there we are.

Q227 Chairman: Not even the Government!

Mr Hayter: Thirdly, Grand Committees, which it should be recognised were introduced in order to help the Government and allow much more business to get through the Lords than would otherwise be possible, nevertheless do prolong the time that the individual bill takes, because the Grand Committee does not sit for so many hours of the day. So, there are a number of factors which have increased the amount of time that bills require in the Lords at the moment without any accusation of unreasonableness.

Q228 Chairman: It has been suggested by some people in evidence that the Animal Health Bill 2002 and the Constitutional Reform Bill 2004 breach this reasonable time convention. Do you think that is true?

Mr Hayter: No, I would say about the Animal Health Bill that the important thing was that the Bill was enacted—it got through—which is an indication that there was reasonable time. The circumstances were certainly odd, but it was, I think, not unreasonable for the House to want to have the promised scientific evidence about foot and mouth

before concluding on the bill. If that had resulted in the bill being lost, there would be a different case to answer.

Q229 Chairman: Before you move on, even though the Government was pressing for additional powers because it was concerned about the recurrence of the foot and mouth outbreak, you still think there was reasonable time and the convention was not breached?

Mr Hayter: I do not think it was breached, and remember, the decision of the House is: what is the right thing to do in the circumstances? It is only if the outcome had been to prevent the Government getting its bill. It got its bill, and when, in the later stages, the Minister was speaking, he actually was prepared to accept that there were some grounds for agreeing that the delay had been profitable. On Constitutional Reform Bill, there the crucial thing was the undertaking by the Conservative opposition, or the House in general, that if the bill went to the Select Committee it would be carried over into the next session in order to enable it to go through. That bill certainly came pretty close to a breach of the then understood reasonable time convention, but I would say that it was not breached.

Q230 Lord McNally: I am glad you mentioned that the Grand Committee was a conscious decision by opposition parties to co-operate with the Government in getting business. This pressure for a specific time limit does suggest perhaps that there have been examples of conscious filibusters. Are you aware of any filibusters in the Lords in your time?

Mr Hayter: I think I am aware of one, possibly two, but one I am certainly aware of, when the Labour Party were in opposition and filibustered against the Industrial Relations Bill 1971.

Q231 Chairman: I remember it well.

Mr Hayter: The fact that I can point to one example and it is so long ago bears out my main contention that the House of Lords does not filibuster. It sees no benefit in doing it. Maybe it has got less staying power than members of the House of Commons but long may it last.

Q232 Lord Tyler: The genesis for our consideration has been to some extent, and acknowledged by witnesses to be, the report of the Labour Peers and the recommendation that 60 days should be the limit on reasonable time, which is rather curious, of course, because our remit says we should not be looking at changes, we should be simply examining the existing situation. Do you think that there is a justification for examining that particular proposal, and, if that proposal is on the table, have you and your colleagues considered other ways to deal with a situation which has apparently caused that proposal to come forward?

Mr Hayter: That proposal probably originated in the White Paper of 1968 when it was suggested that the House of Lords needed 60 parliamentary days for consideration of the bill, but that was in the context of a proposal to rewrite the Parliament Act,

so that those 60 days will run and then changes to the timetable in the Parliament Act might have been considered. We are not talking about that now, and so I think that we ought to be looking at first principles. Is it right to place a limit of 60 days on the amount of time that the House of Lords has to consider a bill? I would preface my answer to that question by saying that 60 days will normally be adequate, but I would regard it as wholly counterproductive to insist that it had to be done in 60 parliamentary days. First of all, it would encourage the abuse of time to become a factor, which at the moment is completely absent in the Lords; secondly, it would conflict with what I think is a really valuable feature of Lords procedure, namely the right of every member to move amendments without selection and actually I do not think it would do anything to help the Government or the usual channels. The usual channels at the moment manage to work out how to get things through. Sometimes it suits the Government to take a bill through very fast, and the House of Lords usually cooperates. Sometimes it suits the Government to take a bill through extremely slowly, and the House of Lords cooperates as well, and no bill is taken through in isolation. If you are trying to run a legislative programme and you have got six big Home Office bills all at once, you cannot do them all in the same time-frame; you have got to make sure that you can stagger them and allow a few other departments to have a bill as well. So, I would suggest that a 60-day ceiling would be a mistake.

Q233 Lord Tyler: You very effectively demolished that. It was outwith the responsibility to this Committee, but have you and your colleagues got any other ideas which might meet the objectives of the original proposal?

Mr Hayter: The short answer is, "No", because I do not think that the present situation is working badly. I think, in fact, it is working rather well and, therefore, I do not see any need to come up with a new solution to a problem that does not exist.

Q234 Lord Wright of Richmond: Can we ask Sir Roger how far the length and depth of scrutiny in the House of Commons affects the definition of "reasonable time" in the House of Lords?

Sir Roger Sands: I think that that is a matter for your judgment rather than mine. I noticed that in your evidence session with the Liberal Democrats Lord Higgins posited the existence of a convention that bills should be scrutinised by the House of Commons. I simply do not recognise such a convention. How the House of Commons deploys the time available to it I think is a matter for them. It is possible to objectively measure two things. One is how many clauses in the bill have not actually been debated in the Commons, at committee or on report; and it is also possible objectively to set out how many parts of the bill have been, either at Committee or on report, put formally under the provisions of a programme order, *en bloc*. Both of those two things can be set out factually, but what is not possible to do objectively is to assess why that might have been

so or to draw any conclusions from it. It may just have been that there were a number of clauses in the bill that members of the House of Commons regarded as entirely unobjectionable and not worth debating; it might have been that the time provided under the programme was manifestly inadequate; it might have been that the time provided under the programme was manifestly adequate but members on the opposition side of the House decided to try and indicate that it was not adequate by over-debating the early clauses of the bill. I have seen all those situations, and I do not think that it is possible to make an objective determination of what the factors are or, I think, for the House of Lords to draw any conclusion.

Q235 Lord Higgins: We are constantly told about the primacy of the House of Commons. In fact the House of Lords is a revising chamber, but over the last ten years or so, as a result of the introduction of programming, huge chunks of bills which I think no-one would dispute were important and simply not worth bothering about arrived in this House in a completely raw state, and we are now becoming on particular bills an entirely legislative chamber, and that is certainly true on the pensions point, and we are dealing with that legislation, given the primacy of the Commons, given we are a revising chamber, that there is a convention that the House of Commons legislates, and they are to a large extent now on particular bills failing to do so.

Sir Roger Sands: I think that that is an assertion rather than a question. I hesitate to comment too far or enter into open dispute with you, but programming has had an effect—there is no doubt about it—and it is now imposed routinely in the way that guillotining was not; but guillotining, on the other hand, which was used by governments quite frequently long before 1997, did tend to be applied to the more important and controversial bills and it could lead to large chunks of them being undebated for all sorts of reasons; so I think I would dispute that we are in a totally different ball game since the introduction of programming.

Q236 Lord Elton: Nevertheless, if it is apparent that considerable passages of a piece of legislation have not been scrutinised by the House of Commons, would you not concede that that might have a relevance to the length of time that the House of Lords needed to devote to it?

Sir Roger Sands: I can see that subjectively some members of the Lords might consider that, but I do not see there is any way that that could be codified as a convention, because I do not think you can specify the reasons which have led to that situation. The members of the House of Commons now have a great number of demands on their time, they always have but they perhaps now have even more, and if it is their decision to concentrate their attention on particular parts of the bill and to leave other parts to be scrutinised, I think that is a judgment which the Lords should respect.

Q237 Chairman: Can we turn to ping-pong. Would you say that ping-pong is a convention or is it simply an agreement that there will be a negotiation, ping-pong is really just a negotiation which the Lords may have, perhaps not even with the Commons, but with government departments about legislation? How would you really describe it?

Mr Hayter: I think it is a part of the process of agreeing a bill, and I find it very difficult to see any surviving conventions within ping-pong. Indeed, if I get the opportunity I would like to suggest that if there is one convention that used to apply—and it does apply to other business—it is the notion that business should be considered only with due notice. That convention is not applied to ping-pong at the moment, and there lies some of the root of the trouble that we have with ping-pong. Things have been done too fast.

Q238 Chairman: Do you think there is any evidence to suggest that if ping-pong was, let us say, badminton, bowls or croquet, that it was a slower, more long drawn out process of exchange, would that be of any great benefit to anyone?

Mr Hayter: There is a danger in saying that if it was very long and drawn out that would be better. If it was very long and drawn out, I have no doubt it would be worse, but a little more time for reflection would be to everybody's advantage. I do not think that if we have five exchanges in the middle of one night that necessarily gets to the right result by the most direct route.

Q239 Chairman: In your experience, would extending ping-pong weaken the position of the House of Commons with respect to the House of Lords or not?

Mr Hayter: As long as it is still possible to do things to any timetable, then I do not see that the administration has to lose. The assumption at the moment is that you do not need to leave very much time for ping-pong. If the business managers knew that they had to leave longer for ping-pong, that would be an irritation but I think it would actually be to everybody's benefit in the long run.

Lord McNally: The game we are playing is not ping-pong or croquet, it is poker, is it not, whatever length of time it is?

Chairman: Are you sure it is not Russian roulette!

Q240 Lord McNally: It could be. Sometimes I think people get over excited. The times I have been involved in it, we have known that ministers have got so many concessions they are going to make, and it is a matter of judgment whether you think you have got enough to throw in your hand.

Mr Hayter: Another convention we thought we had at one point was the one about double insistence, which is virtually a convention but it has been altered in its operation by the introduction of packaging and it is now extraordinarily difficult even to arrive at a situation of double insistence, so that I think there is a tendency at the moment for people to be looking for cosmetic changes. If you are only

looking for cosmetic changes you are not actually engaging in ping-pong. I am not even sure which form of chance it is.

Sir Roger Sands: I think for the first time today, Lord Chairman, I would like to slightly challenge something that my colleague has said. I think that the truth of the matter which has been revealed by some recent events, is that the Lords' *Companion* states the double insistence rule in a more severe way than Erskine May does. I have only dimly become aware of this as I have looked into this subject more and more. Just to go back to packaging, as you will know from your own experience, it has been the practice of the House of Commons for at least 40 years to group amendments for the purposes of debate. So, you have a single debate covering a number of related amendments, which may have been proposed by different parties, and very often, at the end of the debate, one vote on one particular amendment will settle the whole issue and the other votes are taken *pro forma*. Packaging, which only applies at a relatively advanced stage of ping-pong, is simply a way of formalising that and wrapping up as one motion a group of Lords amendments, a motion to disagree, an amendment in lieu or whatever it is. And so I do not think the packaging has made such a huge difference as has been suggested. On the double insistence rule, as stated in the *Companion*, it refers very firmly to an amendment and the implication there is any amendment, any single amendment. I do not think we in the Commons have ever interpreted it quite as strictly as that. What Erskine May says is "each House has one opportunity of drawing back from the position it has taken up unless it offers alternative proposals". Generally speaking, when one gets to an advanced stage of ping-pong, there is only one issue (possibly two issues) still in question, but there may be a large number of amendments, and so I do not think we have ever thought that merely because one House has reached its double insistence on a single amendment, thereby the double insistence rule has been breached. As long as alternative proposals on something have come forward, then the "game-over" sign has not flashed up on the screen. There were one or two occasions when I was taken aback by the Lords' interpretation of when we might be breaching the double insistence rule; so that is possibly an area where further codification might be important.

Q241 Lord Higgins: We have had an enormous amount of evidence about the technicalities of double insistence, and so on, but is it not the case also that one of the reasons that things have speeded up so much is because of a combination of packaging and programming, so that matters which have been debated at length, sometimes for days, in this House, when they arrive in the Commons, are programmed and not considered in any detailed form?

Sir Roger Sands: I think the biggest single fact leading to the increase in the velocity of ping-pong has been the advance in the technical facilities available to us to facilitate it. A few years ago we

would simply not have been able to produce a usable version of the Lords' amendments themselves, the government propositions and so on, quickly enough to support the sort of speed of ping-pong that we have now.

Q242 Lord Higgins: The debate has also been curtailed, has it not?

Sir Roger Sands: Debate is generally being curtailed, but then it frequently was under guillotine too.

Q243 Lord Higgins: I do not think anyone guillotined a Lords' amendment?

Sir Roger Sands: Oh, it was quite common. It was generally the case that a guillotine motion would provide for—. The standard provision in a programme order provides an hour to consider a Lords' message at an advanced stage of ping-pong. I am subject to correction, but from memory that exactly replicates the standard provision that used to be in guillotine motions.

Q244 Baroness Symons of Vernham Dean: Can we go back to what Mr Hayter said a few moments ago. I think the words you used were that some things are done too fast and that five exchanges in one night did not produce the best results. You are presumably talking about the Terrorism Bill, but in the end it reached a conclusion and I am not really quite sure why you made that judgment rather than to say that staying up all night does not do anybody's health any good, but if it did reach a conclusion, I am a little perplexed about why you would think about it as an example of things having gone wrong rather than things having gone right.

Mr Hayter: I would make a slight correction. I did not say it did not produce the best result, it was the route by which one got there. I think that it would have been perfectly possible to have arrived at a conclusion sooner if there had been longer in between the stages, and you might very well have got there in two attempts, rather than in five, if there had been more time for deliberation.

Q245 Baroness Symons of Vernham Dean: I have been member of this House for ten years, but I remember being on bill teams as a young civil servant a very long time ago and things have evolved enormously over that period, and we are talking about conventions, and I take your point about flexibility being enormously important, but when we are considering the ping-pong at the moment, is it not a question of political judgment about how far each side wants to push each other? Just on the point you make, if all things were equal and people were standing back and you were all civil servants working these things out, maybe what you say would be true, but my point to you is that this is politics and people actually really like pushing and pushing and pushing and we do it more and more because that is the nature of the political debate rather than something which could be sorted out by that rather cool Civil Service type of judgment?

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Mr Hayter: I readily accept that the system we have got is there to support politicians rather than the other way round. Therefore, if the politicians wish to do it that fast, we have provided the technology to assist it. As Roger has said, 25 years ago or more you simply could not have done it so fast. I am just asking the Committee to think whether it is actually as efficient a system now as those engaged in it think.

Q246 Baroness Symons of Vernham Dean: Twenty-five years ago or more we accepted handwritten amendments in the House of Lords, because I remember doing it as a young civil servant. I do not think that was any more efficient?

Mr Hayter: I am not hankering after the old days.

Q247 Chairman: We are not going back to manuscript amendments, but they are still in order in the House of Commons in certain circumstances.

Sir Roger Sands: In technical terms what we now do when we consider Lords' amendments without notice, which is unfortunately quite frequent, is we are considering manuscript amendments, but it just happens we have the technology to produce them in a form which is indistinguishable from the normal printed version. If I could follow up what Baroness Symons was asking about under the Terrorism Bill precedent, I think the underlying problem is that we have these procedures and that they are procedures for considering Lords' and Commons' amendments and reasons and all that sort of thing, which have developed over a very long time, and are based, I suppose, on the rationale that the two Houses are genuinely trying to reach a compromise. The fact is that now the habit has grown up in recent years that we immediately get into something which is not an attempt to find a genuine compromise but it is political arm-wrestling, no more or less than that. That is what was going on during the night on the Terrorism Bill, and the solution to it was an entirely extra-parliamentary one. Michael Howard saw Charles Clarke give an interview on Sky Television, thought what he had said was adequate and called the dogs off. That may be a success in some people's eyes, but is it a parliamentary success?

Q248 Chairman: No, but it is what Baroness Symons rightly said. It is politics; it is show business.

Sir Roger Sands: It was politics. I think what that section of my paper is saying is that you can take two views of the way these things have developed. You can say it is, as Paul indicated, a procedure responding very flexibly to political demands and pressures or you can see it as a total distortion of the underlying rationale and conventions that govern what is going on when the Houses exchange amendments and reasons at that stage. I would not like to put my money firmly on either, but I think it would be quite helpful if this Committee did say something about it.

Q249 Chairman: Can we move on then to secondary legislation. Are there any conventions governing secondary legislation? Are they alive and well? One of them was pronounced dead some time ago.

Mr Hayter: I do not think there are any at the moment, no. There used to be a loose convention that the House of Lords would not vote against SIs, but that is no longer the case. It is an example of how things have changed, how conventions have shifted. Although I have noticed that the Government evidence states it to be "a long standing convention that the House of Lords does not use its powers to reject statutory instruments", I think that overstates the case. Because of the unamendable nature of SIs, it might be that the only way for the Lords to exercise its revising function is to reject a whole SI. Think for a moment of a case where an SI misapplies a manifesto policy or the objectives of an Act of Parliament. You cannot amend it. So, there could be circumstances in which the Lords revising function would only be fulfilled by rejecting the SI, and we know that there are then ways for the Government and the Commons to pursue the matter and ultimately get their own way.

Q250 Chairman: The House of Lords does not use this power very often.

Mr Hayter: No, it does not. If one wanted to say conventionally it does not do it very often, that would be true, but I am not sure that it takes one very far.

Sir Roger Sands: I think one of the problems with this convention, and I am perhaps speaking against the interests of my House, although I do not think I am, is that there is no clear rationale for it. It does not seem to me to be contrary to the concept of a revising chamber that the House of Lords should occasionally throw out a statutory instrument, as long as in doing so it is not breaching the Salisbury Convention by another route. There are some statutory instruments which are so fundamental to the implementation of the bill that to throw them out would effectively be to throw out the Act at the same time; but there are many which do not come into that category. If we can take Australia—you have had a memorandum from the Clerk of the Australian Senate—there was a time when the Australian Senate would routinely reject any statutory instrument which their equivalent of the Joint Committee on Statutory Instruments had criticised and the government had not responded. So the Senate was underpinning the work of their joint committee on statutory instruments, and I think that was entirely appropriate for a revising chamber. If the government was not listening to reasoned criticism, that a statutory instrument perhaps looked *ultra vires* or was an unusual use of powers, then why not? The difficulty with it, however, is that you are looking at the motive and effect in each case and that is always a difficult thing to do.

Q251 Mr David: This is a slightly tangential question. At the moment the Lords is considering the Government of Wales Bill and one of the things in that bill is the proposal to allow the Welsh Assembly to have greater secondary legislative powers. Do you see any implications, as we are dealing with secondary legislation, for what is

happening with regard to devolution, particularly for Wales, for any of our discussions here in terms of the relationships between the two Houses?

Sir Roger Sands: No, I do not think I do. I am aware that there are big constitutional issues there but I do not think they will affect the basis of the relationship between the two Houses. One area of difficulty that has been mentioned in some of the papers to this Joint Committee is the extended periods when, unfortunately, the only way of legislating for Northern Ireland has been by delegated legislation, Orders in Council, which are in that case the equivalent of an Act of Parliament or a full bill, and yet Parliament cannot amend them. That is a genuine difficulty and I suppose if we were to end up in a similar situation with Wales we would have the same thing. As I understand it, that is not what is proposed, it will be a matter of passing more power to the Welsh Assembly and I do not see a problem about that from the point of view of the relationship between the two Houses.

Q252 Mr David: I am simply making the point that inevitably the debate about conventions and codification is already developing in terms of the Welsh Assembly's relationship with Westminster. I am just wondering if precedent in some way or another could be set which could have implications for what we are talking about.

Sir Roger Sands: The Sewel Convention is referred to by that name and that has developed as a very important constitutional convention. The Scottish Affairs Committee has recently been looking at proposals from the Scottish Parliament to formalise the operation of the convention so, yes, it is a precedent.

Q253 Chairman: We should move on now to financial privilege. The Government suggested that the scrutiny of the Finance Bill by the Lords Economic Affairs Committee risks intruding on Commons financial privilege. Do you think that is so, Mr Hayter, Sir Roger?

Mr Hayter: Shall I go first? It is for the Commons to defend their privilege but my advice is identical to that of Lord Williams of Mostyn: the Lords is not infringing Commons financial privilege and would not want to do so. It is acting as a revising chamber within the limits imposed by financial privilege.

Sir Roger Sands: I think my definition of that, Chairman, would be that the Lords is certainly not infringing the letter of financial privilege because that would involve interfering with legislation, but I can see why, as the work of this Sub-Committee develops and the remit of it tends to expand, the Government might feel that it was infringing the spirit of financial privilege.

Q254 Chairman: Do you think that financial privilege should encompass National Insurance?

Sir Roger Sands: This was a topic which, when I was Clerk of Legislation a few years back, I wrote a paper on for our Procedure Committee but they found it too difficult and never conducted the inquiry.

Q255 Chairman: Your equivalent of the Schleswig-Holstein question, was it?

Sir Roger Sands: It is pretty dense stuff. I was quite surprised that the Government raised this issue in their memorandum because, to be frank, in the past governments have been keen to claim that National Insurance is not a tax, it is something that is designed to finance a closed system; but it is clear the way things have developed over the past few years it has been largely the mechanism for funding a huge increase in National Health Service expenditure. My own view is that the pretence that it is not a tax is now threadbare and this is an area which should be reviewed and that was why I wrote the paper. That was some years ago.

Q256 Chairman: Perhaps we should have a look at it.

Sir Roger Sands: I was trying to get it found this morning.

Q257 Chairman: Just one final question before I pass to some of my colleagues. Is it your view that the Lords is straining the conventions by responding to Commons privilege reasons with amendments? This is referred to in your memorandum, Mr Hayter.

Mr Hayter: As I said, it is not up to the Lords to defend financial privilege but, as the staff of the House, we do advise members not to do so deliberately. If there is a Commons privilege reason for disagreeing to an amendment then I think it is absolutely essential that the House of Lords accepts that at its face value. That does not mean to say that it cannot then provide an alternative to that which does not infringe financial privilege, but the difficulty is to know what will or what will not. We can try to give helpful advice to members and usually they take it. I would say that this is one of the conventions that does exist, the convention that the House of Lords does not deliberately infringe Commons financial privilege.

Q258 Chairman: Sir Roger, do you have anything to add to that?

Sir Roger Sands: What *Erskine May* says on that is "a hint of privilege", which is the phrase that is used, "in a Commons reason is generally accepted by the Lords and the amendment is not insisted upon". To that extent, I agree that the convention has been observed, but if another amendment in lieu of the original one is then offered which quite clearly is also going to fall foul of financial privilege because it is only a very minor variant of the previous one then I think that is straining the convention.

Q259 Chairman: That is trying it on a bit.

Sir Roger Sands: I think a couple of the examples that Paul gives in his paper perhaps come in that category.

Q260 Lord Wright of Richmond: Can I just ask an historical question. When Lord Williams of Mostyn supported the idea of the creation of the Sub-Committee, did this cause any controversy or problems in the House of Commons?

Sir Roger Sands: I am not aware that I or any of my colleagues were consulted about it, but I have no doubt there was discussion at a political level.¹

Chairman: Yes, I think perhaps not as wide ranging as perhaps it should have been.

Q261 Lord Fraser of Carmyllie: I am rather surprised that you would even regard financial privilege as a convention. Is it not something that the House of Lords has to surrender to the Commons if the Commons assert financial privilege? Going back to your earlier definition of a convention as being a rule, it is not a rule if something can be changed from time to time. I do not think that we have got any right at any time to say that we do not think the financial privilege the House of Commons is asserting should be modified.

Sir Roger Sands: I agree that financial privilege is much more than convention, I do agree with that, it is a fundamental constitutional principle which has been asserted since the late 17th century.

Q262 Lord Fraser of Carmyllie: I thought what we here to discuss and try and come to a view on is are they conventions, because the way Mr Hayter has put it is that a convention can from time to time be modified or altered to suit the circumstances of the time, and my view is, rather in the way Sir Roger has put it, we have absolutely no right to modify anything to do with the financial privilege asserted by the House of Commons.

Mr Hayter: Can I say I do not dispute for a moment that financial privilege is not based on convention. I was talking about convention within the House of Lords as to what to do in response to a Commons privilege reason. Do remember that the Commons waives its financial privilege frequently, so the Lords can never be 100% certain what the Commons will do in any given situation, but if a privilege reason is given that is a clear indication that the Commons are saying “Get off our lawn”.

Q263 Lord Fraser of Carmyllie: It is a fact that it is only for the Commons to waive privilege if it wants to, we cannot waive privilege.

Mr Hayter: That is correct.

Q264 Chairman: We move on to some general questions now. Perhaps I can begin with a fairly straightforward one. What do you understand by the “primacy of the House of Commons”?

Sir Roger Sands: I think I cover that in paragraph five of my memorandum where I describe the basis of it. The primacy of the House of Commons is not, in my view, a convention, it is a fact and has been a fact for at least 100 years.

¹ *Note by witness:* I have subsequently discovered that in 2002 my predecessor, Sir William McKay, was consulted about this by the then Leader of the House of Commons, Mr Robin Cook. He responded that although “one can readily envisage arguments against the proposal”, his view on the strictly constitutional question was that “the proposals as stated do not run counter to the current distribution of powers between the Houses”.

Q265 Chairman: Not a convention?

Sir Roger Sands: No. It is a fact that is recognised and also was formalised by the Parliament Act 1911; it is recognised in all sorts of ways, even down to small things like Lord Home feeling that he had to resign his peerage if he was to be Leader of the Conservative Party.

Q266 Chairman: Should that fact be codified? Is it necessary to be codified?

Sir Roger Sands: No, I do not think it is necessary. I have some slight hesitation about the situation that will arise—which I realise you do not want to cover—but if the House of Lords were to become a largely or wholly elected body I can conceive in that circumstance a new statutory statement of the functions of the House of Lords might be necessary.

Q267 Chairman: Or the primacy of the House of Commons?

Sir Roger Sands: Well, I think it is always easier to restrict power by a legal provision than to provide it by a legal assertion.

Q268 Sir Malcolm Rifkind: We are asked to advise on the practicality of codifying the conventions and both witnesses have indicated that conventions by their very nature are unenforceable and that part of their strength is they can evolve to meet different circumstances over a period of time. Can I ask, therefore, if we were at the end of the day to have codification of conventions, in other words they were written down in some form, when they are written down would there have to be some reference in each of the codified conventions to the fact that they are unenforceable and can evolve despite the fact that they now appear in written form? Would that have to be part of the codification in order to maintain the principle of what a convention is in the way that it has been described?

Mr Hayter: Whether it is written down or not, that would be the truth of the matter. If you say that this is a convention and do not provide the means of enforcing it then you are recognising reality.

Q269 Sir Malcolm Rifkind: Can I come back to you on that. I think the concern some of us may have is that part of the thinking behind codifying the convention is in practice to make it far more difficult for it to evolve and to be changed as circumstances change and, therefore, if you wish to protect against that that would have to spelt out in the codification.

Mr Hayter: That is a matter of judgment for the Committee.

Sir Roger Sands: I notice that the report of the Labour Peers group included this sentence: “These conventions are so important that there ought not to be any doubt or ambiguity as to their application in all circumstances”. I do not think that is a viable proposition. I think that any statement that was made would have to resile from that to some extent.

Q270 Lord Elton: Sir Roger, you said a moment ago that if this House were to become more elected it might require a statutory statement of some sort as

to its function. Is that drawing together the general principle that any change in the composition of this House would have to in some way be reflected by changes in any code that was constructed?

Sir Roger Sands: I just get a sense that we are moving inexorably in the direction of a written constitution. It will not all be in one document, it will be in a variety of different documents, but we have devolution which is set out in the statutes, we have the controversial Human Rights Act which has made a considerable difference to practice in regard to the powers of Parliament, and I feel to embark on a major reconstruction of the composition of the Second House without at the same time attempting to pin down what you are reconstructing it to do would be a dangerous course.

Q271 Lord Elton: Therefore, to establish the functions and powers of this House in a convention would not be an effective way of restricting or defining the powers of this House were its composition to be changed.

Sir Roger Sands: That is effectively what my memorandum says, yes.

Q272 Lord Elton: Exactly. So that the exercise of trying to build a concrete defence of the circumscription of this House in advance of changing it is actually bound to fail.

Sir Roger Sands: I think if the codification is of the sort that I described as being at the weakest end of the spectrum, yes, I would have thought so.

Q273 Lord Wright of Richmond: Lord Chairman, this is a quick comment rather than a question going back to your earlier question about primacy of the House of Commons. I take it that our terms of reference do not require us to consider the practicality of codifying primacy of the House of Commons but, to quote Sir Roger, it is a fact against which we are asked to consider other practicalities.

Mr Hayter: Can I just respond to that and say I agree entirely with Roger, it is not convention, it is a fact and it is evident from the terms of the Parliament Acts. Therefore, if you are going to need to change it you are going to need to change it in a statutory way otherwise that is really—

Q274 Baroness Symons of Vernham Dean: It is a fact that, as Sir Roger points out in paragraph five, it is based on more than one assertion. It is based on three assertions. One, the tax and expenditure powers of the Commons as opposed to the Lords, second the Parliament Act and, third, the elected nature of the Commons. Do you think, maybe you do not, that one of those is a more important base? You stress the point that it is not just one issue, there are three issues here, but is there one of those that you think is the more important base or are they all of equal importance in the primacy?

Sir Roger Sands: I think they all hang together historically. Long before we had universal suffrage and election in the form that we now consider appropriate, the Commons were the representatives of the localities, the different parts of the country,

who were brought together and it was with that status that they agreed to the provision of money to fight the King's battles. That is the basis of financial privilege. The political primacy, though, started, I am sure, with the Reform Act 1832 and the subsequent development of genuinely popularly elected governments, so in my book the Parliament Act 1911 was recognition of a situation that had developed for some time before that. I would say, if you were to push me, that election, of the three, is the most important but really it all hangs together as one.

Q275 Baroness Symons of Vernham Dean: To follow your argument through, if you change the election you would change the Parliament Act because it is the Parliament Act that flows from the elected nature of one House as opposed to the other. On the expenditure issue, again, if you want to go further back in history, it was the barons who decided whether the King could fight his wars, but we will not go back that far. If we are going to go back to the Parliament Act, it is the Parliament Act that flows from the elected nature of one House and the non-elected nature of the other.

Sir Roger Sands: That is correct.

Q276 Baroness Symons of Vernham Dean: Therefore, if you change that essential relationship do you logically have to think about changing the Parliament Act?

Sir Roger Sands: I think the Parliament Act would have to be reconsidered. My paper points out that the preamble to the Parliament Act envisages it as a temporary measure pending the full reform of the House of Lords. The preamble is not an effective part of the legislation so you could leave it as it is, have an elected House of Lords and still rely on the courts to apply the Parliament Act; but, nonetheless, the fact that it is there in the preamble and on the record does suggest at the very least you would have to reconsider things.

Q277 Baroness Symons of Vernham Dean: So essentially you would be changing automatically two of the three bases upon which the primacy of the Commons is based. Two of your three premises, if you were to change the elected nature of one House, that is one of them, and secondly, flowing from that, looking again at the Parliament Act, that is two or three bases which are then changed by the very nature of changing the elected nature of one House.

Sir Roger Sands: You are taking me into very deep waters here.

Q278 Baroness Symons of Vernham Dean: I am not going further than your—

Sir Roger Sands: There are too many degrees of uncertainty here. What sort of election is one considering for the House of Lords, at what intervals—

Q279 Chairman: Would it suffice to say that these issues would be called into question?

Sir Roger Sands: I think they would. I think that is right.

Q280 Mr Spellar: In Sir Roger's memorandum, in paragraph eight you say "A further difficulty would be the need for adjudication. . . ." What would whoever was the adjudicator adjudicate on?

Sir Roger Sands: I think when I wrote that I perhaps had not sufficiently appreciated the range of possibilities that could be covered by the term "codification". I had assumed, rather like Lord Fraser, that codification meant some sort of assemblage of what are now conventions into a body of rules, and rules do not make sense unless somebody is there to enforce them. I think the form of adjudication would depend on the form of the codification. I went through the possibilities right at the outset: for standing orders, it would be the chair in the House of Commons; with legal codification it would inevitably be the courts.

Q281 Mr Spellar: How could the courts then adjudicate on whether the House of Commons had applied its rules properly or applied the rules of the relationship between the two Houses?

Sir Roger Sands: It would be a very uncomfortable process but something not too dissimilar looked at one stage as if it might happen in the extended court proceedings over the use of the Parliament Act in relation to the Hunting Bill.

Q282 Mr Spellar: As you rightly say, this is very difficult territory because there is a procedure by which legislation then becomes enacted into law and ultimately it is by receiving Royal Assent under our constitution. How can an adjudicator or a court second-guess that process under our constitution?

Sir Roger Sands: Well, these issues did arise during those court cases in relation to the Hunting Bill and we did worry at one stage that the Speaker's Certificate might come into question. There is a provision in the Parliament Act that says the Speaker's Certificate cannot be second-guessed by the courts but I cannot believe that there are no circumstances conceivable where that would be so.

Q283 Mr Spellar: How can that be under our constitution? If we had a Speaker's Certificate, which is the voice of Parliament, and that legislation then receives Royal Assent, how can any external body, an adjudicator or a judge, actually override that under our constitution, unless we are changing our whole constitution?

Sir Roger Sands: Yes, I—

Q284 Mr Spellar: That is more significant than just saying there is a need for adjudication. This is a major constitutional change, it is not just an inevitable consequence. This is a substantial constitutional change.

Sir Roger Sands: Yes, I would agree with that.

Q285 Mr Spellar: It does not read that way in paragraph eight, it is almost as though we can do that but, of course, there has got to be a need for adjudication. This is a significant change to the British constitution.

Sir Roger Sands: Yes, indeed. I did not draft the terms of reference to this Joint Committee and I was trying to understand what the Joint Committee was supposed to be doing, and I was expressing there the probability that any codification would raise exactly that issue.

Q286 Chairman: I think if the terms of reference look like a camel it is because they were negotiated through the usual channels! Sir Roger, do you think the creation of a Supreme Court could have any significant impact on what you have just been saying one way or the other?

Sir Roger Sands: In the end from my point of view as a defender of the lower House and the Parliament Act, the Law Lords' ruling in relation to the Hunting Act was satisfactory but there were some obiter dicta in that by one or two of the Law Lords which struck me as possibly positioning themselves for their new role.

Q287 Chairman: Flexing their muscles.

Sir Roger Sands: And opening up the possibility that they might see themselves possibly taking on some of the functions of a constitutional court along continental lines; but the judgment itself was fine. I imagine that the Supreme Court will, at least initially, approach matters in exactly the way that the Law Lords would have done, so I do not see it necessarily going in that direction.

Q288 Chairman: Mr Hayter, would the election of a Lords' Speaker make any difference to any of these things?

Mr Hayter: It should not.

Q289 Chairman: Carefully chosen words, if I might say so. If this Committee decided to recommend to Parliament that the Clerks of both Houses should be invited to jointly produce a draft codification of existing conventions, is that something that Clerks would feel they were obliged to do or not?

Mr Hayter: Invited by whom?

Q290 Chairman: By Parliament, if that was a recommendation from the Committee which Parliament accepted, ie both Houses.

Mr Hayter: Undoubtedly, if we are invited to do things by Parliament we will try to do it. The essence of this is to find something that, no matter how skilfully drafted, is accepted by everybody so that our contribution would merely be the first stage in a long and tortuous process.

Q291 Chairman: Let me put it another way: is it possible or practicable that some kind of code of practice about the conventions could be seriously set out, robustly set out?

Mr Hayter: Perhaps it might be worthwhile just referring back to that episode of the Planning and Compulsory Purchase Act and double insistence. There had previously, and this was evident from what Roger was saying earlier, been differences of opinion in the two Houses about the double insistence rules and packaging. The conclusion of that was a statement agreed by the two of us jointly, which I think now represents the agreed position of the two Houses. We can do the same again in whatever area we are invited to do it. I rather hope that we are going to get a bit of a steer from this Committee as to how much of what we have been saying convinces you.

Q292 Chairman: Maybe since the two questions I have just asked were not among the questions you saw in advance, since I dreamed this idea up myself at 6 am this morning, you might like to go away and reflect on it and give us a note.

Sir Roger Sands: I hear your suggestion with relative equanimity as I am retiring at the end of September.

Q293 Chairman: Yes. Somebody did suggest you may say this was a matter for your successor!

Sir Roger Sands: I think it would be perfectly reasonable to look to the Clerks for help with some areas of this but to look to the Clerks, for example, to define what a manifesto bill is I think would not be something we could do.

Mr Hayter: Perhaps I could add. In the House of Lords it is always the Clerk's position that we give you advice but ultimately it is for the House to decide, so the best I could do is to provide the first material on which it is the House that has got to take its decision.

Q294 Sir Malcolm Rifkind: Would it be fair to say you are underwhelmed with enthusiasm at the Chairman's proposal?

Mr Hayter: No, it would not be fair to say that.

Chairman: I must restrain Sir Malcolm from going around the country stirring up apathy, as one of his late, lamented colleagues once said. Perhaps you might reflect on that. Are there any more questions? It remains for me to thank you, Mr Hayter and Sir Roger, for spending so much time with us and so candidly responding to all of our questions. Thank you very much indeed.

Tuesday 18 July 2006

Members present:

Cunningham of Felling, L, in the Chair

Bledisloe, V	Mr Russell Brown
Elton, L	Simon Hughes
Higgins, L	Sarah McCarthy-Fry
McNally, L	Sir Malcolm Rifkind
Tomlinson, L	Ms Gisela Stuart
Tyler, L	Mr Andrew Tyrie
Wright of Richmond, L	Sir Nicholas Winterton

Memorandum by Lord Norton of Louth

A NOTE ON DEFINITIONS

The Joint Committee has invited submissions by 20 June. It has also published, in its First Special Report at paragraphs 6 to 13, a list of assumptions and exclusions that will inform the Committee in its work. At paragraph 15, it states “Evidence which disregards these assumptions and exclusions is unlikely to be considered or published”. I appreciate that what follows may therefore not be considered, given that it challenges the assumptions made by the Joint Committee. The terms of reference and the First Special Report of the Joint Committee rest on assumptions that are not necessarily sustainable.

There are fundamental problems of definition with both the terms of reference and the Joint Committee’s First Special Report. The Joint Committee declares at paragraph 8 “We do not offer a definition of a ‘convention’. We believe we will know one when we see it”. Given that the Joint Committee is charged with considering the practicality of “codifying the key conventions on the relationship between the two Houses of Parliament” then defining one’s terms is crucial. We need to know what is meant by conventions *and* by codification. Proceeding on the basis that the meaning of both terms is known and uncontested is not a defensible position.

The assumption that the Joint Committee makes appears to be that it knows what is meant by codifying conventions and that it is possible to engage in such an exercise. However, on the basis of the definitions that I am familiar with, the term “codifying conventions” is a contradiction in terms. One can have conventions or one can have codification. They are mutually exclusive. If conventions are codified, they cease to be conventions.

The confusion created by the Joint Committee’s First Special Report is apparent in the section on Questions. Under the heading Secondary legislation, we are asked if the statement in the Companion (paragraph 8.02) constitutes “an accurate codification”. The passage quoted does not constitute a convention, never mind a codification of a convention. The passage constitutes a statement of what has occasionally happened and then reproduces a resolution of the House that it retains its unfettered freedom to vote on any subordinate legislation submitted for its consideration. It is not at all clear why this should be considered to be a convention of the constitution. My understanding is that the assumption made by some is that it is a convention that the House does not vote against secondary legislation. That is not what the Companion says.

In short, if the Joint Committee is to proceed to fulfil its terms of reference, it must first define its terms. Defining a convention of the constitution is not a particularly easy task—it has exercised scholars for some time—but it is essential. (Conventions are, after all, one of the four principal sources of the British Constitution.) The definition that I have found most useful is that conventions of the constitution are rules of behaviour that are not legally binding, and are not enforced by the presiding officers of either House of Parliament, but are treated as binding by those at whom they are directed in order to make the political system function effectively.¹ They are, in essence, the oil in the machinery of state, enabling the formal machinery to adapt to political reality. There are “strong” conventions—well established, well understood and adhered to—such as that the Queen gives her assent to measures passed by both Houses of Parliament and that a Government defeated on a vote of confidence in the House of Commons resigns or requests a dissolution.

There are problems, though, with establishing when an established practice has attained the status of a convention and, once established, how far it extends. The fact that some behaviour has been maintained for some years does not necessarily render it a convention of the constitution. For many years prior to 1972, no Government had been defeated in the House of Commons as a result of its own supporters voting with

¹ See P Norton, *The Constitution in Flux* (Oxford: Martin Robertson, 1982), p 7, drawing on G Marshall and G Moodie, *Some Problems of the Constitution*, 4th revised edn (London: Hutchinson, 1967), p 26.

the opposition. That did not make it a convention of the constitution that the House of Commons refrained from defeating the Government. Some MPs and commentators believed that the convention on Government defeats extended beyond votes of no confidence.

For something to constitute a convention there therefore needs to be practice that has become established *and* for that practice to derive from a rational principle to justify its maintenance. The Queen gives assent to measures passed by both Houses in order to ensure that her actions are predictable and she operates above the partisan fray, thus bolstering the position of the monarch as a unifying figure above politics. The rationale for the Government resigning in the event of losing a vote of confidence is fairly straightforward, but it is confined to votes of confidence. There is no reason for it to extend beyond that, nor any consistent practice of behaviour in doing so.²

If conventions are so defined, then it is difficult to see how rules of behaviour that are not formally enforceable can be codified, since codification—if it is to mean anything—implies enforcement. If codification means simply listing what are agreed to be conventions, then one is simply engaging in a process of adumbration which takes one little beyond the Joint Committee’s First Special Report. The Joint Committee itself seems to have some cognizance of this in paragraph 8 in the section on Questions, where it asks “If there is such a convention, how could it be codified? In its codified form, how could it be enforced?” One could thus adopt a soft definition of codification, which would largely render the exercise nugatory, or a strong definition, which means that conventions cease to be such once codified.

In short, it is a case of deciding whether certain rules of behaviour, which have been followed for some years for good reason, should lose their existing and inherent flexibility and be transferred into rules that are, in some way, enforced. If the Salisbury-Addison convention (the Cranborne doctrine that became the Salisbury-Addison convention) is codified, then it robs the House of Lords of its capacity to act as a longstop in the event of legislation that is deemed to be constitutionally improper. So long as it retains the power to vote on Second Reading on a Bill in the Government’s programme, it serves as a deterrent to a Government seeking to act in a dictatorial manner. So long as a Government does not act in such a way, then the House does not vote on Second Reading. Given the provisions of the Parliament Acts, it is not clear why the Salisbury-Addison convention should be transformed into an enforceable rule.

It is also not clear to me why the presumed convention on secondary legislation should be made into a fixed rule. I am not aware that there is agreement that it actually constitutes a convention, so there is therefore nothing to codify. There is no consistent practice of behaviour—as the paragraph of the *Companion* that is quoted in the Joint Committee’s report makes clear, the House has “only occasionally” rejected delegated legislation. The essential point is that it has done so on occasion (however rare that may be). I am not clear what the rationale for the presumed convention is, especially given that Statutory Instruments are not amendable and the Government can come back with fresh orders. Furthermore, any case for such a convention is undermined, necessarily so in my view, by the creation of a Select Committee on the Merits of Statutory Instruments. If the Committee is to have teeth, then the House needs to reserve to itself the power to reject Statutory Instruments, albeit on rare occasions. If the Legislative and Regulatory Reform Bill presently before the House passes into law as presently drafted, then arguably the case for the House to retain the capacity to reject orders becomes even greater.

My purpose in submitting this memorandum is to help the Joint Committee in completing stage one of its work and that is to define its terms. The Joint Committee now has until the end of the Session to report, though I take the view that is still too short a time if it is to engage in a thorough study of the conventions and practices that govern the relationship between the two Houses. Nonetheless, it has greater opportunity than existed when it was first established in order to probe deeper into the contours of that relationship. Utilising that opportunity is a necessary, but not sufficient, condition if the Joint Committee to fulfil its remit.

Norton of Louth

20 June 2006

Memorandum by Professor Anthony Bradley

JOINT COMMITTEE ON CONVENTIONS

EXECUTIVE SUMMARY

This paper does not deal with specific issues raised in the Joint Committee’s call for evidence, but comments on (a) the nature of conventions, and (b) the process of codifying conventions. As well as expressing constitutional principles, constitutional conventions include both descriptions of regular practice and statements of rules of conduct; and many conventions have a dynamic and evolving character. Codifying conventions may involve merely summarising past practice or an exercise in formulating rules for future conduct. In carrying out its remit, the Joint Committee ought to take into account (a) the possibility

² See P Norton, “Government Defeats in the House of Commons: Myth and Reality”, *Public Law*, Winter 1978, pp 360–78.

that proposed legislation may raise questions of constitutional principle, and (b) the effect of the Parliament Acts 1911–49 in providing a residual procedure for resolving major disputes between the Commons and the Lords.

A. The Joint Committee has the task of considering the practicality of codifying the key conventions on the relationship between the two Houses which affect the consideration of legislation. This remit raises questions about the nature of constitutional conventions and the process of codifying conventions. The following comments deal with these questions, and do not deal with the specific issues raised in the Joint Committee’s notice inviting evidence.

The nature of conventions

B. The Joint Committee has indicated that they will know a convention when they see it. Nonetheless, the Committee may wish to remember that an underlying difficulty in identifying conventions is that in common usage the term can cover a range of phenomena, including

- (a) matters of principle and democratic values that underly the system of British government (as in “the convention of ministerial responsibility”);
- (b) the description of habitual practice by holders of particular constitutional positions; and
- (c) statements of rules of conduct that apply to the holders of particular constitutional positions.

Within one area of the constitution, for instance the relations between Ministers and the Commons, the three senses of “convention” can co-exist.

C. The fundamental difference between matters of practice and matters of obligation is sometimes overlooked, but (for instance) the fact that, as Lord Chancellor, Lord Irvine of Lairg rarely sat as a judge did not create a convention that he should not do so (and he denied that there was such a convention), even though there were many appeals before the Law Lords involving the government as a party in which it would have been improper for him to have sat. Similarly, the fact that the House has seldom sought to defeat a statutory instrument laid before it does not create a binding rule that it should not do so. Conduct that is unusual is not necessarily a breach of convention.

D. Some writers³ have used the term “non-legal rules of the constitution” to make two points (a) that a convention is a rule relating to particular conduct and (b) that the rule does not have the force of law. Certainly, over time repeated practice may become formalised as a rule of conduct, and become conventions in that sense. But conventional rules may also be created by agreement. The recent “Sewel convention” is an instance of a precise rule, based on agreement between those holding office in London and Edinburgh. Although it is often said that the whole system of Cabinet government is founded on convention, and not upon law, not all features of Cabinet government involve conventions of the same kind. Some aspects of the Cabinet system may be stated in the form of rules (as in the *Ministerial Code*), but others are not. Some aspects of practice can be readily changed by the Prime Minister. But not all features of Cabinet government are at the Prime Minister’s disposal—for instance, the rule that Ministers are collectively responsible to the House of Commons and can continue in office only if they retain the confidence of the Commons.

E. The lack of a bright line between matters of practice and obligation may sometimes seem to be a nuisance. In fact, this lack of clarity helps to make possible the evolution of constitutional government in response to changing circumstances. The British system is dynamic and flexible, rather than rigid. Many aspects of government are in a constantly evolving state, so that commentators need a sense of history as well as knowledge of current conditions. Stanley Baldwin, in a celebrated discussion of the nature of constitutional government, said:

“The historian can tell you probably perfectly clearly what the constitutional practice was at any given period in the past, but it would be very difficult for a living writer to tell you at any given period in his lifetime what the Constitution of the country is in all respects, and for this reason, that almost at any given moment . . . there may be one practice called “constitutional” which is falling into desuetude and there may be another practice which is creeping into use but is not yet constitutional”⁴

F. Nevertheless, not all matters of convention are equally flexible. For instance, the constitutional position of the judiciary (including judicial independence) has not in its essence changed in the light of the Constitutional Reform Act 2005, but there is current evidence that the relationship between the judges and Ministers involves dynamic elements, and this may in turn impact upon the relationship between judges and the media.

G. Whether seen as rules or as matters of practice, the content and effect of conventions derive from the time in which they are first identified. The process of defining a convention may enable a lesson from experience to be reinforced. Equally, if circumstances that gave rise to a convention change, this may affect the strength of the convention, or may make it necessary to re-visit the practice or rule. The history of the

³ For instance, the late Geoffrey Marshall, in *Constitutional Conventions* (1984), chapters 1 and 13.

⁴ (1932) 261 HC Deb, col 531, quoted by Jennings, *Cabinet Government* (3rd edn, 1959) p 12.

Salisbury/Cranborne doctrine⁵ demonstrates that the doctrine emerged as a necessary *modus vivendi* in the political circumstances of 1945–50. Changes in the composition of the House of Lords since then are relevant to an appraisal of the present role of the House in the legislative process. So too are changes in public perception of the process by which the House of Commons is elected. It is, of course, wholly outside the remit of the Joint Committee to question the primacy of the Commons in the legislative process, but a judgment about the propriety of the House of Lords in questioning or resisting a government's bill may have to take some account of the extent to which approval given by the Commons to the bill may be said to represent the clear will of a majority of the electorate.

H. One or two other brief points about conventions.

- (a) Many conventional rules of conduct binding on certain office-holders involve reciprocity on the part of other office-holders; thus a departure from customary behaviour by (say) a senior civil servant might release a Minister from the customary obligations owed towards the civil servant (for instance, to maintain his or her anonymity).
- (b) For this reason, even where a convention can be stated as a rule, it must generally include a qualifying word like “normally” to allow for the possibility of a departure from the rule in the event of unexpected circumstances.
- (c) In so far as a convention may express an important principle in practical terms, maintenance of the principle may be more important than the formulation of a precise rule and the question of whether that formulation of the rule has been breached.
- (d) Some conventions apply to the conduct of individuals—a Minister, a judge, a civil servant—and an appropriate sanction for breach is loss of office. In the case of conventions that seek to govern the behaviour of an institution, or a large group of individuals, it may be more difficult to formulate the rule, to ensure that the rule is observed and to provide a sanction for breach.
- (e) The annex contains an extract from Geoffrey Marshall's summary dealing with the nature of constitutional conventions, and also Sir Ivor Jennings' well-known trio of questions for identifying constitutional conventions.

The process of codifying conventions

I. The common law has mainly developed through case-law, general principles being established through the decision of innumerable individual cases. Other European systems of law have made use of codes, bringing together in a single text the leading rules of a branch of law. In the context of conventions, codification may involve:

- (1) the process of writing down a body of practice in an objective and accessible way (just as the editors of *Erskine May* may be said to have prepared a “code” of parliamentary practice);
- (2) the formulation of agreed or regular practice in the form of a written rule (as could easily be done in the case of the Sewel convention; another illustration is the adoption by both Houses in 1997 of the rule that it is the duty of Ministers not knowingly to mislead Parliament); or
- (3) the presentation of an entire constitutional relationship in the form of a complete statement of the relevant conventions (that might need to include the underlying constitutional values and a description of regular practice, as well as a statement of rules).

J. The Joint Committee's task could possibly fit within each of these meanings. In any event, the challenge to the Committee is to deal with an area of constitutional relationships that concern both the regular, recurring processes of making new law, and the difficulty in exceptional situations of resolving an issue of constitutional principle that may be raised by a Government proposal.⁶ The latter difficulty may arise since, in the absence of a written constitution and by reason of the sovereignty of Parliament, a bill may raise a fundamental constitutional question such that it is not possible in advance to predict how the Lords should respond when the bill comes from the Commons. If the aim is to produce an accessible and objective statement of House of Lords practice since 1945, that practice has not been uniform throughout that time. Moreover, a written formulation of the conventions is inherently likely to have a normative effect for the future and to steer further evolution.

K. In considering the likely practical effect of any normative code, it must be remembered that, unlike legal rules, there will no obvious means of resolving a dispute as to the effect of a codified convention unless provision is made for a referee or umpire with authority to interpret and apply the code. The statement that “the House of Lords will consider Government business within a reasonable time” must surely command general support. But there may well be circumstances (particularly where the Government considers that legislation is urgently needed on a controversial matter) in which different views are reasonably held of what is a “reasonable time”. Similar difficulties are likely to apply to a rule against the making of “wrecking amendments”, or a rule to determine when legislative “ping-pong” should be brought to a close.

⁵ An informative account of its history that deserves to be widely read is in the House of Lords Library Note, *The Salisbury Doctrine* (updated June 2005).

⁶ In practice, as is clear from reports of the House of Lords Select Committee on the Constitution, the question of whether a bill raises an issue of constitutional principle is itself liable to be controversial.

L. In dealing with these general considerations, I am well aware that I have not addressed the particular questions on which the Joint Committee has invited evidence. One reason why I have not done so is that on the history of relations between the Lords and the Commons in the legislative process there is nothing that I can usefully add to the historical account in the House of Lords Library Note, *The Salisbury Doctrine* (updated June 2005) and to the evidence of more recent events given to the Committee by the Clerk of the Parliaments and the Clerk of the House of Commons. A reading of this material suggests to me that the subject-matter to be reviewed by the Joint Committee cannot be summarised in the form of one or two short “conventions”.

M. In the final section, I mention one matter that is relevant to the present inquiry, although it is not mentioned in the Joint Committee’s invitation to give evidence.

The Parliament Acts 1911–49

N. Whatever may have been the conventions that governed the relationship between Lords and Commons before 1911, enactment of the Parliament Act in 1911 had a profound effect on the constitutional position of the House of Lords. The legal effect and extent of the 1911 Act were considered by the Law Lords in *R (Jackson) v Attorney-General* [2005] UKHL 56; [2005] 3 WLR 733.⁷ Although some judgments in that case ranged more widely,⁸ Lord Bingham in his judgment⁹ emphasised that the judges were not concerned with the broader implications of the effect of the 1911 Act, nor with the conventions that might apply to use of the Parliament Acts in relation to major constitutional changes.

O. When a constitutional relationship breaks down and legislation is enacted, a possible result is that the relationship is in future governed solely by the new law. If this were the result of the Parliament Acts, it might be argued that there is no place for new conventions or political understandings to come into play since on any controversial issue it is open to either the Commons or the Lords to rely on the 1911–49 Acts. In my view, the history of Lords-Commons relations since 1911 demonstrates that this was not the result of the Parliament Acts, and that there is a need for some consensus (some shared political understandings), as to what will normally happen to make recourse to the Parliament Acts an infrequent event. However, this does not mean that it is “unconstitutional” for such recourse to be necessary, and there is much scope for reasonable parliamentarians to disagree as to when it is necessary to rely on the Parliament Acts. It would, of course, be an untenable position for the House of Lords to force the Parliament Acts to be used as a matter of course on every government bill. But it would equally be difficult for the Government to claim that the Parliament Acts should never be used. Certainly, the Parliament Acts do not provide, save in the case of money bills, the answer in a situation in which the Commons but not the Lords are satisfied that there is an urgent need for legislation that will be frustrated by the statutory period of delay. Nonetheless, at the risk of stating the obvious, I consider that any statement of conventions in regard to the process of legislation will need to deal with the claim that may at any time be made by either House, that in the absence of any other solution, the Parliament Acts must be deemed to provide the answer.

*Anthony Bradley*¹⁰

22 June 2006

Annex

[A] In Geoffrey Marshall’s book, *Constitutional Conventions: the Rules and Forms of Political Accountability* (1984), chapter 12, the conclusions reached by the author as to the character of conventions include the following:

- “1. Conventions are rules that define major non-legal rights, powers and obligations of office-holders in the three branches of government, or the relations between governments or organs of government. (It being often useful to distinguish duty-imposing from right-conferring conventions.)
2. Conventions have as their main general aim the effective working of the machinery of political accountability.
3. Conventions can in most cases be stated only in general terms, their applicability in some circumstances being clear, but in other circumstances uncertain and debatable.
4. No general reason needs to be advanced to account for compliance with duty-imposing conventions beyond the fact that when they are obeyed (rather than disobeyed, rejected or changed), they are believed to formulate valid rules of obligation.
5. Conventions are distinguishable from rules of law, though they may be equally important, or more important than rules of law.
6. Conventions may modify in practice the application or enforcement of rules of law.

⁷ On which, see the 7th report of the Select Committee on the Constitution, 2005–06, HL Paper 141.

⁸ See eg the speech of Lord Carswell at paras 177–178.

⁹ See para 41.

¹⁰ Professor emeritus of constitutional law, University of Edinburgh; barrister, of the Inner Temple; specialist adviser to the House of Lords Select Committee on the Constitution, 2002–05; visiting fellow, Institute of European and Comparative Law, University of Oxford; author (with KD Ewing) of *Constitutional and Administrative Law* (13th edn, 2003; 14th edn, forthcoming).

7. Conventions are not direct sources of legal rights and duties, but they may be used or invoked by courts in the application or interpretation of existing rules of law.”¹¹

[B] In *The Law and the Constitution* (5th edn, 1959), Sir Ivor Jennings concluded his chapter on conventions with a discussion of “the most difficult problem connected with them. When is it possible to say that a convention has been established?” (p 134) In dealing with this problem, Jennings states that “mere practice is not enough” and that a single precedent is not enough. He summarises his conclusions in a passage that was cited by the Supreme Court of Canada in its decision *Reference re Amendment of the Constitution of Canada (Nos 1, 2 and 3)* (1982) 125 DLR (3rd) 1:

“We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons regarded them as bound by it.” (p 136)

¹¹ Conclusions 8 and 9 are omitted, since they are not relevant to the present inquiry.

Witnesses: **Lord Norton of Louth**, a Member of the House of Lords, Professor of Government, Hull University, **Professor Anthony Bradley**, Professor Emeritus of Constitutional Law, University of Edinburgh, and **Dr Meg Russell**, Senior Research Fellow, Constitution Unit, University College London, examined.

Q295 Chairman: Good morning. Having welcomed you informally let me welcome you formally to the Committee, Dr Russell, Lord Norton and Professor Bradley. We are delighted to have you come to talk to us about conventions and related matters. I would begin by asking you if you would like to make any opening statement before we discuss the various detailed issues?

Lord Norton of Louth: There is only one opening point I would make that may be helpful. In my own submission I was concerned to call attention to the importance of defining what is meant by codification, but it strikes me, having looked at the evidence, that it is equally important to think about what you actually mean by the term “convention” because when you look, particularly at the evidence that you have received, it tends to be used in a very generic sense to cover everything, and really it strikes me that one needs to try to distinguish a convention of the constitution from a parliamentary convention and also from, say, a parliamentary rule and custom, a practice adopted for means of convenience or, indeed, political norms, agreements and behaviour. I think those are all distinguishable, but there is a danger, using convention, more or less to cover all those and I think that that contributes to the confusion that has arisen in addressing this.

Professor Bradley: I have nothing to add to the paper I have put in, but having heard the point just made I should say that it is something that occurred to me that my thinking on conventions has mainly been generally with regard to conventions of the constitution. I have not given the specific attention to conventions of the two Houses, which possibly the Clerks to the Houses have and that came out from the evidence that they gave.

Q296 Lord Higgins: What I think would be very helpful, Chairman, given the distinction which is being made between constitutional and parliamentary conventions, would be to know, of the ones listed in our terms of reference, Salisbury and so on, in which ones the witnesses regard as falling on one side of the fence or the other.

Lord Norton of Louth: The only query in relation to convention and the constitution would be in relation to what is referred to as the Salisbury Convention because when you are looking at conventions of the constitution you are dealing with conventions that are derived to ensure that the basic relationships operate effectively within our constitutional arrangements, as distinct from something that is, say, internal to the institution that facilitates the operation of the institution. So I suppose the Salisbury Convention is the only one where a doubt arises as to which category it falls in; all the others that you are considering I would not regard as coming anywhere close to being treated as conventions of the constitution.

Professor Bradley: I wonder if I could be a little more agnostic than that because I said that I had not previously given my attention to the possibility of there being parliamentary conventions which are different in their nature to constitutional conventions. Having said that, I am not yet very far advanced in how these are different and I would have thought that the generic term “convention” could well apply; what I find central to one of the definitional problems of the term convention is whether one is concerned with practice or with a rule, and it would seem to me from what I have read that this is also a problem so far as conventions exist and are understood within Parliament. Having said that there may be a difference, I would not wish to over emphasise the nature of that difference. I cannot, I am afraid at the moment, identify it very clearly. It seems to me that parliamentary matters are of constitutional interest, certainly the matters that this Committee is considering are of the highest constitutional interest, and it would be a bit of a let out to say that what one has read and understood about conventions elsewhere do not apply in this particular situation. What I was saying, in that there could be a more particular understanding in the parliamentary context, is when the Clerks in their evidence have indicated that a matter may be a Standing Order, it may be a decision of the Speaker in the case of the House of Commons, and it may be referred to in the Upper House in the Companion to

the guidance of procedure. These are specific illustrations of a status that may be given to a particular form of conduct, which of course would not exist in the general constitutional context in at all the same way.

Lord Norton of Louth: It may be helpful, my Lord Chairman, to offer examples in the importance of the terminology, which I think is fundamental because I think the important point between convention, rule and custom is the extent to which one is enforceable and the other is not; one is enforceable because people accept it in a self-regulatory sense—it is self-regulating—and the other is an external body that can enforce a rule. If you take parliamentary convention, you could say that it is a convention that an MP who is not dealing with a letter from a constituent of another Member, but passes it on, that is a convention because there is no formal mechanism for enforcement, it is a general agreement; whereas in the House of Commons the terminology, how the Members address one another is a practice as custom which is enforceable by the Chair. So I would regard that as quite an important distinction to be drawn in terms of the categories that are identified.

Q297 Chairman: Dr Russell?

Dr Russell: I would leave that discussion to the professors, but perhaps it would be worthwhile saying a few words about why I think I might be here, particularly given that I did not put in written evidence although I did refer the Clerks to some things I have recently written. I have conducted two major research projects at the Constitution Unit at University College London, where I have worked for the last eight years. One resulted in a book which was published in 2000 on lessons from second chambers in other parliamentary systems for the possible reform of the House of Lords, so I know a bit about overseas although in some ways I think I am getting a little rusty on that. The other project which I am currently undertaking is one looking at how the Lords may or may not have changed since 1999, which is a terribly big question and difficult to answer. But the thing which I think might be of particular interest to you is some survey work that we have done with Members of both Houses and members of the public about when they think it is justified for the Upper House to try and block a government Bill. I also worked for a couple of years as special adviser to Robin Cook when he was Leader of the House of Commons, which I suppose is relevant in some ways to our discussion on the legislative process—but maybe not.

Chairman: Simon Hughes.

Q298 Simon Hughes: Chairman, perhaps I could pursue the first general point that Dr Russell made about comparable experience from other bicameral constitutions. I am sure that your topicality or your knowledge of other legislatures is better than ours so can you first give us a general answer as to whether you think there is any country where the situation is broadly comparable or the most comparable to ours? Which of the other bicameral legislatures are

most similar? Then if you want to break that down in relation to the issues we have talked about, namely the right of the second House to send things back to the primary House, and so on, that would be helpful too. But it would be very useful if you could give us a snapshot of where you think is the best place to look for comparable practice and recent experience?

Dr Russell: Similar in terms of reliance upon conventions or other aspects?

Q299 Simon Hughes: Similar in terms of reliance on convention or rule or custom or practice, things that are not written down in law but which have evolved and governed the relationship between the two Houses?

Dr Russell: I would invite you to bring Professor Norton in on this as well because my knowledge is far from universal—I have studied in some detail no more than 10 second chambers around the world and there are somewhere over 60 at the moment. But from what I know I would say that in terms of reliance upon conventions there is nowhere comparable. The British constitution is obviously well known for its dependence on conventions and I think that the same applies to the British Parliament. Although there are examples everywhere where there are written constitutions of reliance on convention, and similarly where the behaviour of Parliament is more codified of reliance on convention, conventions are more at the fringes and less central to the working of the House and the bicameral relationship.

Lord Norton of Louth: I would come back to my earlier distinction, that you could argue that the British constitution is more dependent upon the use of conventions than elsewhere, but the nature of our constitution arrangements is not that we have an unwritten constitution but we do have an uncodified constitution and therefore we are fairly heavily dependent on conventions of the constitution in a way that other countries tend not to be, so in terms of our constitutional arrangements we are distinctive. I am not sure how distinctive we are in terms of the legislature itself relying on convention because most legislature to some extent develop their own practice, procedures and understandings as to how to go ahead. So I am not sure we are that distinctive from others in terms of our internal arrangements as distinct from the relationships that are the heart of our constitution that are governed by convention.

Dr Russell: One of the things I think is interesting about the Committee's task is that you are focusing on the currently controversial conventions rather than some of the utterly uncontroversial conventions which govern the relationship between the two Houses. For example, the fact that the Prime Minister and most senior Cabinet Ministers are now drawn from the Commons rather than the Lords, I think this is well established and uncontroversial; the fact that the government relies on the confidence of the House of Commons and there is no concept of a confidence vote in the Upper House, these are very important conventions which are crucial to defining

the primacy of the House of Commons, and I think whilst some of the controversial conventions would be difficult to get agreement on some of these less controversial ones might be very easy to get agreement on. On these aspects there are examples in other countries of where these things are written down very firmly, so, for example, the Irish constitution states that the Prime Minister, the Deputy Prime Minister and the Finance Minister may not be drawn from the Senate, and many constitutions actually state—it is not a convention, it is not a Standing Order, it is not even a law, it is a constitutional provision—that the government relies only on the confidence of the Lower House not the Upper House. And that exists in states with both unelected and elected Upper Houses.

Lord Norton of Louth: The practice is in a very wide breadth. In some systems very fundamental points of constitutional arrangements are embodied in convention, so we are not unique but we are distinct at the level of our constitutional arrangements.

Dr Russell: Absolutely, and one of the most interesting cases, for lots of reasons, to compare with the UK is Australia, and there, although the Upper House is directly elected and has been since the Australian constitution was written in 1900, it is a matter of convention that the government relies only on the confidence of the Lower House and not the Upper House, and there is never a question of there being a confidence vote in the Upper House although it is elected and is elected by proportional representation. So convention, yes, can be important in other places.

Q300 Simon Hughes: Are either Dr Russell or Lord Norton aware of any other country which has recently looked at, for example, the reasonable time rule or other non-constitutional rules which are the subject of our inquiry too?

Dr Russell: My answer to that is no.

Lord Norton of Louth: We know from some of the evidence you have already received that the rules differ from legislature to legislature about the time period that is allowed; I do not know of any recent example where it has been reviewed. But one has to look, of course, at that in the context anyway of the different system, the legislative processes, and I think one of the points that it is important to stress is that it is very difficult to generalise about our legislative process or our parliamentary system by taking particular points in isolation because systems differ so much in terms of their relationships that it is difficult to extract one particular element; so time frames are going to relate to very different processes and you are not actually comparing like with like.

Q301 Lord Tyler: A very interesting point seems to emerge from what our witnesses have just said. It sounds as if some of the so well accepted conventions like the issue of confidence only being in the Lower House, in the elected House, are so uncontroversial, so taken for granted that we do not even think about them; we have not even looked at them here. By implication that would suggest that the few that we

do have are now relatively unimportant to the primacy of the Commons. Would you like to comment?

Lord Norton of Louth: I think there is something in that because you do have, as you imply, very strong conventions, which are generally understood, certainly by those to whom they are directed and they comply with them in order to make the system work because they are at the heart of the constitutional arrangements, they are there to make our system work; whereas what we are considering—that is my point about the distinction I was drawing earlier—is more at the level of the practice rather than overriding principles necessary to make the system work. One of the points I make is about the Parliament Act so ultimately the Commons can get its way. So I am not sure that the Salisbury doctrine is that crucial to constitutional arrangements within our system. So that is why I am talking about rules, practices, customs that develop within the institutions to facilitate it working effectively, but which are not relationships that are crucial to the good health of our constitutional arrangements.

Chairman: Nicholas Winterton.

Q302 Sir Nicholas Winterton: My Lord Chairman, it appears to me that what has been said so far by our witnesses is that the conventions as are are working very well. I have not yet heard any criticism of the conventions. Do our witnesses have any criticism of the conventions because they have certainly not indicated that they have; far from it, they have indicated—certainly Dr Russell and Lord Norton—that the conventions appear to be working very well. Would they comment?

Lord Norton of Louth: I would be happy to start off. It comes back to my earlier distinction. I think that the point that Lord Tyler was making about fundamental conventions, the conventions of our constitution work well because they are generally accepted and they are not a matter of dispute, and I think what you are discussing is really something somewhat different, which is practices, procedure developed to facilitate the work in the institution, and the value of them is that they have a degree of flexibility, which I think favours the system. The danger is that if you try to codify them in the sense of making them enforceable you lose that flexibility and you also create a problem in terms of the mechanism for enforceability—who enforces them? But I think the practice is working reasonably well in the sense that what one is addressing here is not clearly an identified problem.

Professor Bradley: I think I would—not take issue—have a slightly different emphasis from what Sir Nicholas said in talking about whether the conventions are working well. The relations between the two Houses in the matter of legislation I would have thought are likely to involve tension. A government is a government is a government, and this Joint Committee has been told that several times. I do not agree that because a government is a government, it therefore can claim to carry through in a single session all legislation it wishes to carry

through in its programme, so that one of the functions of the House of Lords, as well as being a revising chamber, is a delaying chamber and to impose the time for public opinion, for the media, for Parliament to think again and for ministers to be persuaded to think again or for civil servants to be persuaded to think again. So there is going to be disagreement and there is going to be aggravation and there are going to be pressures of time. It seems to me that this is a healthy element of a democracy unless we are to have a unicameral almost one party government, and therefore democrats should welcome the possibility that legislation does not go through on the nod. It does seem to me that things have moved on, as I say in my paper, since 1945 and I notice that Professor Brazier, whose knowledge I greatly admire, has also felt that since 1999 the Salisbury Convention as such—and I notice that my fellow witness has brought a copy of the late Geoffrey Marshall's book on constitutional conventions, that book does not mention the Salisbury Convention and one or two other places I have looked at do not include the Salisbury Convention as, as it were, examples of constitutional convention. That may be because the authors concerned were not looking at Parliament. Sir Ivor Jennings in the second edition of his work on Parliament, which was I think prepared around 1949,¹ deals very fully with what led up to the Parliament Act 1911 and what happened thereafter, but he does not again pick up in his commentary, bringing the book up to date, the Salisbury Convention as such. I think the relationships between the two Houses are of great constitutional importance. Whether or not they are governed by convention is another matter. What I think is particularly important is that unlike some constitutional conventions which have been fixed and continue to be—that the government depends on retaining the confidence of the Commons, as Dr Russell has said—, these relationships have been evolving: they are different now from what they were in the late 1940s and I think they are different from what they were in the 1970s and since 1999 we have yet had more. This is where it is particularly difficult to try and write down the conventions. One can write down the facts of how often it is that the Lords send a bill back to the Commons; one can write down the details of how long the game of ping-pong goes on, and so on, but if practice is evolving there clearly are no rules and this has to, if you like, come out in the political wash. The Upper House is not the elected House and it must respect the ability of the government to get its core legislation through; and it makes a contribution to that process but how it does it is very much a matter which members of the Upper House have to think about and deal with very conscientiously, and I think the evidence given to the Joint Committee so far reflects that. I was rather struck; if I may—I do not see Lord Carter here this morning—

Q303 Sir Nicholas Winterton: He is in hospital.

Professor Bradley: . . . but on the first day of the Joint Committee's proceedings he made a statement

that I found attractive because it moved away from the emphasis on manifesto, and he said this, if I may quote? "The crucial point in my view is not just the manifesto, which in some ways puts the wrong weight on the argument, the real problem is how do we define a convention which allows the elected government to obtain a programme of legislation and at the same time allows the Lords the right balance of scrutiny and revision and if necessary delay. The reason there has not been deadlock is because we have the ultimate deterrent of the Parliament Act. The fact we have used it rarely is because we have avoided deadlock but the Parliament Act is there. It is an extremely blunt weapon to use but is that not the central argument we have to answer?" I think, if I may say so, that Lord Carter was putting his finger on a very important point, in my view, and the way forward, as I see it—and I think that there is room for a way forward—is for talks to go on, whether in this room or in other places than this, that can develop a common political understanding of what the role is of the Upper House and should be in the future. I do not summarise that just simply as conventions.

Q304 Chairman: The question, incidentally, was: are the conventions working well or not? That is the question, just to remind you.

Dr Russell: I agree with most of what Professor Bradley said and I do not mean to repeat it, but I did want to come back to the question are the conventions working well? To go back to the comparison that I made between contentious and un-contentious conventions, I said I think that there are some very un-contentious conventions which, interestingly, you are not looking at, which are the ones, I would have thought, the prime candidates for codification. There are other ones which you could add to that list, such as we have a clear convention here that the Prime Minister when appointing does not appoint only from his own party—the Prime Minister in Canada does tend to appoint only from his own party—so that is a very firm convention and one which would be well worth preserving. I think we are now developing a convention that no party should have a majority in the Upper House, which I think would be quite a healthy thing to get tied down. But then we have these things which are contentious and I think that is why you are looking at them—the Salisbury Convention, the secondary legislation and so on—and I was very interested to see that in the government's evidence, in paragraph 19 of the written evidence they say: "A contested convention is not a convention at all." I think I would agree with that statement. So whilst the relationship between the Houses might be working well, if there is some contestation about certain conventions—and that means they are no longer conventions—then it is difficult to say that the conventions are working perfectly.

Lord Higgins: Could we have a list of the ones that Dr Russell thinks are not contentious?

Chairman: Lord Tomlinson, and then we move on to codification.

¹ *Note by witness:* It was in fact published in 1957.

Q305 Lord Tomlinson: My question is leading into the area of codification, but having listened to the three witnesses I am still not precisely sure what you are saying about codification. Are you saying that with the high degree of unwritten imprecision in our conventions that they are incapable of being codified, those that we are considering, rather than the list that Meg Russell is going to provide for us, what she described as the less contentious ones? Are they capable of codification and is codification possible? If you pursue a course of codification does it change the very nature of that which is currently imprecise, and does it change it to the detriment of the working of the relationships?

Lord Norton of Louth: I think the answer to the last two questions is yes and yes; it would change it fundamentally. If you take codification you have the problem of what you mean by codification, but if you mean it in terms of some element of enforcement, which I think from all the literature before you and your own document suggests that you do, whether it be Standing Orders, statute or whatever, that there is some means of enforcement, then of course it does change fundamentally the relationship because when you have the present flexibility you are leaving in the possibility that the formal power that is there is not actually utilised. There is a convention that, as you say, we use in exceptional circumstances. So it is always held in reserve and that gives one some leverage. If you destroy that by codification, by saying that there will be some means of enforcement—"That in all the circumstances you will comply with this and there will be no exceptions"—then you change fundamentally the relationships, I think to the detriment of the system, because the Lords would then lose some of the clout that it has and it has that in reserve. Basically what you are saying about codification, if you take away the opportunity to use that power on those rare occasions where you might think it should be used and you take that away you build in problems anyway, as I touched upon earlier, in terms of enforcement. If you are going to have some degree of codification by statute or by certain rules, who is going to police those rules? That in itself creates problems in deciding who and how. There is a wider problem—

Q306 Chairman: Excuse me interrupting but is that not so whether you codify them or not? The Clerk of the Parliaments was quite clear that conventions are not enforceable.

Lord Norton of Louth: The conventions are not. What you are moving to, if you have codification, they cease to be conventions. They only work because they are an element of self-regulation because people accept that it is desirable that they comply with them to make the system work. I agree with the point that if they are contested they are not really a convention, but there is an understanding at present as to how to operate, which on the whole that understanding has worked reasonably well and has extended beyond what is usually defined as, certainly in terms of the Salisbury Convention, goes beyond what is defined as statute.

Q307 Chairman: Just on this issue before I call on Lord Elton, how would you describe the statement from the Leader of the Conservatives in the House of Lords that he would observe the Salisbury Convention except when he chose not to?

Lord Norton of Louth: I think that is true of most things one is discussing, that you leave that power there if there is an exceptional circumstance when you feel that something has gone beyond what is acceptable and you therefore vote against it on second reading. That is the importance of leaving the power there.

Q308 Chairman: Even though it was a manifesto Bill?

Lord Norton of Louth: Whatever a Leader says the ultimate point is what the House itself does; it is the Members who are important, not the party Leaders. I think this was a fundamental misunderstanding about the nature of the Salisbury Convention—it is said, "Salisbury said it in 1945, it established a convention." No, it did not; it is the behaviour of Peers that established it as a convention. It was by no means certain that they would go along with what Salisbury was saying; he was by no means certain he would carry them. So it is really the Members themselves and it is the behaviour that defines the convention, it is not the articulation by one or more individuals; that is the fundamental point about the nature of conventions.

Dr Russell: I would have thought that a convention by its nature can be broken, then when it is broken questions arise as to whether it is a convention any more.

Q309 Chairman: Forgive me, but just a little while ago I thought you were agreeing with the government's statement that if a convention is broken it is not a convention.

Dr Russell: That is right, yes.

Lord Norton of Louth: Conventions can be easily broken. It takes time for them to be developed, to be recognised as conventions, but they can disappear really very quickly.

Professor Bradley: I wonder if I could attempt a brief answer to Lord Tomlinson? It depends on the convention, whether you can write it down as a rule without changing its character. If we take the Sewel Convention, for example, I think it would have been very possible to write that down, and even if there is some implied exception for emergency, where the time is so short that approval cannot be obtained, the Sewel Convention essentially is a rule that is clear and precise and agreed by all concerned. If one is getting into more difficult territory—and we are in more difficult territory here—the example that one could give is "government business should be conducted in a reasonable time in the Upper House". That to me is a statement of the convention, but of course it leaves two matters open: first of all, what is a reasonable time and, secondly, as has just been said, it does allow an exception for unusual cases. If by codification you want to make the rules comprehensive so that they cover every conceivable situation you are inevitably going to change the

character. If you are content with a statement that government business must be transacted within a reasonable time I do not think you have changed the nature of the convention.

Chairman: Thank you. Lord Elton.

Q310 Lord Elton: We have not been charged to consider the composition of a future second chamber and the government quite recently, and in my view surprisingly, said that the relationship between the Houses is not dependent on the composition of either of them. But we are looking at codification in the context of the debate about the future of the House of Lords' composition and you have referred to flexibility once or twice and everybody in the debate, including the government, goes back to the composition of the House of Commons as the reason for its primacy. So in that context I ask whether you feel that codification would have the effect in some way of ossification and how practical it would be to attempt ossification in a situation where the composition of one House is likely to change?

Professor Bradley: I agree fully with the doubts expressed in that question, if I may say so. Did not the Leader of the House say to this Joint Committee earlier on, when he explained that the reason for particular interest in the work of the Joint Committee is that until that is resolved then there can be no movement on composition, and one can understand that. But my own view is a little different. If the composition is in issue then there might be no real force in seeking to change the composition unless one was prepared for circumstances in which the behaviour of the Upper House would be different. We surely can all agree that today the composition of the Upper House is very different from what it was 50 years ago and that its behaviour is necessarily different, and had there been an attempt 40 or 50 years ago to state the Salisbury Convention in a way that would be precise and binding then I think that would have been unfortunate for the future of the Upper House.

Lord Norton of Louth: I think the important point is to remember what conventions are for. They develop, they emerge over time to facilitate the relationships within our political system. They develop, they evolve, they can be destroyed because they are no longer relevant to the relationships that exist. As I put in the paper, they are essentially oiling the machinery of government, whereas by codification you are trying to make them part of the machinery itself. They will change over time; so if the relationships within the political system change then necessarily those conventions will change or new conventions will have to emerge to adapt to those changing circumstances. That is the fundamental value. If you try to codify something to embody in the Standing Orders or statute, then, yes, there is the danger of ossification and you then have to undo that if there is a change in the relationship because those rules themselves would no longer be relevant to the circumstances that you face in terms of your constitutional arrangements. The great advantage of conventions is that degree of flexibility they can

adapt to meet those changing circumstances, which is what they have done over time. But why do they exist? As I say, they exist to facilitate relationships within the system, what is generally accepted, and if you change the system then necessarily you must change how you arrange the relationship between those different parts.

Dr Russell: I think you have to be very careful making statements such as—I will not get your words quite right—the composition of the House of Commons is the reason for its primacy. I think historically that may be the case and that is why our system has developed in the way that it has, but the British Parliament is a member of a large family of bicameral parliaments and most of them recognise the primacy of the Lower House, not necessarily because it is elected and the other one is not because often the other one is elected as well, but simply because that is an efficient and sensible constitutional arrangement and they recognise primacy, as I have said, often through firm and constitutional rules and through government only being responsible to one House and not the other, and often through rules about legislation and the amount of time that it can spend in one House or the other and which House has the final say, in the way that we do in the Parliament Acts. So there is more to it than the elected nature of the Lower House. I would bring in something else as well, if I could here, because something which I think is very important to this is the issue of public opinion, and I think it is important to be aware that second chambers are restrained not only by constitutions and laws and rules and conventions but also by public opinion and in Australia, as I say, where both Houses are directly elected, the second chamber is elected by proportional representation, it very rarely defeats government Bills despite the fact that the government on the whole over the last 20 years or so has not had a majority in the Upper House. Why does it not do that? Because there is a general acceptance amongst the Australian public and Australian politicians that the government has a mandate of some kind and the second chamber tends not to stand in the way of popular government measures, although if the measure were unpopular—

Q311 Lord Elton: Could I just interrupt to ask, is it not the case that if the Upper House in Australia defeats the Bill there is automatically a general election, which concentrates the mind fairly considerably?

Dr Russell: That is not quite right, there is not automatically a general election—that is ultimately the only way of resolving a dispute. But Bills can obviously be dropped—if the government wishes to see its Bill dropped it can be. But in my book I quote the 1993 to 1996 parliamentary session, which I apologise is slightly out of date, where there were 482 Bills considered by the Senate, seven of which were rejected. Members of the opposition parties in the Senate are held in check by public opinion, as much as they are by parliamentary rules or constitutional rules.

Chairman: We must move on. Andrew Tyrie.

Q312 Mr Tyrie: I think we have made a great deal of progress this morning; I think there is a lot of good sense in Lord Norton's paper and in what the three witnesses have said this morning. Just to clarify, it seems to me that we have said that conventions are there to be broken in exceptional cases and there seems to be an implication that those who want to codify conventions are doing so because they want to reduce the risk of them being broken, and that might lie behind the Chairman's quotation of Tom Strathclyde. I would like to explore the views of witnesses on whether once something is codified there is actually a reduction of that risk, whether we lose the flexibility but still have the risk, and in particular whether once codified the protection that the Commons would still have would be the Parliament Acts; if you insist on pushing through a measure in the Lords, where a codified convention has been overturned, then the Parliament Acts will have to apply.

Lord Norton of Louth: I agree with the underlying premise of the question. I think a lot will depend on the form of the codification, and you are right that if it is embodied in a Standing Order, or something like that, then it might be overridden and then the Parliament Act could be utilised, but of course it might be codification in terms of statute. The example of the problems that you have with definition and what you might call a low level of the codification would be the one that the Clerk of Parliaments drew to your attention in the Companion to Standing Orders that says it is the firm convention that the House normally rises by about 10 pm on Mondays to Thursdays. Quite often it does not; so it is very firm! That illustrates my point about the definitional point as well about what is a convention and also the point about at what level do you codify it, and what I was trying to suggest was that you have a spectrum or an ascending scale of codification, one of which is just articulation, which is easily broken. Another might be that if it is felt as a rule of practice that it is somehow enforced by the authorities of the House, or you move up to the statute to be defined as the ultimate form of codification. It depends at what level you codify it. If it is at a sub-statute level then what you are suggesting is absolutely right.

Q313 Sir Malcolm Rifkind: Our terms of reference require us to report on the practicality of codification. The Clerk of the House, Sir Roger Sands—you may have seen his evidence—indicated in his evidence that in his view not just a question of desirability of codification but also the practicality came into considerable question and came to be a proper matter if there was real doubt as to the future of the composition of the House of Lords or other matters that would affect the relationship of the two Houses. Could I ask our witnesses whether they agree or disagree with the view that practicality as well as desirability is an issue at this moment in time?

Professor Bradley: It seems to me that conventions and regular practices are, I agree with what my colleague said, about oiling the machinery. That depends very much on a consensus between the parties and between the different sides, and if that consensus does not exist then the practicality of proceeding in the way of conventions is really very small indeed—it could only be done by the imposition of will by the superior party or institution, whichever that may be. The practicality in the present circumstances is not so much a total disagreement as to what they should be doing but the way that they are applied in particular circumstances. The essence of a Bill may be wholly acceptable to the Upper House on the basis that this is government policy and so on and they recognise it as government policy, but some of the detail may not be acceptable to the Upper House; the Upper House may take the view that there are constitutional matters involved and therefore put their feet on the line at that point, and you get a disagreement. How is that disagreement to be resolved by codification? And could codification provide in advance a solution to problems of that kind? So I think that codification, writing down some of the main understandings is perfectly possible, but I think it will be unlikely to afford the result of providing a simple solution in matters where there is going to be political disagreement, and legitimate political disagreement.

Dr Russell: We come back to the question of what do we mean by convention and what do we mean by codification. I am inclined to agree with Lord Norton that if you codify a convention it is no longer a convention. If you seek to tie down something in the form of a convention and then expect it to apply to a House which is reformed in significant ways then you cannot expect to bind your successors with a convention which by its nature can be broken. On the other hand, if you want to codify it as a rule or a law that is a different kind of discussion that you need to have, and obviously you can do that until such time as a future Parliament sought to repeal that rule or that law.

Lord Norton of Louth: I agree with what has been said, and just to reinforce the point I was going to pick up on the terms of reference, which I think is quite important, about practicality because there is a value in looking at conventions, looking at summarising past practice, so one could do that. But given your terms of reference—and this is what my submission is really getting at—there is a very real problem if you try not just to decide what is desirable, but then how do you enforce it, as Meg says, and this is to do with how do you define codification, how do you enforce it, and it comes back to Mr Tyrie's question as well. So if you take the example of the Salisbury Convention and you said, "Let us find some way of codifying the Salisbury Convention," how are you going to do it? Do we embody it in the Standing Orders or in the Companion to Standing Orders saying that it is a convention perhaps, that the House does not vote against a manifesto Bill brought in on a manifesto commitment. Who enforces that? What if the

Houses actually vote the Bill down? So if you do not do it through that route what do you do? The ultimate codification is through statute, in which case what you are talking about here is in effect an amendment to the Parliament Act.

Q314 Lord Wright of Richmond: You have referred to flexibility several times. Do you see a logical incompatibility between codification and flexibility? Could you codify a convention but add the caveat that it has been flexibly interpreted?

Lord Norton of Louth: I do not see why you need to go beyond the stage of merely articulating it because codification has taken you beyond the stage of articulation, in which case you come back to the problem of the practicality of how do you police that if you have some element of codification? Who then decides this is an exceptional case under the element of codification? I cannot see what value is added.

Q315 Chairman: You are standing by what you said in your memorandum, that really you think this is nugatory?

Lord Norton of Louth: Yes.

Chairman: Gisela Stuart.

Q316 Ms Stuart: Let me try this from another angle. I think it was Churchill who said that we shape buildings and then buildings shape us. So if we were put to some of those conventions into code form and they therefore became law are there some things, from looking at the way that the Upper and Lower Houses behave in their relationship, where you feel that they are doing things they ought not to be doing which is currently covered by conventions and therefore if they were put into the rules it would change our behaviour in a way which you think is desirable?

Professor Bradley: I can only give a partial answer by thinking of an example. Suppose it was agreed that the legislative ping-pong had recently gone on too long and there had to be a rule that one could only have two exchanges, or whatever it might be. One question is as to how you enact it, and I think it might have to be legislation, but it could be by a Standing Order agreed by both Houses. What lies further though is how would this affect the behaviour of the two Houses and of the key players if one had a rule that one could only go through two exchanges, and surely it would affect the behaviour. It would affect on the one side those who want the Bill to go through, who would know that they could no longer proceed through ping-pong and there would have to be another outcome; and equally those opposed to it would know that there was going to be another solution too. So I think it would inevitably affect the political behaviour. Whether one could include in that some flexibility, I think it would have to depend on what the result was. Is the result of two exchanges which have not succeeded that the Bill fails, or does it possibly mean that the Bill could go through under the Parliament Act? Probably not a complete answer to your question, but it is an illustration.

Lord Norton of Louth: Could I just add that I would agree with everything that has just been said because I think you need the flexibility and that comes through conventions rather than codification? There is a completely separate issue I think in terms of mechanisms as opposed to rules—what are the mechanisms by which the two Houses seek to resolve disputes—and I think there is a separate issue to be explored there, but I think it is outside the context of general agreement as to how we deploy the powers but rather more the mechanisms are actually in place.

Q317 Chairman: I would like now to move on in a little more detail to the Salisbury Convention. Dr Russell, I believe that you would like to say something in the beginning about that, or is that what you were referring to earlier when you mentioned your memorandum?

Dr Russell: Goodness, my polling.

Q318 Chairman: Yes.

Dr Russell: You want to cover other things before we cover the polling, I imagine.

Q319 Chairman: Say what you want to say. I was just advised that you wanted to say something about the Salisbury Convention, so if that is not the case we can just go straight to the questions.

Dr Russell: I will say something about the Salisbury Convention, if I may, but maybe we can come back to the polling, which I think is probably a secondary issue to the broader philosophical points. There is clearly some contention at the moment as to whether the Salisbury Convention any longer applies or should apply and it strikes me that in this discussion there is perhaps a disagreement over the definition of the convention, which is at the root of the problem. Having read through your evidence and from what I know from the past the definition of the convention, which you put in your first report, that manifesto Bills are not rejected on second or third reading, does seem to have general agreement and I think that is the established form of the convention. The thing which appears not to have agreement—if you refer to what I just described as the “narrow” form of the Salisbury Convention—is a broader form of the Salisbury Convention that appears to be around, which I suspect has never been a convention, which is that the House of Lords should not substantially amend a Bill which is implementing manifesto commitments. My understanding is that the convention was that the Lords gave these things a fair hearing and did not throw them out in their entirety, but not that it was denied the opportunity to amend. But when the Salisbury Convention is bandied around in debates on things like the ID Cards Bill or the Government of Wales Bill on the Welsh electoral system at the moment it tends to be the detail which is being discussed rather than whether or not the Bill in its entirety should be rejected, and I think that is probably where the difficulties come from.

Lord Norton of Louth: To pick up on the point, I think it is a wider definition from a slightly different perspective as well because, as Dr Russell says, the way it is articulated is in terms of if the government is elected on a particular manifesto it is entitled to get those things that it has promised the electorate, and therefore the House does not vote against a Bill on the principle that is on the second reading. But if you look at behaviour some argue that it extends beyond that because the House does not actually vote against a government Bill on second reading and the exception would prove the rule. So how far this would extend obviously raises the problem if you are trying to codify it and distinguish between what is a manifesto and what is not. But in practice the House has tended to give a Bill in the government's programme, whether in manifesto or not, a second reading, and then focus on the detail. If you actually try and codify it in the terms which it has been expressed in the narrow definition that might not be helpful to government if the House then thinks, "Those are things we do not vote against on second reading, let us start voting against second reading of non-manifesto Bills."

Chairman: Lord McNally.

Q320 Lord McNally: One very accurate description of the origin of the Salisbury Convention was that wise old bird Lord Salisbury, faced with a House of Commons with an overwhelming Labour majority and leading himself a wholly hereditary House of Lords with a built-in Conservative majority, simply said, "Look, lads, do not push our luck or we will get ourselves abolished." And that was the real origin, that the House of Lords had very little legitimacy and was therefore very prudent in its behaviour. The interesting thing that has come into evidence is that of course 1999 did change the Upper House fundamentally and it did so with a great deal of forethought. The Cook-Maclennan study by the Labour and Liberal Democrats before the 1997 election committed to a House with no overall majority and there has been no quarrel with the government's creation of such a House. But there has been no afterthought about how that then affects the relations, and rather than go on and on about a convention that was made in a wholly different time for a wholly different House of Lords we should really be looking at how the new House, more self-confident with—as Dr Russell has pointed out—greater public support should use its powers. In 1999 the House of Commons could have removed the House of Lords' right to say no, but it did not. It could have in the years built in a government majority, but it did not. Surely it is those things that we should be thinking about rather than going through actions of an out of date convention?

Lord Norton of Louth: On the first point about Lord Salisbury's motivation you provided an interesting analysis of what you thought were his reasons for doing that. Those of course are not his expressed reasons.

Q321 Lord McNally: Politicians rarely do!

Lord Norton of Louth: The important point is what is on the record in 1945 and what he gave as the justification for the view.

Q322 Chairman: Do not let the facts get in the way of his prejudices!

Lord Norton of Louth: It is rather important to what I am coming on to in terms of the underlying articulation that Peers then accept and that then formed their subsequent behaviour in a fairly consistent manner and still does, so that is an important point in relation to what I am coming on to. Yes, the House has changed as a result of the 1999 Act but you could still argue that the articulation of the principle underlying the convention that Salisbury—or rather Cranborne as he was at the time—articulated still holds, certainly in terms of the narrow definition, though regardless of how the change had taken place in the Lords. You still have a government elected on a manifesto at a general election and therefore could argue that it is entitled to get its manifesto measures through. So in terms of what you might call the narrow definition of the Salisbury Convention then that would still hold. If you come on to what I referred to as that wider definition—and I have said this in the House—then there is a case of perhaps reflecting on circumstances in which the House might wish to exercise its particular power it still holds in respect of certain Bills. So if there is a matter of reflection you may develop something of a modification, a new convention, but that would largely derive from the House itself in terms of its reflection of the powers and the circumstances in which it found it to be appropriate to actually utilise those powers.

Dr Russell: I have to say that I find all this focus on the Salisbury Convention in its narrow form, which I think is its only proper form, slightly mystifying because in its narrow form I do not think anybody has suggested that it should be thrown out, and in fact as far as I can see the parties are signing up to something broader, which is that really no Bill, except in perhaps the most exceptional circumstances should be thrown out on its second or third reading, and so long as that remained a convention and not a rule then it could be broken in the future if a party changed its mind, and therefore I am not really sure what the problem is. In case I miss the opportunity, if I could come back to the point that Lord Cunningham was inviting me to make about our polling evidence, it does fit here perhaps because we asked Peers and Members of the House of Commons and the public in what circumstances they felt it was justified for the House of Lords to vote against a government Bill and it was very interesting that the public seemed to give no credence whatsoever—despite the fact that our questions were asked two weeks after the 2005 general election—to the question of whether a Bill was in the manifesto or not. They were actually fairly supportive of the Lords' rights to block Bills in general, but the thing that mattered to them was whether the Bill had public support or not. If it was

an unpopular Bill around two-thirds of the public felt that it was justified for the Lords to vote against it, whether or not it was the manifesto—the manifesto seems to make very little difference. This goes back to the point perhaps Professor Bradley was making earlier, that there is a broader question about how we negotiate the relationship between the government and both Houses of Parliament, and the focus on the manifesto is a bit of a distraction really.

Lord McNally: Could I just clarify because I would like a response on this. The importance of the right to amend bills and to stick to those amendments is very key on the point that Professor Bradley was making about ping-pong. Unless the House of Lords retains the right to say no, there is no leverage in the negotiations with the House of Commons. They will just play ping-pong until our time runs out. The second thing about the manifesto is that politicians are cute creatures and, you are quite right, the Salisbury Convention virtually disappeared from view until the Government started running into a more feisty House of Lords and then it thought up the wheeze the longer and more detailed that we make manifestos, the more we will be able to wave that at the House of Lords and say, “You can’t touch us,” and that is the danger of the manifesto. What Lord Carter said in the piece that was quoted, I can sign up to entirely. What I do not want to see is the House of Lords lose the right to say no or increasingly long and detailed manifestos subverting the right of Parliament to scrutinise legislation: discuss!

Chairman: To say nothing about increasingly long and detailed statements!

Q323 Lord McNally: That is the question.

Professor Bradley: One question I have had about this sort of issue—and I have really given my views already and I will not repeat them—is what about government bills that are important and necessary and are not in the manifesto? Is the House of Lords to take a totally different view because it is not in the manifesto? I would have thought not; its duty is to not oppose it on second reading. So to that extent if the Salisbury Convention can be reformulated and be worked out again, fine, but it really does need to be taken in today’s terms and not linked to the circumstance of the past. Could I just say this: if my paper appeared to be negative in tone it was not meant to be negative in tone. There is a value, I think, in a body of this kind discussing what the relationship should be. My reservation is whether one can tie it to something that happened in the past and tie it down and codify it in that way.

Dr Russell: Could I make two points in response to what you have just said, which I think reiterate things I have already said. Firstly, if you agreed the Salisbury Convention in its narrow form as a convention, you would retain the right ultimately to say no, even saying no in terms of throwing out the Bill on its third reading, which actually the House never does anyway. I think the problem is with this broad definition of the Salisbury Convention, which is not an established convention. I would have thought that the House of Lords might find it useful

to come to an agreement with the government that it was the narrow version of the Convention which applied because that would require the government to sign up to the narrow view just as much as it would require the House of Lords to sign up to it and that might provide clarity for everybody.

Professor Bradley: One might add to that, and I know the Committee is not considering the legislative process *in toto*, I think the way that government bills are constructed has a large bearing upon what we are talking about: the religious clauses that appeared in two Terrorism Bills and then eventually went through as a separate bill would be an example, or a Criminal Justice Bill that contained many, many different provisions of differing effect. This, again, is a matter where I think the House of Lords must be able to say, “This particular idea is not a good one,” and so on. To that one could add (and this does not appear in any discussion of the Salisbury Convention but I think it is relevant to the practice of Westminster today) the practice of pre-legislative scrutiny, the circulation of draft bills. It is time to get away from the thinking that the legislative programme is on a session-by-session basis. I know the Constitutional Reform Bill had a rather stormy passage but one has to ask why did it have a stormy passage. There is I think a solution that could have been found that would maybe have had the legislation enacted at the same time, but it would have gone through with prelegislative or draft bill scrutiny, that would have been much more satisfactory on a topic of that kind.

Q324 Chairman: Where would you put government commitments to allow a free vote on an issue in Parliament? If there is a manifesto statement which says, “If elected, we commit ourselves to giving Parliament a free vote on something,” where would you categorise that as coming? Inside the Salisbury Convention or outside it?

Lord Norton of Louth: Both actually because you could argue of course that the House would have to vote in order for the government to fulfil its manifesto commitment.

Professor Bradley: Could I say it might depend on what the subject matter was? If it were a matter of, shall we say, personal morality on abortion or euthanasia or whatever, then I think the House of Lords should take very seriously what the House of Commons has decided. It would still retain, I think, for individual Members of the House their right to state their own position on matters of that kind. If it is a free vote on something different, then it is, I think, probably easier for the House to say well, this is not a matter of personal morality where we should pay particular regard to the views of the elected Members at Westminster and therefore we could disregard it. In principle, one would have said that bills coming from the Commons should normally be taken very seriously, and I think are, by the Upper House.

Lord Norton of Louth: The purpose of the Convention itself is built on the government’s manifesto commitment and that is fundamental in terms of accountability within our political system.

If you are talking about free votes on bills because they are saying they are private member bills there is not the same element of accountability, so very different rules would apply.

Q325 Viscount Bledisloe: I just want to take Dr Russell up on something. You said that there was now appearing a convention that the Upper House should not reject any bill on second reading. I think the highest that that could be put was that Wakeham said that the “Second Chamber should think very carefully before challenging the clearly expressed views of the House of Commons on any issue of public policy.” There are two qualifications there. First of all, it is limited to issues of public policy but, much more importantly, it is saying think very carefully, which must allow that there are some exceptions when, having thought very carefully, it does reject them on second reading.

Dr Russell: I did not suggest that this was becoming a convention. I mentioned it because I was struck particularly by the fact that it appeared in the Liberal Democrats’ evidence to the Committee. What I was remarking on was the fact that at the present time all of the parties seem to have agreed that this is desirable. That does not make it a convention, I do not think.

Lord Norton of Louth: The practice—and I think I come back to the point you are making—is that there will be exceptions, which is the value of having it as a convention rather than in terms of codification which in some ways is about practicality of enforcement.

Q326 Lord Tyler: It is a quick question to follow up Dr Russell’s opinion research. I think I am right in saying that the inquiry that you undertook was in the context of a large Commons majority, whether it was with the public or with MPs or with peers. In all cases there was a recognition of the right of the Lords to block—and it is quite a strong expression—government legislation, but supposing that the government of the day did not have a large majority or indeed had no majority at all, would you have expected the support for the blocking of the legislation to be even stronger?

Dr Russell: You are asking me to use a crystal ball I think, are you not. Firstly, on the wording of the question, just to explain, we used a rather crude version of the question when we asked the public and MPs. We asked about blocking a bill. In the Lords, on advice and sensible advice, I amended that to talk about blocking “elements of” a government bill. So in effect we are asking the Lords about the wide Salisbury Convention and the public and MPs about the narrow Salisbury Convention. I think it is interesting if you look at evidence from overseas—and there is some evidence although it is quite limited, I know of evidence from France, from Australia, and from the United States, and I am sure there is other evidence I do not know of that—publics like there to be checks on governments. It is interesting if you look at our figures on the blocking of bills amongst the public, the public are not split by party. 59% of Labour voters, people who had voted

Labour only two weeks previously, felt that the House of Lords had the right to block a bill if it had little public support. I think this is an indication, and it links to the Salisbury Convention obviously, that people who vote for parties do not sign up to every dot and comma in manifestos. Even perhaps people who stand on those manifestos do not sign up to every dot a comma and sometimes will move amendments and so on in line with that! There does seem to be clear evidence from several different countries, and I have no doubt it is the same here, that people are prepared to vote a party into office but they quite like there to be another group of people who are sitting on their shoulder making sure that they are behaving properly and particularly that what they are doing is in line with broad public opinion.

Lord Norton of Louth: Can I come at that from a slightly different perspective. I was thinking in terms of political behaviour that reinforces the point about the need for flexibility. When it comes to ping-pong, sending something back to the Commons and codifying something and saying you will only get one bite of the cherry, then you limit what I see as the essential need for flexibility because when you look at when the Lords sends something back to the Commons, and it comes back to the Lords, what the Lords takes into account is how it was received in the Commons. If it is quite clear to the Lords that the Commons were absolutely firm, no change, it is probably not going to persist with it, but if it is quite clear there is some doubt within the Commons itself then there is a case for sending it back. So I think that flexibility is important in relation to what is actually happening in the Commons itself. If we look at past practice that is what has tended to happen. I think that is extremely important for allowing that flexibility.

Dr Russell: We did actually ask about that. It is maybe worth throwing in that the three sets of circumstances we asked about were strong public support, little public support and where there have been many rebels on the Labour side in the Commons, and we asked about manifesto and non-manifesto bills. Amongst the MPs, and if I remember rightly amongst the public, the thing that was most likely to be seen as a justification for the Lords blocking was many government MPs having rebelled. 60% of Labour MPs felt that it was justified for the Lords to block a government bill in those circumstances.

Lord Tyler: And 92% of Labour peers, if I have got the right figure!

Chairman: Okay, we will move on, reasonable time, Nicholas?

Q327 Sir Nicholas Winterton: My Lord Chairman, I think this is extremely important. It appears that the Government is backing down on the 60-day limit, and I believe quite rightly. Do our witnesses believe that flexibility here is absolutely vital to the effective scrutiny of legislation because, sadly, due to what I would describe I presume as an Opposition Member as “unreasonable” programming in the House of Commons, quite a large amount of legislation comes

through to the House of Lords with large sections of that legislation undebated in the standing committee and even the report on remaining stages of a piece of legislation in the House of Commons. What are our witnesses' views about reasonable time? How unsatisfactory is the current convention that the Lords should do their job in reasonable time? Does it work and are there other ways of tackling this general problem of reasonable time, in the eyes of the government?

Professor Bradley: My answer is very clear: I would be against a 60-day rule. I do not think on the evidence that I have read it is justified. I think it could have some harmful effects. That probably is a sufficient answer. I have already indicated in an earlier statement the fact that the prior history of a bill is significant, whether it has been through the Houses first, as a draft bill or as pre-legislative scrutiny. Certainly when I was advising the Committee on the Constitution and therefore having to read government bills coming forward, then one would try to find out what lay behind some of the clauses and one would go to the standing committee in the House of Commons and find no discussion because this had gone through and all the time had been taken up. I do not wish to blame anybody but certainly the system by which important sections of major bills can go through without time for detailed debate in the Commons is not satisfactory, and therefore would be an additional reason I would have for not favouring the 60-day rule.

Lord Norton of Louth: I do not see how you can have an absolute time limit because reasonableness must relate to the circumstances in which the bill is brought forward. It must be relative, it is not absolute, so what are the circumstances in which the bill is brought forward? The government itself may delay a particular bill. However, it is not just how long a bill is but how complex is it. It may take more time whilst you might expect a shorter bill to go through relatively quickly. So I think it has to be looked at in the circumstances in which it is brought forward. Therefore you need to treat it in a flexible way. I do not think you can say that it is reasonable to expect all bills to be got through in 60 days. Some will need more and of course some will need considerably less. My point is "reasonable" has to be seen in the context in which the bill is brought forward.

Dr Russell: I would agree strongly with that. I would say two things on strict time limits. Firstly, and perhaps this is a mischievous point, it is quite clear from the evidence that you had from the Clerks and others that 60 days in the House of Lords is not a convention. Many bills in the House of Lords take far longer than 60 sitting days and therefore to recommend a limit of 60 days would be to introduce a new convention. It probably would not be a convention at all anyway. Secondly, I think it is probably undesirable to have any fixed limit because this imposes limitations (given my background as working for the Leader of the House of Commons, who was in charge of the legislative programme obviously) on government business managers just as

much as it would impose limitations on the House. They require flexibility as well. I would have thought that the convention of reasonable time, which does appear to be adhered to, was probably the best way to leave things.

Q328 Lord Higgins: My Lord Chairman, this may be a convenient point in the discussion to raise a point I wanted to ask a question about. Both Lord Tyler earlier and Dr Russell also earlier were suggesting there are conventions which are so obvious there is no need to describe them as such. It has always seemed to me that if the Commons is to claim primacy then that means primacy in the legislative process, and that the Commons should scrutinise bills properly and we should then act as a revising chamber. Because of programming, however, and I think this is implicit in what was said a moment or two ago, if it is indeed a convention, as I believe it certainly ought to be, it is breaking down. We raised this matter with the Government as to whether in the context of 60 days and so on, this was dealt with properly. We got the reply: "The Government does not accept the Commons failed to do its job of scrutiny. Most bills in fact spend more time being scrutinised in the Commons than they do in the Lords." They do not provide any data to support that view. Then they go on to suggest that the total time in the Commons is greater than that in the Lords, which is not surprising as we are supposed to be a revising chamber, although in some years recently we have spent virtually the same amount of time the Commons has. Do the witnesses feel there is a convention that the Commons ought to scrutinise bills as a whole and that we should act as a revising chamber?

Professor Bradley: This is really difficult, I think, because if Members on the government side of the House have been elected, they may regard it as their constitutional duty to help the government to achieve its objectives and achieve its policies and put through its programme.

Q329 Lord Higgins: But not by failing to scrutinise the legislation?

Professor Bradley: The closeness or degree of scrutiny that one gives when one is looking at a bill is in part going to be affected, I think, by where one is coming from. If you accept, and for proper reasons accept, that this is the best scheme being put forward, it may not be a perfect scheme but at least it is progress, then you will say the sooner it goes through the better, and not delay it by looking at it now. An Opposition member is very unlikely to take that view and will be more inclined to scrutinise. Of course, this is not the only view that can be taken on the government side of the House, but to say that it is a convention that a bill should have been scrutinised closely in the Commons is going too far. It is implying some obligation possibly which is not there, or at least a practice which is not there, and so I myself would not use the word "convention" in describing this. It is certainly very reasonable for the

Upper House to expect that a bill will have been looked at in detail when it comes to it from the Commons.

Lord Norton of Louth: I agree and I would not regard this as a convention. What we are talking about is what the two Houses exist for basically, it is the job of the two Houses, so what you are dealing with is whether they are doing their job particularly well; not whether it is a convention. The Commons is there to scrutinise measures and to make the procedures as effective as they can. It is the job of the Lords then to consider the legislation, not necessarily to revise it, as the bill might start its life in the Lords, so it is legislative scrutiny. So those are the tasks of the two Houses and one can identify whether they do them particularly well or not. There are particular limits on the Commons which place particular burdens on the Lords. So it is not just a question of time, which is a quantitative element; there is a qualitative dimension of procedures as well. One House has programme motions and the other does not. One House has to have selection of amendments and the other does not have any selection of amendments. So the procedures matter enormously, but, as I say, this is fundamental to what the two Houses are about, what they exist for, and really what we are about determining is looking at how well they did their job rather than looking at it as a convention and an agreement. It is fundamental to what the two chambers are there for.

Q330 Lord Higgins: If one takes the point made by Professor Bradley, you would say government supporters push everything through without any scrutiny at all, which is clearly not what they are there for. It is true, as Lord Norton says, that they have the task of legislating and the effect of programming has been more and more to shift the burden of legislating in detail from the Commons to the Lords.

Lord Norton of Louth: I would not disagree with that analysis. The point I would make about the Commons is you get the shifts where clearly the Government wants its way. The Commons proceed on what I would refer to as the equilibrium of legitimacy, which is a recognition of the two sides that the Government is entitled to get its business but the Opposition is entitled to be heard. It is really creating the mechanisms to allow that to exist. If it does not, then the system starts to get out of kilter and potentially break down.

Chairman: Thank you. Can we just quickly ask a couple of questions about ping-pong. Terence?

Q331 Lord Higgins: Perhaps I might just make one point leading on from what I was saying a moment or two ago, which is presumably there is an implicit arrangement whereby the views of one House are taken into account properly by the other. We have found more and more lately, particularly with the packaging of amendments from the Lords, that the Lords will spend days and days going into the detail on various amendments and they then arrive in the Commons packaged, and that is in turn

programmed so that there is no serious consideration given to the arguments which have been put forward in the Lords.

Lord Norton of Louth: Yes, I would agree with that. I think it is up to the House to take that into account when considering whether to send something back in the light of whether it has had proper consideration or not, if there is evidence that it has been thought about again, since that is the purpose of sending it back the Commons.

Q332 Sir Nicholas Winterton: Very quickly, one question particularly for Lord Norton but maybe comments from our other two witnesses. Does not the Lords comprise people with a wider and deeper knowledge of many subjects than exists in the House of Commons? Is not therefore the ability of the House of Lords to debate the more technical legislation in some detail essential to effective scrutiny of legislation?

Lord Norton of Louth: It is perhaps better that somebody other than a Member of the Lords actually answers the question. I think there is something in that in terms of the composition, not in the sense of being negative about the Commons, but in the way in which it complements the Commons because there is a present value in terms of the two chambers, one complementing what the other is doing because it can contribute something that is qualitatively distinctive, and particularly by focusing upon the detail, I think it can add enormously, as a result of which both Houses benefit.

Q333 Chairman: Is there any evidence from other legislatures of them handling what we call ping-pong more effectively, more efficiently? Does it happen at all? If so, where?

Dr Russell: Well, there is ping-pong that goes on in many, if not all, bicameral parliaments, but I do not know enough to go down to the level of detail that you are interested in as to the conventions which govern the precise operation of it. There are parliaments where the number of rounds of ping-pong is limited. There are parliaments where after a certain number of rounds of ping-pong a conciliation committee is created to try and resolve the dispute. There are parliaments where even a joint sitting of both Houses is called to resolve a dispute ultimately. Whether or not those things are more effective, I think is probably outside the terms of reference of your inquiry. At the level of conventions, I am not sure I really know the answer to your question.

Q334 Chairman: Is ping-pong a convention or is it simply a negotiation?

Lord Norton of Louth: It varies. I think it is fair to say that in terms of second chambers, what one might call ping-pong or the *navette*, which is amendments going back and forward between the chambers, it is more common than the conference method, which is to bring representatives of the two Houses together to negotiate some agreement which then goes back to the two Houses. In the sense of an

amendment going back and forwards, that is not at all unusual and it will vary from legislature to legislature about how many times it can do that and at what point it is blocked or indeed goes off, in one or two rare cases, to another body.

Dr Russell: In some cases it has no end, there is no equivalent of the Parliament Act and so there is no limitation on the veto power of the Upper House. Can I say something on the point that Lord Higgins made. I was very struck by the power of the evidence from the Clerk of the House of Commons where he suggested that conventions about proper consideration of Lords' amendments in the Commons are effectively being broken. That was a very strong statement, I think, to come from the Clerk so I think it has to be a matter of concern, but going back to the point about conventions, if the convention has been broken then we cannot now seek to tie it down because minds have moved on. This may be a result of the changed composition of the House and the way that it is feeling more confident and it is inflicting more defeats than it used to, but if the House of Commons is breaking an established convention of course the House of Lords can retaliate at some point. That is the danger. That is the nature of the self-regulating, self-adjusting system that we have, that if the House of Lords got to the point some time where it felt that the House of Commons was not giving due consideration to its amendments, it could simply refuse to back down, at which point the House of Commons would presumably start behaving differently. That is the way the British system works. It is a self-correcting system.

Q335 Lord Tomlinson: You rather skipped over conciliation as being an alternative to the continuation of ping-pong, and yet I have been quite impressed with the way, for example, as between the European Parliament and the Council of Ministers, which is very analogous to a two-chamber system with co-decision-making, that the conciliation system works there. Do you think we have anything to learn from that example?

Lord Norton of Louth: That was the point I was making in the response I gave about looking at different methods of resolving the dispute, which is a slightly different issue than conventions. The point I was just making was that essentially the two processes on offer are the *navette*, which is the amendment going back and forth, and the conference procedure. My point was that one might in a slightly different context want to reflect upon that and whether our mechanisms for procedures are the best way of resolving disputes or should one be looking at some sort of conference mechanism.

Dr Russell: There are lots of examples of these conference mechanisms. I do not know the European one particularly but I know various national ones, and in their detail they vary in important ways and their effectiveness varies as a result. I think that is something worth looking at and something I have written on but probably something outside the scope of this inquiry.

Q336 Sir Nicholas Winterton: Could I just say, particularly to Dr Russell, was she concerned that the House of Lords might react because of the packaging and the way therefore that the Commons dealt with Lords' amendments, returned as they are in a packaged way or considered in a packaged way by the House of Commons, ie inadequately dealing with a great deal of thought and constructive debate that has gone into these matters in the House of Lords?

Dr Russell: I imagine that could be a response to either packaging or simply the rapidity by which the House of Commons turns the amendments around. I am not really commenting on the strength of the case, merely that if there is a strong case there is a way of resolving it, which is that the House of Lords ceases to be quite as co-operative and in that way the House of Commons would probably change its practices.

Q337 Sir Nicholas Winterton: Would you blame programming for that?

Dr Russell: I would not say that. I would not necessarily want to get into that discussion.

Q338 Chairman: I did not hear you say it and you should not put words into her mouth.

Dr Russell: Did I say "programming" instead of "packaging"? If I did, I apologise.

Q339 Chairman: Can I just ask a couple of questions finally about secondary legislation. We have had some discussion. The Government take the view that statutory instruments are made by ministers and it is for the Commons, as the source of ministers' authority, to withhold or grant their endorsement. Is that how you perceive secondary legislation?

Lord Norton of Louth: No, absolutely not, and I thought that was an absolutely atrocious statement in the best Jim Hacker or Sir Humphrey style. The important point to stress is what we are talking about is secondary legislation—and I stress legislation—conferring powers that are delegated by Parliament. That is the crucial point and the Government submission, as I say, is absolutely appalling in terms of its statement. I could develop the point but I think you get my drift.

Q340 Chairman: You have made your point.

Professor Bradley: I would agree with that!

Q341 Chairman: I do not think anyone is dissenting. Perhaps you would agree then with what Lord Wallace said to the Committee: "The Second Chamber should not regularly send back statutory instruments, but under exceptional circumstances it is appropriate for it to do so." Does that meet with your approval?

Lord Norton of Louth: I suspect we are going to say the same thing anyway.

Q342 Chairman: Do you need a reconciliation committee down there?

Lord Norton of Louth: Not for those. I would agree with that because of the nature of what we are talking about. That is what I was trying to get at in my paper. I could not quite understand the emphasis on this being a convention that we should not reject statutory instruments. They are not dealing with great issues of principle. It is usually the House just applying itself and looking at whether these are, to use a popular phrase, fit for purpose. If not, the government can go away and can come back with a new one, slightly amended, but I cannot see what the problem is with the House saying, "No, it will not work as presently constituted, you must amend it, so come back with a new one."

Professor Bradley: I endorse that, but one asks why it is that in so many hundreds of statutes the powers conferring on ministers delegated legislation require either a positive resolution of both Houses or are subject to negative resolution in both Houses. If that is not what the supreme legislator intended, then they should have stopped referring to the Upper House years ago. I do not understand why the Government gets into such an enormously excited state if the House of Lords is deciding, out of the many thousands of statutory instruments that are made each year, that a particular one or a particular aspect of one is not a good idea.

Q343 Sir Nicholas Winterton: But should they be subject to amendment rather than just a negative?

Professor Bradley: That is, I believe, outside the remit of the Committee!

Dr Russell: It would be a problem if the House of Lords routinely voted down all statutory instruments it was sent, of course, but I think in the current situation there is a reasonable *quid pro quo* for the fact that these instruments cannot be amended and therefore they may be rejected, and the government can easily resolve that by coming forward with a different instrument, which is what it has done on the few occasions when it has been defeated.

Q344 Lord Elton: Would it then be appropriate that they should be rejected with a reason given for the rejection?

Lord Norton of Louth: Yes.

Chairman: Thank you very much, Dr Russell, Professor Bradley and Lord Norton, for coming here this morning to the Committee and giving us the benefit of your wide-ranging knowledge and experience of these issues. It has been a pleasure to have you giving evidence to the Committee. Thank you all very much.
