



**UCLA**

A photograph of a library interior. In the foreground, there are several dark leather study chairs. In the background, there are rows of bookshelves filled with books, and a study table with a lamp. The lighting is warm and focused on the study area.

**DEMYSTIFYING  
FINANCIAL PRIVILEGE  
DOES THE COMMONS' CLAIM OF  
FINANCIAL PRIMACY ON LORDS  
AMENDMENTS NEED REFORM?**

MEG RUSSELL & DANIEL GOVER

# **Demystifying financial privilege**

## **Does the Commons' claim of financial primacy on Lords amendments need reform?**

**Meg Russell and Daniel Gover**

**Constitution Unit  
March 2014**



ISBN: 978-1-903903-67-4  
Published by The Constitution Unit  
School of Public Policy  
UCL (University College London)  
29-31 Tavistock Square  
London  
WC1H 9QU

Tel: 020 7679 4977 Fax: 020 7679 4978  
Email: [constitution@ucl.ac.uk](mailto:constitution@ucl.ac.uk)  
Web: [www.ucl.ac.uk/constitution-unit/](http://www.ucl.ac.uk/constitution-unit/)

© The Constitution Unit, UCL 2014

This report is sold subject to the condition that it shall not, by way of trade or otherwise, be lent, hired out or otherwise circulated without the publisher's prior consent in any form of binding or cover other than that in which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

First published March 2014

# Contents

<b>Acknowledgements</b> .....	<b>3</b>
<b>Executive summary</b> .....	<b>4</b>
<b>Introduction</b> .....	<b>6</b>
<b>Financial privilege: the process</b> .....	<b>8</b>
What is financial privilege? .....	8
Recent controversies .....	9
How the Commons claims financial privilege.....	12
How the Lords may respond .....	13
<b>Key statistics on financial privilege</b> .....	<b>15</b>
Official published statistics.....	15
Financial privilege and Lords defeats: four social security bills .....	16
Financial privilege and all Lords defeats 1974-2013.....	17
<b>Complaints about financial privilege</b> .....	<b>19</b>
Complaint 1: The procedure for financial privilege is opaque.....	19
Complaint 2: There are no clear rules for which amendments engage financial privilege.....	20
Complaint 3: Financial privilege is being interpreted increasingly broadly .....	22
Complaint 4: No explanation is given for why financial privilege applies .....	24
Complaint 5: The privilege Reason doesn't reflect why the amendment was rejected .....	25
Complaint 6: Decisions on financial privilege exclude MPs as well as peers.....	26
Complaint 7: Financial privilege is controlled by government for political ends.....	27
Complaint 8: Financial privilege weakens the Lords' capacity to scrutinise legislation.....	30
Complaint 9: Financial privilege is being invoked more often than it was in the past.....	31
<b>International comparisons</b> .....	<b>33</b>
Financial legislation in 20 other bicameral legislatures.....	33
Ireland.....	35
Canada .....	35
Australia .....	36
<b>The politics of financial privilege</b> .....	<b>39</b>
<b>Financial privilege: what if anything needs to change?</b> .....	<b>42</b>
Transparency and the process.....	42
Definitions and boundaries .....	44
Streamlining the process .....	45
The bigger politics .....	46
<b>Conclusions</b> .....	<b>48</b>
<b>Appendix 1: Baroness Royall's 2009 memorandum</b> .....	<b>49</b>
<b>Appendix 2: Parliamentary counsel internal guidance</b> .....	<b>50</b>
<b>Bibliography</b> .....	<b>51</b>

## List of tables

Table 1: Official data on waiving and invocation of financial privilege, 2000-12 .....	15
Table 2: Financial privilege on amendments to four social security bills 1989-2012, by whether government supported amendment or defeat .....	16
Table 3: Number of amendments and proportion of Lords defeats on which financial privilege was invoked, 1974-2013 .....	17
Table 4: Lords defeats and application of financial privilege, 2001-02, 2005-06 and 2010-12 sessions .....	32
Table 5: Treatment of ordinary and financial legislation in 21 bicameral parliaments .....	34
Table 6: Number of bills per parliament which the House of Lords has returned to the Commons following disagreement with its amendments, 1974-2012.....	40

## Acknowledgements

This research was funded by a grant from the Nuffield Foundation (“An abuse of privilege? The Commons, the Lords and financial matters”) 2013-14. It also draws on data collection, and particularly interviews, conducted for a larger project (“An elaborate rubber stamp? The impact of parliament on legislation”) likewise funded by the Foundation. We are extremely grateful to Sharon Witherspoon, Rocio Lale-Montes, and the trustees at the Nuffield Foundation for their support and encouragement.

The project relied to a great extent on cooperation from those who have been close to the process described in this report. In particular, the House of Commons authorities, House of Lords authorities and the Office of the Parliamentary Counsel have provided data, and been both patient and constructive in dealing with our enquiries. A number of key individuals have been interviewed, but their comments are (with one exception) quoted anonymously in the report. They include officials, members of both chambers of parliament, and representatives of outside groups. Some of these same individuals subsequently provided comments on drafts of this report. We are again extremely grateful for their help.

We also include some information on how parliaments in overseas jurisdictions deal with financial matters. We are grateful to Anne-Marie Fahy (Ireland), Rosemary Laing (Australia) and to several officials at the Parliament of Canada for answering our questions, providing documents, and reading draft sections of the report.

## Executive summary

- In the UK parliament the House of Commons' primacy is well-established, both in law (through the Parliament Acts) and convention. A particular and well-known element of this financial primacy relates to "money bills". But a lesser-known element of financial primacy is the "financial privilege" that the Commons can claim with respect to legislative amendments sent to it by the House of Lords. When the Commons "invokes" its financial privilege on such amendments, the Lords is expected to back down.
- These arrangements have recently been controversial, most notably on the coalition's Welfare Reform Bill in 2011-12. The invoking of financial privilege over several Lords amendments on high-profile matters led to allegations that the procedure was somehow being "abused" by ministers. The ensuing debates demonstrated that there was widespread lack of understanding, or indeed misunderstanding, about how the process works. This report therefore attempts to set out the facts, and to ask whether anything needs to change.
- We base our analysis on documentary evidence about financial privilege over the period 1974-2013, and on interviews with those closely involved in the process. We believe that this report sets out the most complete recent exposition of how financial privilege works.
- We review practice in particular with respect to nine different complaints that have been made during debates about financial privilege. These range from procedural complaints – for example regarding lack of transparency about the definitions of what kind of amendments will engage financial privilege, to more political ones – such as that the government controls the process or that it is being applied more frequently than in the past. We conclude that evidence on these different complaints is mixed.
- Some complaints are clearly justified. We find that the process lacks transparency, that information about it is scattered, and definitions are often unclear. It is therefore easy to see why both parliamentarians and outside observers of parliament are confused. This lack of transparency helps to feed suspicions that something untoward is going on. The confusion is exacerbated by the fact decisions on financial privilege are taken in the Commons, but their primary impact is on members of the Lords.
- In fact our analysis finds no clear evidence that government or any other body is acting inappropriately. The primary reasons for more frequent clashes over financial privilege (which occurred when Labour was in power pre-2010, as well as under the coalition) relate to political changes in the Lords. That is, the chamber's growing assertiveness, and its changed party balance. Most recently the coalition's public spending cuts, occurring in a period of relative austerity, have put financial arguments at the heart of political debate – between government and opposition, and therefore Lords and Commons.
- But the current arrangements create vulnerabilities. Decisions about financial privilege are primarily taken by Commons clerks, with little political cover from the Speaker. This could place them under too much pressure from parliamentary counsel (who draft government bills). Without transparency, and with decisions based on precedent, there is a risk of "creep" in the definitions of when financial privilege applies.
- We also look briefly at practice in other bicameral parliaments. We find that it is very common for the lower house to enjoy at least a degree of financial primacy. In some cases restrictions on members of both chambers proposing amendments that would increase

spending are far harsher than in the UK. But also procedures, and different interpretations of rules by the two chambers, are sometimes far clearer and more explicit.

- We thus recommend a series of changes to current practice. We believe that there should be clearly published definitions, and statements about why financial privilege applies to particular amendments, with more explicit involvement by the Commons Speaker. The Lords may wish to accept the Commons' published definition, or propose a narrower one. For example some countries apply limits to amendments that increase spending, but not to ones that reduce it or change its administration. Beyond definitions, the procedures in the Commons with respect to financial privilege could also be streamlined.
- In the end, financial privilege is governed by conventions rather than hard law, and the Lords may choose how it responds. This may continue to change over time, particularly if the chamber is reformed. Whether the unelected – but now relatively proportional and “expert” – chamber should be able to behave more assertively on financial matters is ultimately a political question.



## Introduction

In late 2011 and early 2012 the government suffered a series of defeats in the House of Lords on amendments to its flagship Welfare Reform Bill. Most of the defeats were on highly controversial matters, including the so-called “bedroom tax” and introduction of an overall benefit cap. All were subsequently overturned by the House of Commons, which cited its “financial privilege” – or right to dismiss the Lords’ demands on financial matters. As a consequence it was argued that the Lords should, by convention, not insist on its proposals. This episode provoked anger both inside and outside parliament, with claims that the government had misused parliamentary procedure in order to secure its policy programme, and that the incident could thus be considered “an abuse of privilege”.<sup>1</sup>

Controversy over financial privilege was in fact nothing new. Under the previous Labour government, the Commons’ claim of privilege on two bills in November 2008 (the Counter-Terrorism Bill and Planning Bill) had likewise caused complaints. Subsequently, two months after the controversy on the coalition’s Welfare Reform Bill, criticisms resurfaced when the Commons cited financial privilege in rejecting Lords amendments to the Legal Aid, Sentencing and Punishment of Offenders Bill.

Such episodes have revealed widespread confusion about this little-known aspect of parliamentary procedure. They also raise bigger questions about relations between the House of Commons and House of Lords. While the elected Commons undoubtedly enjoys primacy, the unelected Lords is nonetheless respected for its expertise, and increasingly lobbied by civil society groups. Since reform in 1999 transformed the Lords into a “no overall control” chamber, it has become more assertive and has inflicted numerous defeats on government. A sense that procedural tactics are being used to undermine its scrutiny role thus risks not only angering peers, but feeding perceptions among outside observers that the parliamentary process is somehow being subverted. Yet at the same time few would argue against the elected Commons having the ultimate right to decide on important policy matters.

The purpose of this report is twofold. First, it aims to throw light on current arrangements by clarifying the existing practices around financial privilege, which are clearly little understood. We hope that this will help parliamentarians, outside groups and the public better understand and navigate the process. Second, in the light of this information, the report seeks to evaluate whether current arrangements for financial privilege are appropriate, or whether they should be reformed.

Our findings are based on detailed research into how financial privilege has operated in practice between October 1974 and April 2013. We have conducted analysis based on official records and publications, and interviewed key actors involved in the contemporary process, including members, and senior clerks from both Houses. In addition we draw on a much larger set of interviews conducted for a separate research project about the Westminster legislative process, including with civil servants and outside group representatives, as well as parliamentarians and parliamentary staff.<sup>2</sup>

The main body of the report is split into seven sections. The first distils and clarifies the basic procedures surrounding financial privilege. This is intended to help those seeking to engage with the legislative process – including MPs, peers, outside groups and the public – better understand what many currently see as a shadowy procedure. The second section of the report goes further, by providing summary figures on use of financial privilege between 1974 and 2013. The third section draws on debate inside and outside parliament over the same period to identify nine

complaints that have been made about how financial privilege operates. Each of these is assessed against the evidence that we have collected. Next, we consider international comparisons, since many bicameral legislatures have special rules for dealing with financial matters. We summarise some of these, to evaluate whether there are useful lessons that Westminster could learn. At the end of the report we consider the wider politics of financial privilege, and then ask whether the current procedures should be reformed, making a series of policy recommendations. A final short section draws some overall conclusions.

## Financial privilege: the process

Even for many seasoned Westminster-watchers, the term “financial privilege” may be something of a mystery. As explained below, our interest is in a relatively narrow aspect of the House of Commons’ primacy over the House of Lords on financial matters. Other aspects of the relationship between the chambers are relatively better understood, though much is governed by convention and practice, rather than hard law. The Parliament Acts 1911 and 1949 set down the statutory framework, and it was the 1911 Act which cemented the Commons’ primacy over legislation. But the Parliament Acts (which were themselves based on conventions established over the preceding centuries) provide little guidance on how the relationship between the chambers operates day-to-day.

The main sources of information about financial privilege are the authoritative guides to the interpretation of procedure in the two chambers: *Erskine May* for the House of Commons (most recently Erskine May, 24th edn., 2011: 785-98) and the *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* (or “Lords Companion”, most recently House of Lords, 2013: 164-65). Brief summaries also appear in more widely available books on parliament written or contributed to by clerks (Blackburn and Kennon, 2003: 333-34; Rogers and Walters, 2006: 265-67). Following recent controversies, some other documents have set out principles and facts regarding financial privilege, as discussed below. But present sources are very scattered, and in some respects incomplete. We believe that this report is the most extensive recent attempt to clarify the rules and practice of financial privilege.

In this first section of the report we draw on the existing sources, as well as on official parliamentary records, and our interviews, in order to set out the basic facts. We begin by briefly clarifying what is meant by the term “financial privilege”. We then outline the most important recent controversies over its use, before summarising the basics of how it operates: first, how financial privilege is claimed by the Commons; and second, how the Lords may respond.

### What is financial privilege?

Most primary legislation can be introduced into either the Commons or the Lords. In the first House the bill will be debated and amendments may be made. A revised version of the bill, incorporating any amendments, will then be sent to the second House, where the process is repeated. Once the bill has passed the second House, the first House will be sent a list of any amendments that were made. If the first House accepts these the bill is sent for Royal Assent. But if the first House disagrees – by rejecting or amending some amendments, or proposing alternative “amendments in lieu” – the bill must return again to the second House. The bill will then “ping pong” in this way between the two Houses until one or other backs down or a compromise is reached.

In this report we use the term *financial privilege* to refer to the primacy of the Commons over any legislative amendment that was proposed by the Lords and has financial implications.<sup>3</sup> If the Lords passes an amendment with financial implications, and the Commons subsequently rejects it during ping pong, the Commons will send a message to the Lords indicating that the amendment would affect taxation or spending and reminding peers of the Commons’ financial primacy. Convention suggests that the Lords should respect this by not insisting on its amendment. But such arrangements are entirely governed by precedent and convention rather than fixed rules.

Financial privilege is one element within a broader set of principles and practices referred to as the Commons’ *financial primacy*. The financial primacy of the Commons dates back many

centuries and was formalised by two Commons resolutions in the late 17th century. The first, from 1671, states: “That in all aids given to the King by the Commons, the rate of tax ought not to be altered by the Lords” (quoted in Erskine May, 24th edn., 2011: 786). The second resolution (ibid) is more detailed, from 1678:

*That all aids and supplies, and aids to his Majesty in Parliament, are the sole gift of the Commons; and all bills for the 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.*

Aside from financial privilege, the Commons’ financial primacy has various other implications for how parliament operates, some of which are better known. There are two overlapping categories of bill that are singled out for special treatment by the Lords. The first is those certified by the Commons Speaker as *money bills* because their provisions relate solely to financial matters, including national taxation, public money and loans. Under the terms of the Parliament Act 1911, money bills can only be delayed minimally by the Lords. The second category comprises *bills of aids and supplies* (usually Finance Bills or Consolidated Fund Bills), which – as indicated in the resolution above – must always begin in the Commons and cannot be amended by the Lords. In practice both types of bill generally have an expedited passage through the Lords, with no committee stage and no amendments passed.

With the exception of bills of aids and supplies, which are brought in on financial resolutions, the Commons must agree either a *money resolution* (to authorise expenditure)<sup>4</sup> and/or a *ways and means resolution* (to authorise taxation) for all other bills that have financial implications. Where such a bill begins in the Lords rather than the Commons, the Lords will pass an amendment known as a *privilege amendment* before sending the bill to the Commons. The privilege amendment states (fictitiously, in order to facilitate Lords’ scrutiny) that nothing in the bill shall have financial implications. Its only purpose is to formally respect the Commons’ financial primacy, and it is removed from the bill at committee stage in the Commons.

Our focus in this report is only on the first of these mechanisms: i.e. the application of financial privilege to Lords amendments to legislation.<sup>5</sup> Although mechanisms such as money bills may be higher profile, the application of financial privilege to Lords amendments is a far more frequent occurrence. As indicated below (see Table 1, p. 15), this occurred with respect to hundreds of Lords amendments over the period 2000-12. It therefore arguably has greater implications for how parliament operates day-to-day.

## **Recent controversies**

Financial privilege has provoked confusion and complaints within parliament for decades, but it has become particularly contentious in the last few years. Some of the recent controversies have led to publications, mostly from parliamentary authorities or select committees, setting out aspects of how financial privilege works. Here we review the most recent developments.

An important flashpoint came in November 2008, when Lords amendments to two bills were rejected by the Commons on the grounds of financial privilege. On the Counter-Terrorism Bill, the Commons cited financial privilege when rejecting a Lords amendment designed to facilitate the disclosure of information held by the government relating to a person’s fingerprints and other samples, and to enable the person to request its destruction. Upon the bill’s return to the Lords, Crossbench peer Viscount Bledisloe said that he was “amazed” at the Commons’ use of financial privilege, and that the Lords was “faced with a remarkable attitude” from the lower

chamber (HL Deb 24 Nov 2008, cc1291-92). In the same month, the Commons cited financial privilege when rejecting a Lords amendment to the Planning Bill, about regulation-making powers relating to the “Community Infrastructure Levy”. When the bill returned to the floor of the Lords – the day after the controversy on the Counter-Terrorism Bill – similar concerns were expressed. Shadow Leader of the Lords, Lord Strathclyde, claimed that the government had given the impression of claiming financial privilege “in cases of doubt simply to stifle debate” (HL Deb 25 Nov 2008, c1359), while Labour peer Baroness Hollis of Heigham warned of “deep unease [...] about where the principle may go” (HL Deb 25 Nov 2008, c1365).

In response to the criticism, in February 2009 Baroness Royall of Blaisdon, then Leader of the Lords, deposited in the House of Lords Library a memorandum outlining the action that she had taken to address concerns. She noted that “the operation of Commons financial privilege is a matter for the House of Commons alone”, but explained that she had discussed the issue within government to ensure that “wherever possible, dialogue between the two Houses can be resolved without similar conflicts arising”. As her statement is not publicly available, we have reproduced it in Appendix 1. Royall attached a short briefing paper written by Michael Pownall, then Clerk of the Parliaments (the most senior clerk in the Lords), which has subsequently been published by the House of Lords Constitution Committee (2011: 8-11). It outlined what financial privilege is, its scope, and how the Lords may respond, as well as very briefly commenting on some criticisms of it. Royall also attached some summary statistics on how financial privilege had been used in practice, which we return to below.

Financial privilege again triggered some complaints in the early months of coalition government. This time the bill in question was the Identity Documents Bill, which repealed the previous Labour government’s Identity Cards Bill. In the Lords, the government was defeated on an amendment to allow those who already held identity cards to claim a £30 refund. The amendment was rejected by the Commons, which cited its financial privilege. When the bill returned to the Lords, Labour peer Lord Howarth of Newport warned that the procedure risked “mak[ing] an absolute mockery of our claim to be a revising Chamber or, indeed, a proper debating Chamber” (HL 21 Dec 2010, c1004). Around the same time, the Savings Accounts and Health in Pregnancy Grant Bill was controversially designated by the Commons Speaker as a money bill, thus restricting the Lords’ ability to amend it. Taken together, these two episodes led the Constitution Committee to publish a short report entitled *Money Bills and Commons Financial Privilege*, which sought to clarify both procedures (Constitution Committee, 2011).

Yet the high-point in controversy over financial privilege came in 2012 when parliament was debating the Welfare Reform Bill. During the bill’s initial passage the Lords inflicted seven defeats on the government, most of which related to high-profile and controversial matters including the so-called “bedroom tax”, the benefit cap (on an amendment proposed by a Church of England bishop), support for disabled people, and reform of the child maintenance system. The Commons overturned all seven defeats citing financial privilege, to which some peers responded with opprobrium. Former Conservative chancellor Lord Lawson of Blaby suggested that financial privilege had been “invoked promiscuously” in a way that was “completely contrary to the conventions of the constitution” (HL Deb 2 Feb 2012, c1674), while former Commons Speaker, Baroness Boothroyd, accused the government of behaving in a “very heavy-handed manner” (HL Deb 14 Feb 2012, c688). Former Conservative Lord Chancellor Lord Mackay of Clashfern (the proposer of one of the amendments rejected by the Commons) suggested that it had been “a waste of time [to] debate provisions which turn out to be completely sacrosanct because of the decision on privilege made” (HL Deb 1 Feb 2012, c1569).

The episode also provoked anger and confusion outside parliament. Writing in the *Guardian*, journalist Polly Toynbee claimed that the bill had been “railroaded through” parliament using financial privilege.<sup>6</sup> The director of policy at Gingerbread, a charity (representing single parents) that had campaigned on the bill, accused the government of employing “strong-arm tactics” and warned that the use of financial privilege set it on a “dangerous path if it becomes common practice in future”.<sup>7</sup> Reflecting on these events, legal academic Jeff King wrote a blog post in which he concluded that it was “an abuse of the privilege to use it to foreclose the revising role of the Lords on matters of social policy not relating directly to taxation or supply of money”.<sup>8</sup> Confusion abounded in the media, with misleading and contradictory claims such as that the procedure was “used each year for major financial measures such as the Budget”<sup>9</sup> and that it was “a rarely used parliamentary device”.<sup>10</sup> As indicated above, neither of these statements was correct.

When the Welfare Reform Bill returned to the House of Lords, a total of seven amendments in lieu were agreed by peers, all of which themselves were judged by the Commons to have engaged financial privilege. Five of them – relating to support for disabled people and to the child maintenance system – were agreed with the support of the minister, and were subsequently accepted by the Commons with financial privilege waived. The remaining two amendments were proposed by Lord Best – relating to the bedroom tax – and were agreed against the government’s wishes. The Commons again disagreed to these, again invoking financial privilege. When the bill returned to the Lords, Lord Best chose not to force another division.

The furore over the Welfare Reform Bill led clerks in both Houses to issue short explanatory documents. David Beamish, Clerk of the Parliaments, published a note in which he emphasised two points: that the Commons always cites financial privilege when rejecting a Lords amendment that has spending implications, and that the Lords is free to respond to the Commons’ claim of financial privilege by proposing an amendment in lieu (Beamish, 2012). Two papers were also published jointly by Robert Rogers, Clerk of the House of Commons (the most senior official in that chamber), and Jacqy Sharpe, Clerk of Legislation in the Commons (the official directly responsible for designating Lords amendments) (Rogers and Sharpe, 2012a; 2012b). These were particularly helpful in explaining the practical process by which financial privilege comes to be cited on an amendment, including clarifying the role of the clerks. They also included some more up to date statistics on how privilege had been used in practice, to which we return below.

In April 2012, financial privilege was once again claimed by the Commons when rejecting a series of amendments to the Legal Aid, Sentencing and Punishment of Offenders Bill. One of the amendments was proposed by Crossbench peer and senior lawyer Lord Pannick, who sought explicitly to write into the bill the purpose of legal aid without requiring any additional expenditure. His amendment stated that the change should be made “within the resources made available” in the bill, and in introducing it he claimed that “the amendment does not require any further expenditure by the Government” (HL Deb 5 Mar 2012, c1559). Yet, when rejecting the amendment, the Commons cited its financial privilege. Pannick responded with an alternative amendment, which sought to ensure that “individuals have access to legal services that effectively meet their needs, subject to the resources which the Lord Chancellor decides, in his discretion, to make available” (HL Deb 23 April 2012, c1560). But this was likewise rejected citing financial privilege. At the next round of ping pong Lord Pannick dropped the proposal, but argued that it was “quite inappropriate to apply financial privilege to an amendment that expressly stated that financial resources were a matter for the discretion of the Lord Chancellor” (HL Deb 25 Apr 2012, c1796).

The question of financial privilege has also sometimes featured in wider debates about the relationship between the chambers, and about Lords reform. We return to these issues later in the report.

## How the Commons claims financial privilege

When the Commons receives Lords amendments, it is the Clerk of Legislation, acting under the authority of the Speaker, who is responsible for checking whether any of them have financial implications (or in technical terms, “engage” financial privilege). Before the Commons debate on the Lords amendments takes place, any that are judged to do so will have a “P” recorded against them on the list of amendments given to the Speaker. This process is known as the “designation” of amendments. In difficult cases the Clerk of Legislation may consult with colleagues but, despite the procedure formally taking place under the Speaker’s authority, only very rarely with the Speaker himself. Indeed the briefing from the Commons clerks indicates that “[t]he Speaker is not directly involved” with this decision (Rogers and Sharpe, 2012a).

When the Commons debate takes place, it has been common in recent years for the Speaker or Deputy Speaker to formally identify at the start whether any amendments engage financial privilege, usually specifying which ones. In response to the controversy on the Welfare Reform Bill the Commons clerks now list on the Commons order papers that are provided to MPs (and are publicly available online) those amendments, if any, that engage financial privilege.

MPs have three possible options for how to respond to any Lords amendment and, in the case of amendments that have been identified as engaging financial privilege, this choice is crucial in what happens next. The Commons can:

- **Agree the amendment.** By virtue of accepting the amendment, the Commons is judged to have “waived” its financial privileges. A special entry is made in the *Journals of the House of Commons* to this effect.
- **Propose an alternative.** Rather than accepting or rejecting the amendment outright, the Commons may suggest an alternative proposal – most commonly by disagreeing to the Lords’ proposal but at the same time suggesting an “amendment in lieu”.<sup>11</sup> In this case, the Lords Companion states that “the question whether the Lords amendment infringes privilege does not arise” (House of Lords, 2013: 165).
- **Disagree to the amendment.** Whenever the Commons disagrees to a Lords amendment without also proposing an alternative, it sends the Lords a short, formal “Reason” for its decision. The text of the Reason is agreed immediately after the debate by a committee of five MPs known as a Reasons Committee. Where the amendment engages financial privilege, the long-standing practice of the Commons is to always send a financial privilege Reason (or “privilege Reason”), which always ends with the words: “and the Commons do not offer any further Reason, trusting this Reason may be deemed sufficient”. We refer to this as “invoking” financial privilege.

In practice, financial privilege may be little mentioned (if at all) when the Lords amendments are debated in the Commons. Aside from an announcement by the Speaker (or Deputy Speaker) that financial privilege applies, ministers and other MPs often make no reference to the financial status of the Lords amendments. Instead the debate tends to focus on other matters, in terms of the amendments’ more general merits.

## How the Lords may respond

When the bill is returned to the Lords, the Commons Reasons are printed on the Lords order papers next to any amendments that have been disagreed to. According to the Lords Companion, where a financial privilege Reason has been given, “the Lords do not insist on their amendment” but may propose amendments in lieu (House of Lords, 2013: 165). This is not a hard rule, since (unlike in the Commons) there is no means of ruling a Lords amendment out of order – in particular, the Lord Speaker does not have this power. Nonetheless Erskine May states that the Commons’ “hint of privilege is generally accepted by the Lords, and the amendment is not insisted on” (24th edn., 2011: 792). We are aware of only one occasion when the Lords did not follow this convention. Erskine May indicates that this occurred in 1930, when the Lords insisted on several amendments to the Unemployment Insurance (No 2) Bill on which financial privilege had been invoked. Interestingly, the Commons did not then insist on its disagreement to the amendments, but instead proposed amendments to them.

In contrast, it is not considered contrary to the convention for the Lords to respond to financial privilege with an alternative proposition (e.g. an amendment in lieu), or to do so for as many rounds of ping pong as it wishes. Out of the 160 amendments on which financial privilege was invoked during the period 1974-2013 (as further discussed below), we found that the Lords responded in 19 cases by agreeing one or more amendments in lieu (representing 22 amendments in lieu in total).<sup>12</sup> These included the amendments in 2012 by Lord Best to the Welfare Reform Bill and Lord Pannick to the Legal Aid, Sentencing and Punishment of Offenders Bill cited above.

A particular area of confusion is whether there are any restrictions on what the Lords may propose as an alternative. Any such restriction (like the limitation on insistence) would be a matter of convention, rather than hard rules or law. This question was touched upon in 2005-06 by the Joint Committee on Conventions, which met to consider whether the conventions governing the relationship between the two Houses should be codified. The committee’s establishment responded to concerns that conventions had been coming under pressure following Lords reform in 1999, particularly with respect to the “Salisbury convention” on government manifesto bills, and the chamber’s ability to veto secondary legislation. Although the issue of financial privilege was not central to the committee’s inquiry, its conclusion on this matter has gone on to be widely quoted.

The committee based its conclusion particularly on evidence from Paul Hayter and Roger Sands, then the most senior clerks in the Lords and Commons respectively. Hayter noted in his written evidence that the Lords had responded to financial privilege Reasons with amendments in lieu on three bills in the 2003-04 session, often making only minor modifications to avoid a formal insistence (Joint Committee on Conventions, 2006b: Ev 90-91).<sup>13</sup> The topic was then discussed when the two clerks gave oral evidence to the committee. When asked whether the Lords was “straining the conventions” by proposing such amendments in lieu, Hayter suggested that it was free to “provide an alternative [...] which does not infringe financial privilege”, while Sands suggested that “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” (Joint Committee on Conventions, 2006b: Ev 110). Consequently the committee’s report concluded that “[i]f the Commons have disagreed to Lords Amendments on grounds of financial privilege, it is contrary to convention for the Lords to send back Amendments in lieu which clearly invite the same response” (Joint Committee on Conventions, 2006a: 67).



But whether this really represents a convention of the Lords is disputed. In 2008, Labour Leader of the House of Lords Baroness Royall stated that “[b]y convention, any amendment in lieu must not clearly invite the same response from the Commons” (HL Deb 25 Nov 2008, c1359). Lord Strathclyde, while Leader of the House of Lords, likewise referred to this conclusion with approval (HL Deb 2 Feb 2012, c1673). However the Joint Committee on Conventions (2006a: 79) had recommended that the House of Lords should consider adding the wording to the Lords Companion, which sets out the chamber’s official procedures and conventions. Although its report was debated in the Lords on a motion to “take note with approval”, such a change has never been put into effect. In his 2012 briefing David Beamish, the current Clerk of the Parliaments, thus confirmed that “the House [of Lords] remains formally free to send back any amendment in lieu” (Beamish, 2012).

In any case it is not obvious what it would mean for an amendment to “clearly invite the same response”. The oral evidence above could support either a wide or a narrow interpretation of the phrase: Sands’ comment could be seen as interpreting this narrowly (i.e. because the subsequent amendment is “only a very minor variant”), while Hayter’s comment suggests a wider definition encompassing any amendment potentially engaging financial privilege. Certainly, a wide interpretation does not appear to have been observed in practice, either before or after the Joint Committee on Conventions report. Of the 22 amendments in lieu sent back by the Lords 1974-2013, 19 themselves engaged financial privilege, including two (on the Housing Bill (2003-04) and the Teaching and Higher Education Bill (1997-98)) that were proposed in the Lords by the government itself.

A third option open to the Lords is to pass a motion protesting against the Commons’ claim of financial privilege. Such a motion was tabled (but not pressed to a vote) in 1988 when financial privilege was invoked on amendments to the Local Government Finance Bill, which introduced the so-called “poll tax”. Labour peer Lord McIntosh of Haringey tabled an amendment to the government’s motion that the Lords should not insist on its amendments, which would have added that the Lords “regrets that Her Majesty’s Government are seeking to oppose Lords amendment 10 not on its merits but on the ground of Commons financial privilege” (HL Deb 26 Jul 1988, c186). The motion would have had no substantive effect, but would have communicated a symbolic message to the Commons.<sup>14</sup>

A final “nuclear” option open to the Lords would be to decline to pass the bill at all, for example through a motion to adjourn consideration until a date after the session has ended. Although no longer used, such motions until recently provided the Lords with a means of occasionally declining to give bills a second reading.<sup>15</sup> If the chamber chose to take such action, no amendments would be returned to the Commons and the entire bill would be lost. For so long as such options exist, any limitations on the Lords’ power with respect to particular amendments can always ultimately be overridden – though that power could of course in turn be overridden by the Commons, through invoking the Parliament Acts.

## Key statistics on financial privilege

Some of the recent publications referred to above have included quantitative data on the use of financial privilege, and these have been quoted at times to support particular conclusions in the debate. However, these statistics have not presented a particularly full or clear picture. In this section we begin with the official data, but then supplement them with more detailed information based on our own research.

### Official published statistics

Statistics issued with Baroness Royall of Blaisdon’s memorandum in 2009 specified the number of Lords amendments in each session from 2000-01 to 2007-08 on which financial privilege had been waived and invoked by the Commons (House of Lords, 2009). The data published by the Commons clerks (Rogers and Sharpe, 2012b) were both more detailed, and brought these figures up to date. In Table 1 we show similar figures to those used in these two published sources, relating to waiving and invocation of financial privilege. These were provided to us by the House of Lords Library, and correct some errors in the earlier published figures.

Table 1: Official data on waiving and invocation of financial privilege, 2000-12

Session	A: Lords amendments on which financial privilege waived	B: Lords amendments on which financial privilege invoked	Total A+B**
2010-12*	158	12	170
2009-10	14	3	17
2008-09	48	2	50
2007-08	154	7	161
2006-07	0	10	10
2005-06	6	0	6
2004-05	5	0	5
2003-04	103	12	115
2002-03	29	4	33
2001-02	91	5	96
2000-01	2	1	3
Total	610	56	666

Source: House of Lords Library.

\* To February 2012.

\*\* This is not the total number of Lords amendments on which financial privilege was engaged, as it excludes amendments that engaged financial privilege to which the Commons responded with an alternative proposal (e.g. an amendment in lieu).

These kinds of official data, which have been used to defend existing practice, show that the Commons has waived financial privilege far more frequently than it has invoked it. Indeed, once financial privilege was judged to have been engaged, the ratio between these outcomes is around 11:1. In her memorandum Baroness Royall thus claimed that the data showed that “financial privilege has not often given rise to difficulties for the Lords” and that “in many cases, the Commons decides not to exert its financial privilege” (see Appendix 1). Likewise, the Commons clerks in 2012 cited the data as demonstrating that “[t]he Commons waives its privilege far more often than not” (Rogers and Sharpe, 2012a: 2).

But, although these data were intended to clarify practice, they also leave some important questions unanswered. The most significant omission is that they do not distinguish between Lords amendments that were supported by the government and those that were passed against

its wishes. We know that the great majority of amendments agreed in the House of Lords are proposed in the name of ministers. For example, figures provided by the House of Lords Public Bill Office for the session 2010-12 show that there were 2405 amendments agreed in the House of Lords, of which 2268 (94%) were government-backed amendments. It is not surprising that the House of Commons – acting on the advice of ministers – should waive its financial privilege in the case of such amendments.<sup>16</sup> What is more important is to ask what happens in the case of government defeats in the House of Lords. But this information is not available from the recently published summary data. Isolating data for Lords defeats presents a very different picture.

### Financial privilege and Lords defeats: four social security bills

To explore the effects of financial privilege on Lords defeats, we first selected four social security bills from the period 1989-2012. Social security bills seem particularly likely to attract amendments with financial implications, and these four bills span periods of Conservative, Labour and coalition governments. We recorded the origin and outcome of every Lords amendment to these bills that was judged by the Commons to have engaged financial privilege. Out of a total 690 Lords amendments, 123 engaged financial privilege. Of these, 91 were government-supported amendments and 31 were defeats (one was a hybrid case). For 90 amendments financial privilege was waived, but all of these were originally passed in the Lords with government support. By contrast, financial privilege was invoked on 26 amendments – all of them resulting from government defeats in the House of Lords.

Table 2: Financial privilege on amendments to four social security bills 1989-2012, by whether government supported amendment or defeat

	TOTAL			
	Govt support	Defeat	Hybrid*	Total
Total Lords amendments	690			
LAs with financial implications	91	31	1	123
- agreed & privilege waived	90	0	0	90
- disagreed & privilege invoked	0	26	0	26
- amended the LA (privilege waived)	0	0	1	1
- amended words restored to bill	0	1	0	1
- amendments in lieu	1	4	0	5

Bills: Social Security Bill (1989-90), Welfare Reform and Pensions Bill (1998-99), Pensions Bill (2007-08) and Welfare Reform Bill (2010-12).

\*In one case the Lords amendment was a combination of an amendment sponsored by the government and one that resulted from a government defeat.

Table 2 also illustrates a second gap in the official data, which is that they do not specify how frequently the Commons responded to Lords amendments that engaged financial privilege by proposing amendments in lieu (and thus not invoking financial privilege). Of the remaining five Lords defeats not responded to with financial privilege invoked, the Commons proposed an alternative amendment – thus avoiding a financial privilege Reason.

Examination of these four bills allows us to conclude, unsurprisingly, that government and non-government backed Lords amendments attract very different responses in the Commons with respect to financial privilege. Where privilege is engaged on government amendments it is likely almost always to be waived. In contrast, where privilege is engaged on non-government

amendments it is far more likely to be invoked. Indeed, with very few exceptions, cases of privilege being invoked tend to apply only in response to government defeats in the Lords.

### Financial privilege and all Lords defeats 1974-2013

A third limitation of the officially collated statistics is that they only cover the period from 2000 to 2012. This makes it difficult to assess whether practice has evolved over a longer time period. We therefore conducted further analysis on data going back to 1974. Here we focused only on cases where financial privilege was invoked (rather than simply designated), and thus largely on Lords defeats. We searched the Journals of the House of Commons to identify every Lords amendment on which financial privilege was invoked between October 1974 and April 2013. This period covers 38 parliamentary sessions and nine parliaments (the last of which is incomplete). Over this period financial privilege was invoked on a total of 160 Lords amendments to 61 bills, as shown in Table 3.

Table 3: Number of amendments and proportion of Lords defeats on which financial privilege was invoked, 1974-2013

	Cases where financial privilege (FP) invoked			Total Lords defeats	% of Lords defeats on which FP invoked	Mean no. of amendments annually on which FP invoked**
	No. bills	No. amend-ments	No. Lords defeats			
2010-13 (Coalition)*	4	24	18	74	24%	8.0
2005-10 (Labour)	7	22	11	175	6%	4.4
2001-05 (Labour)	9	21	14	245	6%	5.4
1997-2001 (Labour)	9	23	14	108	13%	5.6
1992-97 (Conservative)	4	7	5	62	8%	1.7
1987-92 (Conservative)	10	24	16	72	22%	5.0
1983-87 (Conservative)	3	3	3	62	5%	0.7
1979-83 (Conservative)	0	0	0	45	0%	0.0
1974-79 (Labour)	15	36	21	355	6%	7.9
Total	61	160	102	1198	9%	4.1

Source: For defeats, House of Lords website, UCL data, Shell (1985: 17); for all other figures, our research based on House of Commons Journals and other official parliamentary sources.

\*Parliament incomplete.

\*\*Calculated per month of the parliament and scaled up to years.

As the table shows, the number of amendments on which financial privilege was invoked (second column of figures) and the average number of such cases per year (final column) have fluctuated somewhat over time. The data for the 2010 parliament are necessarily incomplete, and may well change, but the rate at which financial privilege has been invoked is slightly above that during the most recent period of Labour government, with a rate more similar to that under the previous 1974-79 Labour government. During the Conservative Thatcher and Major governments it was less common (with the exception of 1987-92) – which is unsurprising given the lower number of defeats (as shown in the fourth column of figures in the table) at that time.

We traced each invocation of financial privilege over this period, to identify which defeat (if any) it resulted from. In total, the 160 amendments resulted – either directly or indirectly – from 102 individual Lords defeats (“indirectly” in the sense that sometimes the defeat itself did not engage financial privilege, but this was invoked against a consequential amendment). The main reason for the discrepancy between these two numbers is that other amendments consequential on

defeats also often had financial privilege invoked. In total, 153 of the 160 amendments on which privilege was invoked resulted from a government defeat in the Lords, and the remaining seven were also on non-government amendments (usually resulting from a free vote). This clearly reinforces the conclusion above that the waiving of financial privilege is routinely applied to government amendments from the Lords, while the invocation of financial privilege only really comes into play on non-government amendments.

This analysis also allows us to consider the proportion of Lords defeats in each parliament on which financial privilege was invoked, which is shown in the fifth column of figures in the table. Across the whole period, 9% of Lords defeats were responded to by the Commons invoking financial privilege on at least one of the resulting amendments. The proportion exceeded a tenth in only three parliaments: 1987-92 (22%), 1997-2001 (13%) and 2010-13 (24%). In terms of individual sessions, the 2010-12 session, when the Welfare Reform Bill was before parliament, saw 17 of 48 defeats (around one third) responded to with a financial privilege Reason. The only other session to reach this proportion was 1989-90, when the number of defeats was much lower (20, out of which seven were responded to in this way).

These figures help to explain why financial privilege became so controversial in the 2010-12 session. The number of times that financial privilege was invoked, and the proportion of Lords defeats to which this applied, was relatively higher than it had been in most of the preceding years. But it was certainly not so wildly different as to appear unprecedented. The politics of the situation is also however crucially shaped by what happens subsequently to Lords defeats: including the extent to which the Lords wishes to insist on its amendments. We return to this later in the report. But first, we survey some of the more specific objections that have been made with respect to financial privilege.

## Complaints about financial privilege

Over our period of study (1974-2013), a range of specific complaints have been made about how financial privilege operates. We have identified nine distinct though overlapping criticisms, based on records of parliamentary debates, interviews with key actors, and comments made in the media. While some of these complaints are important and longstanding, others have been made relatively rarely. They are that:

- the procedure for financial privilege is opaque;
- there are no clear rules for which amendments engage financial privilege;
- financial privilege is being interpreted increasingly broadly;
- no explanation is given for why financial privilege applies;
- the privilege Reason doesn't reflect why the amendment was rejected;
- decisions on financial privilege exclude MPs as well as peers;
- financial privilege is controlled by government for political ends;
- financial privilege weakens the Lords' capacity to scrutinise legislation; and
- financial privilege is being invoked more often than it was in the past.

The complaints range from the purely procedural to those which are far more political, and the above list starts with the former and leads gradually to the latter. In the following subsections we consider each of these complaints in turn, evaluating the extent to which they seem to be justified by the evidence.

### Complaint 1: The procedure for financial privilege is opaque

The first complaint about financial privilege is that the procedure is unclear, and difficult for people to understand. This confusion has been evident in many of the parliamentary debates about financial privilege. In 1988 when the Lords debated the Local Government Finance Bill, which legislated for the so-called "poll tax", Labour peer Baroness Jeger confessed to feeling "extremely confused" and "mystified" by the process (HL Deb 26 July 1988, cc156-57). More recently, one MP who was active on the Welfare Reform Bill told us that financial privilege was something "I never got properly sorted out in my head". Clerks that we interviewed confirmed that they observed what one described as "incomplete understanding" of financial privilege, particularly in the Lords. Indeed even Lords clerks themselves appear not to fully understand the process followed in the Commons.

Such confusion about how financial privilege works is not surprising. For many people, the most obvious place to turn to for an indication of how financial privilege works might be the House of Commons standing orders for public business – but the term appears nowhere in this document. Detail is provided in Erskine May, but its section on this topic is somewhat unclear, and leaves several important questions unanswered. Its consideration of financial privilege begins with the Commons receiving "amendments which infringe the privileges of the Commons" (24th edn., 2011: 792), but it is entirely silent on the question of who decides whether an amendment falls into this category and what the process is for determining it. This helps to explain the widespread perception that it is the government that makes this decision (see complaint 7 below). Erskine May (ibid) is also unclear on how the Commons may respond to a Lords amendment that engages financial privilege, indicating only two choices: "to disagree with the amendments on the ground of privilege, or to agree with them, waiving privilege specifically for that purpose".<sup>17</sup> The section about financial privilege does not mention that the Commons

may respond to such an amendment by proposing an alternative, which would avoid financial privilege being invoked.

Some of this lack of clarity has been addressed in subsequent briefings by the clerks. In particular, the 2012 paper by Robert Rogers and Jacqy Sharpe distinguishes more clearly between the role of the Clerk of Legislation in deciding whether an amendment has financial implications and the subsequent political decision taken by MPs (Rogers and Sharpe, 2012a). Likewise, there is obvious confusion – or indeed disagreement – regarding how the Lords can respond, as outlined above. This was clarified to some extent in the briefing from David Beamish (2012).

Yet confusion remains for two reasons. First, the existing accounts remain scattered, and it is left to individuals to piece together a more complete account of how financial privilege works. Even members struggle to make sense of the situation, and those wishing to understand matters from outside parliament – e.g. in the media and lobby groups – are unlikely to find all of the relevant briefing notes, or to access Erskine May. Unlike standing orders and the Lords Companion, the latter is not available on the parliamentary website and can only be found in libraries. The publication of our report is intended to help, but cannot be an adequate substitute for a single, trusted account from within parliament itself.

The second reason for confusion is that even those accounts that exist still leave some important questions unanswered. These include the extent of the government’s involvement in designation of amendments (see complaint 7 below) and, most importantly, the criteria against which clerks judge whether an amendment engages financial privilege (complaint 2). How the Lords may respond, meanwhile, remains a matter of dispute. This lack of clarity of course would make the writing of a single, authoritative account very difficult.

## **Complaint 2: There are no clear rules for which amendments engage financial privilege**

### *Complaint*

The second complaint can be seen as a special case of the first: that it is difficult to understand why financial privilege is considered to apply in the designation of certain amendments. This makes it difficult for peers, in particular, to know where the boundaries lie. One MP suggested to us that “it certainly felt at times as though it was pretty arbitrary, that you could reject almost anything on the basis of financial privilege if you felt like it, you could construct an argument around financial privilege”.

During parliamentary debates, a number of reasons have been suggested as to why financial privilege should not apply to particular amendments. They include that:

- the amendment involved a relatively small amount of expenditure;<sup>18</sup>
- the amendment reduced rather than increased expenditure;<sup>19</sup>
- the amendment did not change the amount of expenditure, but merely redistributed it;<sup>20</sup>
- the amendment concerned a procedural matter, such as regulation-making powers;<sup>21</sup>
- the amendment concerned a fee on users rather than taxation;<sup>22</sup>
- the amendment concerned local taxation, on which the Commons usually waives its financial privilege.<sup>23</sup>

### *Assessment*

The official documents are remarkably unclear as to where the boundaries of financial privilege are drawn in practice, particularly in borderline cases. The recent note from the senior Commons

clerks (Rogers and Sharpe, 2012a) made this process sound quite simple and uncontroversial, stating that:

*[The Clerk of Legislation] assesses whether each amendment has a financial effect. This is normally very straightforward – it’s fairly obvious that an amendment, if made, would affect expenditure under the Bill, or would involve the levying of a charge.*

Erskine May nonetheless points out that the Commons interprets the scope of its financial privilege very widely:

*With regard to the charges in respect of which they claim privilege, the Commons treat as a breach of privilege by the Lords not merely the imposition or increase of such a charge but also any alteration, whether by increase or reduction, of its amount or of its duration, mode of assessment, levy, collection, appropriation or management; and in addition, any alteration in respect of the persons who pay, receive, manage, or control it, or in respect of the limits within which it is leviable.*  
(24th edn., 2011: 787)

This suggests three ways by which the Lords can engage the Commons’ privilege by amending taxation or spending: by increasing it, reducing it, or altering it in some other way. If this principle were applied rigidly, a very high number of Lords amendments would be likely to fall within its remit, as almost every substantive provision has some resource implications. Erskine May does include a small number of examples of occasions on which financial privilege has been applied, but they are far from exhaustive. What is missing from all of the official accounts is anything approaching a transparent set of criteria against which decisions are made in practice about whether an amendment engages financial privilege or not. This is particularly important with respect to less clear-cut cases such as those indicated above. We have uncovered a number of amendments falling into categories such as these, on which it might be considered surprising that financial privilege was invoked (see complaint 3 below).

In order to clarify arrangements, we attempted to obtain a clear statement of how decisions about the scope of financial privilege are taken in practice. Based on our discussions with those involved in the process, we found two broad perspectives on how decisions are made. Some argue that the designation of amendments is conducted on the basis of precedent, using historic records held by the Commons Clerk of Legislation. Others, however, argued that financial privilege actually operates (and even should operate) on the basis of instinct, “smell” and “feel” rather than precise rules. One official described as an “illusion” the idea that designation of amendments is determined legalistically on the basis of precedent. Another advised us: “don’t try and look for any clever principle that runs through all the cases” as “there’s a lot of inconsistency”. This clearly makes it difficult for anyone to understand the rules, and risks allegations that the goalposts can be moved.

The closest we have come to an official explanation is an internal guide that is used by parliamentary counsel (the government’s legal drafters) to guide their own assessment about what is covered by financial privilege. As this has not previously been published, we reproduce it in Appendix 2. This document highlights the inadequacy of the official, public guides. It confirms that financial privilege has been taken to encompass “fees chargeable by a public body” on the basis that these bodies would otherwise require public funding, yet this is not specified in any of the public documents. It also states that “the Parliamentary procedure for secondary legislation making financial arrangements” would “probably” engage financial privilege, but neither this nor any of the public documents make any comment on when privilege would or would not apply in such cases.



In the case of Lord Pannick’s amendment to the Legal Aid, Sentencing and Punishment of Offenders Bill referred to earlier, a clear attempt was made by the proposers of the amendment to demonstrate that it had no financial consequences, yet it was returned from the Commons with financial privilege invoked. Responding when the bill returned to the Lords, Lord Pannick claimed that “[t]he original amendment made it very clear that access to legal services would come within the resources made available by the Lord Chancellor and in accordance with the rest of Part 1, and therefore that amendment had no financial implications whatever” (HL Deb 23 April 2012, c1561). Which criteria such amendments are being judged against does appear, at least to some members, to be quite unclear.

A particularly important area of uncertainty is whether amendments engage financial privilege regardless of the amount of money involved. We understand that the Commons clerks do employ a “de minimis” threshold, on which basis amendments with insignificant financial implications are not judged to engage financial privilege. The internal guide used by parliamentary counsel refers to a threshold and confirms that one amendment to the Welfare Reform Bill in 2012 was determined to have not engaged financial privilege “on the basis that the cost which it involved would be absorbed within the normal costs of the Department” (see Appendix 2). However, we have found it impossible to establish what this threshold is and how consistently it is applied. A senior Commons clerk told us that the de minimis threshold is usually taken to be around £250,000 when deciding whether a bill requires a money resolution, but that there is no equivalent recognised figure for determining whether a Lords amendment engages financial privilege. Another senior official closely involved in the process told us: “looking back over a career I can’t say that I can regard it as ever having been applied in a way that I could tell you what the rule is”.

Some fear that writing such rules down would risk further bureaucratising the process in an unhelpful way. Yet the lack of clear rules undoubtedly makes it difficult for many people to understand how financial privilege works. One peer told us that he would “welcome the publication of some clear guidance of the criteria that they apply [...] not least because we all try to comply, and if we know what the rules are it makes it a bit easier for us”. The lack of clear rules is problematic not only with respect to parliamentarians, but even more so for those outside who seek to engage with the parliamentary process. There is a real danger that the lack of transparent rules may feed wider perceptions of abuse, and erode trust in parliament.

### **Complaint 3: Financial privilege is being interpreted increasingly broadly**

#### *Complaint*

The third complaint is again clearly related. That is, that the principle of financial privilege is being interpreted inconsistently, and that its application may be broadening over time. For example in debate on the Labour government’s Pensions Bill, Conservative frontbencher Lord Hunt of Wirral suggested that “It is curious that suddenly privilege is invoked. The Minister owes us some further explanation ... the House has debated these subjects on many previous occasions” (HL Deb 24 Jul 2007, c700). For so long as the rules about what counts as financial privilege remain unclear, such allegations are likely.

#### *Assessment*

In his 2009 briefing, Michael Pownall, then Clerk of the Parliaments, acknowledged that “it is difficult to say whether the use of privilege reasons is increasing or whether they are being applied to amendments which would not previously have attracted a claim of privilege” (in Constitution Committee, 2011: 10). It is beyond the capacity of our research to answer this question conclusively: to do so would require not only analysis of amendments on which

financial privilege was invoked, but also of the many more on which it was not, and ideally to look at a longer time period. Instead, we draw some more limited conclusions based on the data that we have collected.

We have discovered a number of surprising cases of amendments on which financial privilege was invoked. These include amendments:

- to require the government to publish guidance on how individuals could request information about any data held on them about their fingerprints or other samples, and to request its destruction (Lords amendment 2 to the Counter-Terrorism Bill, 2007-08);
- to require that certain regulations about matters involving spending be subject to the affirmative procedure in the Commons in some circumstances (Lords amendment 173 to the Criminal Justice and Immigration Bill, 2007-08);
- to require a delay of 60 days between certain regulations about matters with financial implications being laid and being approved, during which time either House may debate them and refer them to a select committee for a report (Lords amendment 160 to the Planning Bill, 2007-08);
- to delay the commencement of a bill that had financial implications (Lords amendment 1 to the Personal Care at Home Bill, 2009-10);
- to delay the implementation of a bill that had financial implications until after the publication of an independent report into its affordability (Lords amendment 3 to the Personal Care at Home Bill, 2009-10); and
- to add a sunset provision to a bill that had financial implications (Lords amendment 4 to the Personal Care at Home Bill, 2009-10).

Part of the difficulty with such amendments is that the clerks may judge legitimately that they have financial implications, but it may not have been the primary intent of the mover and supporters of the amendment to challenge the financial implications themselves. If peers feel genuinely that a policy requires greater consultation or parliamentary oversight, it may be galling to see financial privilege invoked on their amendments simply because the policy in question involves money. Yet it would be difficult for the clerks to be expected take into account the primary intent of an amendment – if they did, amendments introducing delay could indeed be used as a “stalking horse” to prevent future spending, or spending cuts. Where the line is drawn between procedural amendments and those whose primary purpose is to affect spending is one of the difficult questions about financial privilege. It is thus of particular interest to see whether such lines have been drawn consistently.

In some of the cases cited above, we have been able to find earlier, seemingly parallel, amendments that were not judged to have engaged financial privilege. For example, while financial privilege was invoked against amendment 173 to the Criminal Justice and Immigration Bill in 2008, it was not judged to have been engaged on Lords amendment 87 to the Social Security Bill (1997-98), which also made regulations affirmative. The regulations in question included those that enabled the abolition of the lone parent rate of Child Benefit, which was estimated by the government to save £45 million over its first three financial years (HC Deb 4 Dec 1997, c328W). Neither was financial privilege considered to have been engaged on Lords amendments 3-5 to the Education (Student Loans) Bill (1989-90), which made regulations affirmative including those that set the maximum value of student loans.

Likewise, while financial privilege was invoked in 2010 against Lords amendment 4 to the Personal Care at Home Bill, it was not judged to have been engaged on Lords amendment 47 to the Community Care (Delayed Discharges, etc.) Bill (2002-03), which introduced a sunset clause

on a part of the bill that involved significant spending. Nor was financial privilege considered to have been engaged on Lords amendment 4 to the Football (Disorder) Bill (1999-2000). This amendment brought forward the sunset provision that was already specified in the bill, and the bill itself involved sufficient spending to have required a money resolution – though the sums involved were undoubtedly lower than those for the Personal Care at Home Bill.

Although we have not examined the period prior to 1974 in any detail, we have found one case from 1931 that appears to indicate a significantly different practice. During the passage of the Agricultural Land (Utilisation) Bill (1930-31) the Lords passed a package of amendments to delete the establishment and funding of the Agricultural Land Corporation. The Commons disagreed to the amendments, but did not give a financial privilege Reason. The Lords subsequently insisted on its amendments, citing in its own Reason to the Commons that the proposal “involve[d] an expenditure which is unjustifiable in the present financial situation”.<sup>24</sup> Such amendments would today almost certainly have been designated as engaging financial privilege.

All we can conclude from these examples is that financial privilege has been applied inconsistently. But they do raise the possibility that the definition of what is covered by financial privilege may have expanded over time. If questions of what engages financial privilege and what does not are indeed based on precedent, any move to include amendments of a given type within its remit is likely to be repeated once the principle has been accepted by the Clerk of Legislation. The parliamentary counsel guide (see Appendix 2) notes that amendments of certain kinds “have” been ruled as engaging financial privilege in the past. This is of course a government document, not a publication of the House of Commons (or indeed the House of Lords), but seems to indicate that the government keeps precedent under review. Any risk of “creep” thus seems particularly real if the government plays any role in the designation of amendments, which is a question that we return to with respect to complaint 7 below.

#### **Complaint 4: No explanation is given for why financial privilege applies**

##### *Complaint*

A fourth and again connected complaint is that, once an amendment has been returned to the Lords with a financial privilege Reason, no explanation is given as to why it had been judged to engage financial privilege. This complaint was voiced, for example, in November 2008 in relation to the Counter-Terrorism Bill. Conservative peer Baroness Hanham complained that it was “unsatisfactory, even more so when the reasons for the financial privilege are not really spelt out to us. The [minister] has just sat down without giving any reason from the other place as to what lies behind privilege being put on the amendment” (HL Deb 24 Nov 2008, c1294). The following day on the Planning Bill, Liberal Democrat peer Baroness Hamwee commented that “it is easy for a Minister to assert in another place that there are financial implications, and for that to be accepted there without discussion and argument as to whether that is really so” (HL Deb 25 Nov 2008, c1360).

This complaint has been repeated more recently. With respect to the Welfare Reform Bill in 2012, Liberal Democrat peer Lord Alderdice suggested that the Commons “could perhaps be a little more forthcoming as to precisely why it feels that it is important to exercise privilege” (HL Deb 2 Feb 2012, c1675). When a financial privilege Reason was later given for rejecting his amendment to the Legal Aid, Sentencing and Punishment of Offenders Bill, Crossbench peer Lord Pannick commented: “I doubt that I am the only noble Lord who finds it very regrettable that this House should be told that financial privilege controversially applies to an amendment but noble Lords are not told why that is so” (HL Deb 23 Apr 2012, c1561).

### *Assessment*

It is certainly true that the Commons does not explain why financial privilege is judged to apply to an amendment. When financial privilege was invoked against his amendment to the Legal Aid, Sentencing and Punishment of Offenders Bill, Lord Pannick approached the Commons authorities to request such an explanation. He received an email reply stating that he could not be given a “reasoned response” because “[d]esignation of financial privilege constitutes procedural advice from the Clerk of Legislation to the Chair and as such is confidential”. In interview he thus suggested that,

*if they weren't parliament – if they were some other public authority – the courts, by way of judicial review, would tell them that it is elementary that public law requires those basic criteria to be satisfied: you must tell people what standards you are applying, and you must give a reason for your decision.*

Parliament is clearly governed by different rules to other public authorities. But particularly when combined with the lack of clear rules, the failure to provide any written explanation risks reducing clarity, as well as undermining legitimacy and accountability. In most cases, only a short statement would be necessary, explaining how the decision that the amendment engaged financial privilege was arrived at. While the role of the Clerk of Legislation is properly behind the scenes, and it may be understandable for advice to the Speaker to remain confidential, accountability could nonetheless be provided more openly by the Speaker himself. This might include statements on the floor of the Commons chamber. Of course, if the definitions were clarified, the presentation of such statements would become much less onerous.

### **Complaint 5: The privilege Reason doesn't reflect why the amendment was rejected**

#### *Complaint*

Whenever it disagrees with a Lords amendment, the Commons sends a formal “Reason” to the Lords to explain why. If the amendment was judged by the clerks to have engaged financial privilege, the Reason always cites only financial privilege rather than the Commons’ substantive policy objection. This means that the substantive reason for rejecting the amendment is lost from the formal message communicated to the Lords. According to the briefing note from the Commons clerks, “[t]his is because giving another reason [would suggest] either that the Commons haven’t noticed the financial implications, or that they are somehow not attaching importance to their financial primacy” (Rogers and Sharpe, 2012a).

Occasionally, this practice has caused problems. On the Social Security Amendment Bill in 1974, Lord Aberdare (Conservative) complained that the use of a financial privilege Reason had left peers without any way of telling “whether our point of view has been considered at all” because the Commons had debated the amendments late the previous night and Hansard had not yet been printed (HL Deb 12 Dec 1974, c782). Commenting on the financial privilege Reason given for disagreeing with an amendment to the School Standards and Framework Bill in 1998, Baroness Blatch (also Conservative) claimed that “there is an arrogance about producing that and no other reason” (HL Deb 21 Jul 1998, cc736-37).

#### *Assessment*

We have not found compelling evidence that the loss of a substantive Reason where financial privilege is involved is a significant problem. Reasons were originally developed in the era before Hansard, as a way of facilitating communication between the two Houses. With the advent of better forms of communication – including Hansard and, more recently, televised proceedings – Reasons have become more of a formality, and tend to be quite brief and imprecise. In fact, it is

arguable that the only useful purpose of Reasons today is to signal to the Lords that the Commons has invoked financial privilege on an amendment.

It has been suggested that, where financial privilege is invoked, the Commons might give a dual Reason that also specifies the substantive policy justification. This appears to have been the practice in the past, when Reasons were far more detailed.<sup>25</sup> The idea was for example highlighted by Conservative Lord Jenkin of Roding in a Lords debate on the Business Rate Supplements Bill in 2009 (HL Deb 29 Jun 2009, c29). But such a change would do little to improve clarity. The bigger question is whether there is any purpose served by Reasons – and the House of Commons Reasons Committee – at all. This question was briefly considered by the House of Commons Modernisation Committee a few years ago, as part of a general review of the legislative process. In terms of the usefulness of Reasons to MPs, the committee noted that “[i]t is possible, even likely, that even Members who have followed the debate closely are entirely unaware of what the reasons are” (Modernisation Committee, 2006: 39). Despite receiving some evidence in favour of the abolition of Reasons, the committee came down against an immediate change. We return to this question in the recommendations section of the report.

## **Complaint 6: Decisions on financial privilege exclude MPs as well as peers**

### *Complaint*

Financial privilege is primarily intended to protect the rights of the elected House of Commons in the face of amendments from the unelected House of Lords. But MPs actually have little engagement with the process. When Lords amendments are debated, and the Speaker has indicated that financial privilege is engaged, it is striking that MPs rarely mention this when they speak. If the Commons gives serious consideration to the amendments they tend to focus instead on the substantive policy merits (thus linked to complaint 5).

In most cases, Lords amendments sent to the Commons fall within the money resolution or ways and means resolution agreed by the Commons, which authorise expenditure and taxation respectively. Occasionally, however, the Lords has passed amendments that were not authorised by the relevant resolution (either because they apply to a bill for which there is no such resolution, or where the terms specified in the resolution do not cover the charge proposed). If such a resolution is not made by the time the amendments come to be debated by the Commons, they are considered to represent an “intolerable breach” of the Commons’ financial privileges and are ruled out of order by the Speaker.<sup>26</sup> Consequently they are not even debated by the Commons. Such amendments are sometimes referred to as involving “unwaivable privilege”. On rare occasions when this has occurred, the Commons’ failure to debate such amendments has provoked criticism from peers. When an amendment to the Films Bill was ruled out of order by the Commons in 1985, Labour peer Lord Jenkins of Putney complained that “[i]t seems to me unreasonable that the proposition should be thrown out in principle without consideration” (HL Deb 13 May 1985, c961).

### *Assessment*

On the broad point of MP involvement, it does seem quite strange that these decisions are taken behind the scenes by Commons clerks with little input, or even interest, from members. This situation must result in part from the lack of explanation offered for why exactly financial privilege is judged to have been engaged. If this were spelt out more clearly, supporters of Lords amendments in the Commons (in particular the opposition frontbench) could monitor the application of financial privilege more closely. Instead they are largely kept in the dark. If MPs themselves are not interested in protecting their financial privileges, this might be seen as weakening the case for using the procedure to constrain the Lords. But equally, there are few

complaints from MPs about current procedures. Nonetheless there are vulnerabilities in terms of lack of accountability to the Commons, discussed further under complaint 7 below.

With respect to unwaivable privilege, the first thing to note is that it applies relatively rarely. Over the period 1974–2013 we have found only 15 amendments, proposed to eight bills, that were ruled out of order on this basis. This occurred most recently in 2010, on the amendment previously referred to on the Identity Documents Bill.<sup>27</sup> According to the Lords Companion, it is “unprofitable” for such amendments to be tabled in the Lords “[u]nless there is reason to believe that the necessary supplementary financial resolution will be made by the Commons” (House of Lords, 2013: 164) – i.e. that the government will support the amendment. Consequently, the Lords clerks will now usually advise non-government peers not to table such amendments. Notably this same kind of warning is not routinely given by Lords clerks in the case of more standard “waivable” privilege.

While it might seem odd that the Commons’ primacy ends up restricting the power of MPs to debate Lords amendments, this treatment can be seen as justified on the basis that a similar amendment proposed by an MP would have been ruled out of order (a facility that does not apply to Lords amendments, given the weaker powers of the Lord Speaker). It would be odd if the Lords were less constrained than the Commons in its proposal of such amendments. In fact, there is still a route for MPs to debate such amendments, but this depends on the government moving the necessary resolution (which only a minister can do). This does not necessarily require the government to support the amendments, though ministers are likely to facilitate such a debate only in unusual circumstances.<sup>28</sup>

## **Complaint 7: Financial privilege is controlled by government for political ends**

### *Complaint*

A widespread perception underlying much of the criticism about financial privilege is that it is controlled by the government and used for largely political ends. This complaint is particularly common, and thus important. The pages of Hansard record many such claims from peers of all parties, and also from MPs: “the Government chose to claim privilege” (HL Deb 22 Jul 1996, c1223), “the Government’s claim to financial privilege is simply misplaced” (HL Deb 21 Jul 1998, c738), “the Government have now made it the subject of the privilege amendment” (HL Deb 7 May 2008, c591), “the Government are trying to invoke financial privilege” (HC Deb 1 Feb 2012, c879), “[it] is therefore unclear how on earth the Government can claim financial privilege” (HC Deb 17 Apr 2012, c205). When financial privilege was invoked against amendments to the Welfare Reform Bill, Labour backbencher Lord Hughes of Woodside suggested that “[i]t is hard to believe there was not a nudge and a wink from the Government to try to save their own blushes” (HL Deb 1 Feb 2012, c1571). One outside group told us:

*it does just seem unfair that you can have an issue that keeps ping ponging and it isn’t resolved because the government haven’t addressed the key concerns, which mean they can’t get parliament to support them, but they can just override that by claiming financial privilege.*

In the particular case of the Welfare Reform Bill, this perception was arguably reinforced by ministers during the Commons debate on Lords amendments. Both Chris Grayling and Maria Miller (then ministers at the Department for Work and Pensions) stated that they would “ask the Reasons Committee to ascribe financial privilege as the reason” for disagreeing to the amendments (HC Deb 1 Feb 2012, cc826, 871, 907). During the same debate, Iain Duncan Smith, the Secretary of State for Work and Pensions, likewise commented that the opposition was “upset that we are invoking financial privilege” (HC Deb 1 Feb 2012, c877).

### *Assessment*

In order to assess this important complaint, it is necessary to distinguish between two stages of the financial privilege process: *designation* and *invocation*.

Once Lords amendments have been received by the Commons, we have already seen that the first stage is to identify whether any of them engage financial privilege. This process of designation is a politically impartial one conducted by the clerks, on behalf of the Speaker. It does not directly involve government ministers in any way. However, the Commons clerks are not experts on how the government's legislation is drafted or on how much it would cost to fund individual provisions. For practical reasons the government therefore does often have some input at the designation stage. This appeared to be confirmed in 2012 by Lord Strathclyde, then Leader of the Lords, who said: "It is the Speaker who takes a view on the advice of the clerks. I would not be at all surprised if they had had a discussion with the Government, but there is nothing new in any of this" (HL Deb 1 Feb 2012, c1568). In fact, as we have seen, the Speaker in practice generally plays no part in this decision.

The key link for the clerks is with parliamentary counsel, the group of government lawyers who draft all government legislation. They provide background advice about the financial and legal effects of bills, which may help the Commons clerks make judgements on various procedural matters, including grouping of amendments, whether amendments are within the bill's scope, and whether a financial resolution is required. According to their own internal guide on financial resolutions, another of parliamentary counsel's responsibilities is to "[c]onsider the financial implications of any amendments in the House of Lords" (Parliamentary Counsel, 2013: 2). Daniel Greenberg, formerly a senior member of parliamentary counsel, has described counsel's relationship with the parliamentary authorities as having "traditionally been one of strong mutual support, and of considerable mutual confidence" (2011: 89).

Our understanding is that it is routine for parliamentary counsel and the Commons clerks to be in contact over the designation of amendments. On the majority of occasions the process of adding a "P" beside Lords amendments of course relates to government amendments, where parliamentary counsel will be well qualified to comment – but where financial privilege will routinely be waived, making the judgement relatively unimportant. Indeed, a side issue is why so much energy goes into this process both by parliamentary counsel and Commons clerks when these amendments are liable to be accepted by the Commons en bloc, on ministers' recommendation.

With respect to Lords defeats, staff working for the government's parliamentary business managers (e.g. whips) will be in close contact with officials in the department handling the bill, and/or parliamentary counsel, to raise with them any concerns. Parliamentary counsel can thus form a view early on as to whether a particular non-government amendment could be designated as engaging financial privilege. Counsel may then initiate contact with the Clerk of Legislation to ask their view, and sometimes argue on the government's behalf that the rules ought to apply a particular way. On other occasions the Clerk of Legislation may actively seek out the view of parliamentary counsel, when he or she is unsure whether an amendment should be considered to engage financial privilege or not. During this process parliamentary counsel may refer the matter back to the government department for advice, for example where it is unclear how much money would be involved. Anecdotally, we have heard of one case where the minister (unsuccessfully) sought directly to influence a decision. It is impossible to know how common this is, but it seems likely to be rare.

None of this suggests that the government actually controls the designation of amendments. Ultimately it is for the Clerk of Legislation to make up his or her mind on the basis of all the arguments. One senior Commons official told us that the Clerk of Legislation is “not a soft touch” and would not take parliamentary counsel’s advice “uncritically”. This interviewee did acknowledge that parliamentary counsel usually argues “for” rather than against designation, and that they keep careful records – thus being in a strong position to cite past precedents to strengthen the government’s case. Another senior clerk commented that in dealing with parliamentary counsel it is advisable to “watch them like hawks”.

This raises several potential problems. First the concern of “creep”, highlighted above, given that in borderline cases government lawyers appear to be more likely to push for the amendments to be covered by financial privilege rather than not. Second, it is striking that both parties to these discussions have overlapping interests: the clerks are responsible for protecting the privileges of the Commons, while the government wishes to secure the passage of its legislation. There is thus a potential imbalance of power, because those representing the interests of the Lords, and of supporters of non-government amendments, are largely excluded from these discussions. This is exacerbated by the lack of transparency, which also means that there is little political cover for these decisions. The Speaker clearly has the political authority to speak for MPs collectively, and is answerable to them, and yet provides little accountability for these behind-the-scenes decisions. The current system hence leaves Commons clerks potentially vulnerable to accusations that they are too close to parliamentary counsel, with little opportunity to answer back. If the Speaker were more actively involved, and particularly if clearer definitions/explanations of why amendments engage financial privilege were available, accountability would be greatly improved, at least in the Commons.

Once an amendment has been judged to engage financial privilege, MPs must decide how to respond. If the Commons accepts the amendments, financial privilege is waived; if it disagrees, privilege is invoked; and if it proposes an alternative, privilege does not arise. In the vast majority of cases it is in effect the government’s attitude to the amendments that drives the decision, as its recommendation to the Commons is almost invariably accepted. Hence at this stage the government wields considerable power, but only through its Commons majority. Once the Commons has taken the decision (which as noted above is generally done on the substantive policy merits, with financial privilege rarely mentioned) the Reasons Committee will meet if any Lords amendments have been rejected. This committee has a government majority, and the Reasons are moved by the minister – having been drafted in advance by parliamentary counsel. In practice whenever the Commons disagrees an amendment on which financial privilege was engaged the financial privilege Reason is given – meaning financial privilege is invoked. Thus although the ministers on the Welfare Reform Bill were strictly correct in claiming that they would ask the Reasons Committee to give a financial privilege Reason, this made the scale of the government’s initiative sound bigger than it really was. Such comments arguably inflamed tensions on this bill in an unhelpful way.

With respect to the invoking of financial privilege, we can see that the government could almost always avoid this if it wished, but only by inviting the Commons either to accept the amendment or agree an alternative proposal (e.g. an amendment in lieu). One former senior minister told us: “I remember in government being in meetings talking about financial privilege where, [...] notwithstanding advice from the clerks, there was clearly a political decision to be taken as to whether or not one should place financial privilege on an amendment”. This suggests that ministers may at times have sought to avoid arguments about financial privilege by proposing slightly altered wording to the original bill, to avoid invocation.



## **Complaint 8: Financial privilege weakens the Lords' capacity to scrutinise legislation**

### *Complaint*

Central to most complaints about financial privilege is that it restricts the Lords' capacity to scrutinise legislation. Responding to the Commons' recent invocation of financial privilege on the Public Service Pensions Bill, Labour peer Lord Whitty warned that "this House has some serious thinking to do about how seriously our amendments and our scrutiny are taken" (HL Deb 23 Apr 2013, c1360). These kinds of concerns are not restricted to the Lords, but have also been expressed in the Commons. Thus during a debate on a Labour government Planning Bill, Liberal Democrat MP Julia Goldsworthy suggested that "[a]lmost all the substantial improvements made to the Bill are the result of pressure in the other place. It seems inappropriate to exclude the Lords from the process of putting flesh on the bones of this legislation" (HC Deb 24 Nov 2008, c553).

This complaint was particularly prominent in relation to the Welfare Reform Bill in 2012. Reflecting on that bill, one Labour peer told us that:

*The bigger worry was [that] there's a lot of social policy that has a budgetary consequence, and if in the end we could be prevented from getting into a whole swathe of social policy that traditionally the Lords has always talked about, because there might be a spending implication, [it] felt fundamentally and constitutionally wrong.*

One charity that campaigned on the bill told us that the use of financial privilege felt like "an amazing way of curtailing the proper interplay" and "seemed a sort of procedural way of curtailing debate". Another group suggested that "the fact that all those amendments could just be overturned on a finance provision does make me question whether that process is working". Whether or not these views are justified, it is clear that the use of financial privilege risked undermining the legitimacy of the parliamentary process among some of those seeking to engage with it.

### *Assessment*

The extent to which the formal conventions surrounding financial privilege do in fact limit the Lords' capacity to scrutinise is debatable. Even if convention requires that the Lords may not insist on its original amendment, it may nonetheless propose alternative amendments. While this certainly limits the Lords' options, it is not dissimilar from how the two Houses behave in order to formally avoid "double insistence" during extended rounds of ping pong (Erskine May, 24th edn., 2011: 636). Referring to the Welfare Reform Bill, one Labour peer described financial privilege to us as "more of an irritant than a serious problem" because "instead of going over the hurdle you just go round it really if you can", by proposing a new amendment.

Yet financial privilege probably does limit the Lords' willingness to challenge the government in practice, not least due to poor understanding. Many peers have almost certainly not realised that they may legitimately agree amendments in lieu. They also generally wish to respect the Commons' privileges. One told us that a financial privilege Reason "may suggest to some members of the House of Lords that they should vote it down on that ground alone, and if you're coming to ping pong a few votes may matter". Indeed, if it did not dampen peers' willingness to press a proposal, financial privilege would serve no useful purpose at all.

Hence, this complaint is really only supported insofar as peers have failed to understand their relative freedom in how to respond. Greater transparency would again help to make this clear. The far bigger question of how much the Lords, as an unelected chamber, *should* be constrained

in what it can do is ultimately a political rather than a procedural one. It is a question which has become increasingly salient as the post-1999 House of Lords has become more assertive in its actions, and a wider range of people (including outside groups) have come to believe that it has a valid role as an amending chamber.

## **Complaint 9: Financial privilege is being invoked more often than it was in the past**

### *Complaint*

The final complaint is that financial privilege is being invoked more often than it was in the past. This claim has been particularly prominent in the period under coalition government. Speaking in debate on the Identity Documents Bill, Labour peers referred to the use of financial privilege as “one more noxious constitutional innovation on the part of the coalition” (Lord Howarth of Newport, HL Deb 21 Dec 2010, c1003), claiming that the Conservative government of the 1980s and 1990s “never cried financial privilege” (Lord Sewel, HL Deb 21 Dec 2010, c1009). In 2012 Labour peer Lord Morgan likewise claimed that the application of financial privilege on the Welfare Reform Bill “adds a new and unwelcome principle to our unfortunately unwritten constitution” (HL Deb 14 Feb 2012, c687). Similar complaints were also expressed outside parliament with respect to the Welfare Reform Bill. Writing for *Public Finance*, the deputy director of Demos, Claudia Wood, claimed that “[f]inancial privilege has been used increasingly in recent years”.<sup>29</sup> A news release by the charity *4Children* stated that it was “virtually unprecedented that ‘financial privilege’ be used in this way to prevent proper democratic oversight of the law”.<sup>30</sup> The *Huffington Post* website likewise reported comments by an unnamed senior Labour figure that the move “went far beyond any tactics used by the Thatcher government”.<sup>31</sup>

### *Assessment*

As established in this report, financial privilege on Lords amendments is not a recent innovation, but rests on principles that are centuries old. It is unclear when financial privilege on Lords amendments emerged in its current form, but the Commons was certainly sending financial privilege Reasons by the early nineteenth century.<sup>32</sup> By 1930 the Lords’ insistence on amendments that the Commons had rejected with a financial privilege Reason provoked anger from the then prime minister, Ramsay MacDonald, who argued that this was contrary to convention (HC Deb 4 Feb 1930, cc1849-53).

As we demonstrated above (Table 3, p. 17), financial privilege has not been invoked greatly more often in the 2010-13 period than in other parliaments since 1974. However, we did note that a higher *proportion* of Lords defeats than usual were responded to with financial privilege – though the overall numbers are relatively small. This has almost certainly fed perceptions of abuse. Leaving aside the question of “creep” in the definition of what is covered by financial privilege (see complaint 3), one possible explanation is that the Commons was more likely to respond to Lords defeats that engaged financial privilege by disagreeing them (and thus invoking privilege) than in the past.

To assess this, it is necessary to look not only at the occasions on which financial privilege was invoked, but also at all of the other Lords defeats on which it was engaged. Since 1974 the government has been defeated almost 1200 times in the Lords, and it is beyond our capacity to analyse all of these defeats. We thus sampled three parliamentary sessions: 2001-02, 2005-06 and 2010-12. These were the first sessions of each full parliament since the Lords was reformed in 1999, making them broadly comparable. We recorded every defeat, and then excluded defeats that were not relevant (e.g. because they were on non-legislative matters).<sup>33</sup> Each of the remaining amendments was traced through the legislative process to determine (i) whether

financial privilege was engaged, and (ii) how the Commons responded.<sup>34</sup> Where it was unclear from the official records whether privilege was engaged on an amendment, we asked the Commons clerks to provide this information from their archived records. This information is summarised in Table 4.

As the table shows, there were roughly comparable numbers of relevant Lords defeats in each of the three sessions considered. Yet financial privilege was invoked on far more amendments in 2010-12 than in the two earlier sessions. However, the primary reason for this was that in 2010-12 a far larger proportion of relevant Lords defeats *engaged* financial privilege. There were only three such defeats in 2001-02 (7% of relevant defeats) and one in 2005-06 (2%), compared to 18 in 2010-12 (46%). Of these 18 cases, 17 were responded to by the Commons invoking financial privilege. In previous sessions the figures are barely comparable, though financial privilege was also invoked on two of the three defeats on which it was engaged in 2001-02.

Table 4: Lords defeats and application of financial privilege, 2001-02, 2005-06 and 2010-12 sessions

	2001-02	2005-06	2010-12
Total number of Lords defeats	56	62	48
Relevant Lords defeats	45	44	39
- on which financial privilege not engaged	42	43	21
- on which financial privilege engaged	3	1	18
– and financial privilege invoked	2	0	17
– and financial privilege waived	0	0	0
– and an alternative proposed	1	1	1

Source: UCL data on Lords government defeats, Journals of the House of Commons, and other parliamentary documents.

The “creep” in the definition of financial privilege amendments hypothesised above could potentially account for some small amount of change over time. But the change in this period has been stark, and is therefore the product of bigger factors. The key change is almost certainly a result of the new policy battlegrounds between the government and the Lords in 2010-12, concerning the coalition’s austerity programme. The Labour opposition has used its base in the Lords to try and alter these policies; hence the changing political landscape has meant that Lords defeats are more likely than before to have financial implications. This implies that change has been largely political, not procedural. We expand on this wider political landscape towards the end of the report.

## International comparisons

As we have seen, the House of Commons' financial primacy in the UK is long established, and has far reaching implications – extending beyond the claiming of financial privilege on individual Lords amendments. But it is important to note that such arrangements are far from unique to the UK. Indeed, it is very common in bicameral legislatures for the second chamber to have less power than the first over financial matters, and for financial bills or amendments to be singled out for special treatment. In this section we briefly review the arrangements for financial legislation in 20 other bicameral legislatures, then consider the treatment of amendments with financial implications in more detail in three case study countries influenced by Westminster: Ireland, Canada and Australia.

### Financial legislation in 20 other bicameral legislatures

It would be far beyond our capacity to collect data on the treatment of amendments with financial implications in a large number of other countries: as we have seen, gathering this information even with respect to the UK is surprisingly difficult. But the extent to which second chambers' powers on financial matters are limited is more readily demonstrated through looking at their powers on financial bills. In the UK, the Lords can delay most government bills by around a year, and has an absolute veto on government bills introduced in the Lords itself (for a discussion see Russell, 2013). But with respect to money bills the Lords has a maximum delaying power of just a month (while by convention such bills are given an expedited passage, and tend not to be amended at all). It is far easier to compare this kind of power between parliaments in different countries, as in most cases it is set down clearly in the constitution. Although being different to financial privilege per se, this gives some indication of the extent to which financial matters are treated as special in other bicameral legislatures.

Table 5 summarises the powers of second chambers in 20 other democracies alongside the UK, in terms of ordinary legislation and financial bills – that is, broadly the equivalent of our “money bills”. In only seven cases are financial bills treated in the same way as other government legislation, while in most of the remainder the second chamber's power is limited in some way. Minimally, it is common to require financial bills to be introduced in the lower house, and be considered there before passing to the upper house. This applies in the UK, but also in 10 of the 20 other cases – including the US, where the Senate otherwise has largely equal powers to the House of Representatives. More substantively, second chambers often have less opportunity to delay financial legislation than ordinary bills, and some also have limited power to amend it. So in Ireland the second chamber has 90 days to consider most legislation, but only 21 days for financial bills. Likewise, in Japan the second chamber is given 60 days on most bills, but only 30 days on financial legislation. Even the powerful elected Australian Senate cannot make amendments to financial legislation, as it can to other bills, but can only ‘request’ them of the lower house (as discussed below). These examples demonstrate the extent to which financial primacy is frequently associated with lower house power.

But of course, the focus of this report is not financial legislation itself, but the power of the Lords to make changes to other bills that have financial implications. Here it is far more difficult to collect comparative information, as this requires a careful reading of other parliaments' standing orders and discussion with country specialists about how these are interpreted in practice. We have chosen three countries from the 20 illustrated in the table – Ireland, Canada and Australia – for which to explore this question in greater detail. They illustrate a diversity of approaches, and indicate some possible lessons that might be imported into the UK.

Table 5: Treatment of ordinary and financial legislation in 21 bicameral parliaments

	<b>Ordinary legislation</b>	<b>Financial legislation</b>
<i>Australia</i>	Bills are introduced in either house. Upper house may amend or reject any legislation.	Must be introduced in lower house. Upper house may not amend but may 'request' amendments, or reject.
<i>Austria</i>	Bills are introduced in lower house. Upper house can object within eight weeks, but cannot amend.	Upper house cannot object to federal budget.
<i>Belgium</i>	Two kinds of bills: 'ordinary' start in lower house and pass automatically unless 15 Senators demand review within 15 days (upper house then can consider for 60 days); 'bicameral' bills, on e.g. foreign affairs, need support of both chambers.	N/a
<i>Canada</i>	Bills are introduced in either house. Upper house may amend or reject any legislation.	Must be introduced in lower house. Upper house may amend but not increase costs.
<i>Czech Republic</i>	Bills are introduced in lower house. Upper house has 30 days to review.	N/a
<i>France</i>	Bills are introduced in either house. Upper house has right to amend or veto any legislation.	Must be introduced in lower house. Upper house may have as few as 15 days to consider it.
<i>Germany</i>	Upper house sees and comments on all legislation before introduction in lower house. After lower house reading bills return to upper house for approval.	Treated as ordinary legislation, except budget which is introduced in both houses simultaneously.
<i>India</i>	Bills are introduced in either house. Reviewing house has six months.	Most such bills must be introduced in the lower house, but budget is introduced in both houses simultaneously and upper house has 14 days to review (lower house is decisive).
<i>Ireland</i>	Bills are introduced in either house. Upper house has 90 days to consider bills passed by lower house.	Must be introduced in lower house. Upper house has 21 days to review. Can 'suggest' amendments, but lower house may ignore.
<i>Italy</i>	Both houses have equal powers to introduce, amend, and reject legislation.	N/a
<i>Japan</i>	Bills are introduced in either house. Upper house has 60 days to review legislation.	Must be introduced in lower house. Upper house has 30 days to review, lower house has last word.
<i>Mexico</i>	Bills are introduced in either house. Both houses may amend or reject legislation.	Must be introduced in lower house. Lower house has last word on spending and upper house on tax.
<i>Netherlands</i>	Bills are introduced in lower house. Upper house can reject, but not amend, bills.	N/a
<i>Poland</i>	Bills are introduced in lower house. Upper house has 30 days to review legislation.	N/a
<i>Russia</i>	Bills are introduced in lower house. Upper house cannot amend bills but may reject within 14 days.	N/a
<i>South Africa</i>	Bills are introduced in either house.	Must be introduced in lower house, but otherwise treated as ordinary legislation.
<i>Spain</i>	Bills are introduced in lower house. Upper house has two months to review, or 20 days in case of urgency.	N/a
<i>Switzerland</i>	Bills are introduced in either house. Both houses have veto power over legislation.	N/a
<i>UK</i>	Bills are introduced in either house. Upper house may amend or reject legislation.	"Money bills" must be introduced in lower house. Upper house may only delay for one month.
<i>USA</i>	Bills are introduced in either house. Senate can amend or reject any legislation.	Must be introduced in lower house, but otherwise treated as ordinary legislation.

Source: Russell (2000: 34-38). "N/a" indicates that financial legislation is treated equally to other bills.

## Ireland

The bicameral Irish parliament, the Oireachtas, comprises Dáil Éireann (the lower chamber) and Seanad Éireann (the upper chamber). As in the UK, there are special rules surrounding “money bills”, defined as those that contain only financial provisions (as set out in Articles 21 and 22 of the Irish constitution). Money bills may only originate in the Dáil and cannot be amended by the Seanad, although the latter may make non-binding recommendations. For all other bills, standing orders in both chambers prohibit non-government members from moving amendments that “could have the effect of imposing or increasing” taxation or public spending.<sup>35</sup> Were a non-government member to table such an amendment, it would be ruled out of order by the presiding officer of the relevant chamber. But with the exception of money bills, which may not be amended at all by the Seanad, there are no restrictions at all on government ministers proposing financial amendments in either chamber. There is no concept comparable to that at Westminster of the Dáil invoking or waiving its financial primacy on such Seanad amendments.

In some respects, the procedure in Ireland is clearly more restrictive than at Westminster, where any peer or MP may in practice freely table amendments with financial implications, provided that the bill in question has the necessary financial resolution. But unlike at Westminster, the restrictions in Ireland only apply to the imposition or increase in such charges: there are no comparable restrictions on amendments that would reduce taxation or spending, or modify legislative oversight of such provisions. In this respect, Ireland’s treatment of Seanad amendments with financial implications is less restrictive than that in the UK.

## Canada

The Canadian parliament comprises the House of Commons (lower chamber) and the Senate (upper chamber). In practice, the Commons has primacy in relation to financial legislation, a principle that can be traced back to the practices of the Westminster parliament including the resolution of 1678 (O’Brien and Bosc, 2009: 823). In accordance with section 53 of the Constitution Act 1867, all legislation that imposes taxation or public spending must originate in the Commons. Section 54 states that the Commons may not agree to any spending unless this is supported by a “royal recommendation” from the Governor General (who acts on behalf of the monarch).<sup>36</sup> Essentially this means having government support.

These constitutional principles extend to individual legislative amendments (O’Brien and Bosc, 2009: 833). Consequently, the Senate may not make amendments that would increase taxation or spending. A helpful discussion paper by John Mark Keyes – at the time Senior Counsel in the Legislation Section of the Canadian Department of Justice – outlines the circumstances in which an amendment requires a royal recommendation. In his view, the test is whether the amendment “would result in an increased charge in relation to the existing legislation, rather than the bill as introduced” (Keyes, 1997: 19). This leads him to conclude that, for a bill that reduced public spending, a royal recommendation would not be required for an amendment that restored some or all of this spending. Notably he indicates that a royal recommendation would also not be required for any reduction or repeal of spending.

Although the Senate may not make amendments that would increase taxation or spending, there is disagreement between the two chambers on its right to make amendments with other financial implications. The Commons’ position is that the Senate should not amend financial provisions at all. In contrast, the opinion of the Senate is that this restriction applies only to increases in taxation or public spending, but it has asserted its right to make amendments resulting in reductions (Senate of Canada, 2013: 223-25). This disagreement is referred to in the official guide to the Commons’ practice and procedure, which states that “[m]ost of the disagreements

between the two Chambers arise over the extent of the Senate's authority to amend financial legislation" (O'Brien and Bosc, 2009: 838).

In the event that the Senate agrees to an amendment that the Commons considers to infringe its asserted financial privileges, the Commons has on occasion waived or invoked these (ibid.). This is done as part of the motion relating to the amendments that is agreed to on the floor of the Commons, and is subsequently communicated to the Senate in a message. For example, the following text is taken from a message agreed by the Commons in 1990 (the most recent occasion on which the Commons has sent the Senate a message insisting on its asserted financial privileges). It provides some explanation as to why the amendments were felt to infringe the financial privileges claimed by the Commons, notably including the amount of money involved:

*... this House considers that some of the aforementioned amendments, by altering the nature of the financial scheme proposed for the Unemployment Insurance system, do infringe the financial initiative of the Crown in a manner at variance with parliamentary practice respecting the Royal Recommendation ...*

*And considers, moreover, amendments 7 and 9, which would cause an increase to the budgetary deficit in the order of \$1.75 billion annually and thus confound the Ways and Means as approved by this House, to be for that reason in violation of the principle embodied in Sections 53 and 54 of the Constitution Act, 1867, and constitutional practice,*

*And, therefore, conscious in this of fellowship with its predecessors, reaffirms its sole and undoubted democratic right, which will not in this matter be waived, not only to grant aids and supplies to the Sovereign but to direct, limit, and appoint for all such grants their ends, purposes, considerations, conditions, limitations and qualifications, none of which are alterable by the Senate<sup>37</sup>*

Because the Commons invokes its privileges relatively infrequently, it is less clear whether there is a consensus on how the Senate may respond in such cases. Yet given the difference of opinion between the two chambers on such matters, it seems possible that the Senate could choose not to be bound by the Commons' claim.

As in Ireland, practice in Canada is in some respects more restrictive than in Westminster. The Senate cannot propose amendments to increase taxation or spending provisions, while non-government MPs are limited by the requirement for a royal recommendation. Yet the Senate does not consider that it is restricted on amendments to reduce the amounts of taxation or spending. Unlike in Westminster, Canadian Commons' messages to the Senate are agreed transparently on the floor of the House as part of a motion, and can provide some explanation for why financial rights were involved.

## **Australia**

Of the three cases considered here, Australia is perhaps both the most well-documented and the most interesting, although it also shares some obvious features with Ireland and Canada.

The Australian parliament comprises two directly elected chambers: the House of Representatives (lower chamber) and the Senate (upper chamber). The Senate is a powerful body. However, section 53 of the Australian constitution prevents "laws appropriating revenue or money, or imposing taxation" from starting in the Senate. In addition it states that the "Senate may not amend any proposed law so as to increase any proposed charge or burden on the people", but it may nonetheless "request" such amendments. In terms of amendments, this oddly places non-government Senators in a stronger position than non-government MPs, since –

as in Canada – amendments involving additional spending require a message from the Governor General. This in practice will only be made available for amendments with government support – which can include those made in the House of Representatives in response to Senate requests. Australian House of Representatives Practice – the Australian equivalent of Erskine May – notes that with respect to the lower chamber:

*The assessment of whether amendments proposed by private Members would be in order can be difficult. At one extreme it may be argued that virtually any change in any bill will have some financial impact and, at the other extreme, it may be claimed that, unless an amendment explicitly and directly increases alters an appropriation, it may be moved by a private Member.*

(Wright and Fowler, 2012: 427)

In terms of proposals from the Senate, the key question is whether a proposal can be sent in the form of an amendment or whether it must be put in the form of a “request”. Here similar arguments about the potential breadth of definitions apply (despite the difference in terms of outcomes being essentially procedural). There in fact are explicit disagreements between the chambers over interpretation. As House of Representatives Practice states, “the Senate may not amend any proposed law so as to increase any proposed charge or burden on the people. The precise meaning of this provision has not been conclusively determined, nor agreed between the Houses” (ibid: 451). The equivalent official document for the Senate notes that “[t]he constitutional innovation that became section 53 has been at the centre of disputes between the Senate and the executive (although technically the disagreement is between the two Houses) over the respective rights and powers of each” (Odgers, et al., 2012: 364). The Clerk of the Senate has suggested that requests should apply only in the case of proposals that “clearly, necessarily and directly” increase expenditure (ibid: 394). Notably, there is no restriction on amendments that reduce expenditure, or reinstate expenditure which a bill proposes to cut, in either chamber.<sup>38</sup> The official guide to Senate procedure does note that there are areas of uncertainty, for example “where it is not possible to determine the effect of an amendment on expenditure” (ibid: 396).

An interesting aspect of procedure in Australia is that since a reform in 2000, proposals framed in the form of requests must “be accompanied by a statement of reasons for their being framed as requests together with a statement by the Clerk of the Senate on whether the amendments would be regarded as requests under the precedents of the Senate”, which “has provided the Senate with information about whether (and how) particular amendments attract any of the provisions of section 53” (ibid: 359). Hence how a proposal affects finance, and how it should be judged against the rules, is now very explicit. This is said to have reduced the number of disputes, both inside the Senate and between the chambers. A judgement is made on this matter in the Senate, by the Chairman of Committees on the advice of the Clerk.<sup>39</sup> The latter will have discussed the question with the Office of Parliamentary Counsel, and generally there will be agreement but occasionally there is explicit disagreement. An example of an agreed statement was on Senate amendment 3 to the Crimes Legislation Amendments (Serious and Organised Crime) Bill (No. 2) 2009, that:

*The effect of this amendment is to extend the purposes in respect of which money may be debited from a special account. This may increase the amount that may be paid from the Confiscated Assets Account established by section 295 of the Proceeds of Crime Act 2002, with those payments being made out of the Consolidated Revenue Fund under the standing appropriation in section 21 of the Financial Management and Accountability Act 1997.*

*It is covered by section 53 because:*



- a) laws which cause money to be expended out of a standing appropriation are a charge or burden on the people (within the meaning of the third paragraph of section 53); and
- b) it is likely that the amendment will have the effect of increasing the amount that may be paid out of a standing appropriation and therefore of increasing such a proposed charge or burden, which is prevented by the third paragraph of section 53.

In contrast with respect to the Tax Laws Amendment (Research and Development) Bill 2010, the Office of Parliamentary Counsel argued with respect to Senate amendment 8 that:

*The effect of this amendment is to allow the making of regulations that may increase the amount of expenditure payable out of the Consolidated Revenue Fund under the standing appropriation in section 16 of the Taxation Administration Act 1953. It is covered by section 53 because it may increase a “proposed charge or burden on the people”.*

However, the statement from the Clerk of the Senate concluded that:

*Amendment no. 8 would not be regarded as a request under the precedents of the Senate. The effect of amendment no. 8 is to provide the making of regulations which have the effect of changing the timing of the delivery of the research and development incentive to certain entities, through the introduction of quarterly tax credits. The Senate has long held the view that only a very direct effect on appropriation is regarded as an increase in charge or burden... [this proposal] does not meet the test of directness.*

The latter was reflected in the ruling from the Chairman of Committees in the Senate chamber, and subsequently accepted by the House of Representatives.<sup>40</sup> These cases are of interest in the UK context both because of the clarity of reasoning, and the narrowness with which restrictions on the Senate are drawn.

In fact, these arguments are of relatively little substantive importance, because in practice “the distinction between an amendment and a request is purely procedural” (Odgers, et al., 2012: 345). Requests can be insisted upon by the Senate if they are refused by the House of Representatives. Despite the fact that “[t]here has been a difference of opinion as to the constitutionality of the action of the Senate in pressing requests. The House has never conceded the Senate’s power to do so” (Wright and Fowler, 2012: 457), this has occurred on various occasions – sometimes even resulting in the bill in question being dropped.<sup>41</sup>

When there are differences of opinion between the two chambers on Senate amendments (but not requests), the House of Representatives sends formal Reasons. These used to be agreed in a Reasons Committee, but this was abolished by the House of Representatives as a modernisation measure in 1998. Reasons are now instead agreed on the floor of the chamber.

The Australian experience reinforces some of the lessons from Ireland and Canada. In all three cases restrictions on amendments with financial implications apply only to those which increase expenditure, rather than those that reduce it or change its administration. Even more so than in Canada, the Australian system for defining which amendments fall on either side of the line has become increasingly explicit – with written statements both increasing transparency and thereby helping to reduce disputes. Australia has also reformed the procedure for the giving of Reasons.

## The politics of financial privilege

This report has demonstrated that there are significant misunderstandings about the current operation of financial privilege at Westminster. We have sought to clarify matters by providing a factual account of how financial privilege operates, backed up by a more complete set of statistics than has previously been published. Our report has considered in detail some of the main complaints levelled against the current process, and concluded that some – but not all – of them are supported by the facts. In particular, we conclude that there are some *procedural* problems with the operation of financial privilege, but the main driver of recent controversies has been *political*. The evidence on whether the application of financial privilege has changed over time is somewhat unclear; but what has definitely changed is the broader political environment.

In the next section we consider options for the future, in terms of procedural and other organisational changes. We make some recommendations based both on existing UK practice, and on our examples from overseas. But before this we believe that it is important to consider the political context within which financial privilege operates, and how this has changed over time.

To evaluate what should happen to arrangements for financial privilege, we need to first be clear on what the purpose of these arrangements actually is. The central principle of financial privilege is clearly that the Commons should control taxation and public expenditure. However, the reason why this might matter – and arguably even the extent to which it matters – has not been constant. Hence when the two resolutions in 1671 and 1678 formalised the Commons' financial primacy, the problem facing MPs was that the Lords was too close to the executive. The resolutions asserted MPs' rights, as the representatives of the people, against those of the executive and the Lords.

In subsequent centuries the relationship between the two chambers substantially changed. Governments were increasingly drawn from the Commons, and became accountable to that chamber. In the years following 1832, as the franchise for the Commons widened, the entrenched class interests in the hereditary House of Lords became increasingly controversial. Various clashes eventually led to the 1911 Parliament Act, which cemented the Commons' primacy on most legislation, and included specific provisions on money bills. By the mid-20th century, arguments about the rights of Lords and Commons were essentially about the right of a still largely hereditary, and Conservative-dominated, chamber against an elected one. The Lords clearly lacked legitimacy, and as a result tended to use its powers with caution (Shell, 1992; 1999), with various conventions to this effect building up.

In 1999, things changed again. As documented at length elsewhere (Russell, 2010; 2013), Labour's removal of the great majority of hereditary peers from the Lords had two important effects. First, it gave the chamber a greater sense of its own legitimacy, as all members had arrived by some kind of merit principle (either direct appointment, or election from among hereditary peers). Second, it removed the political imbalance, leaving a chamber where the two main parties were roughly equally matched, and the balance of power rested with the Liberal Democrats and independent Crossbenchers. These two key changes were mutually reinforcing: the new political balance (ironically reflecting voting patterns more accurately than the Commons) enhanced peers' feelings of legitimacy further. The new party balance also made both Labour and Conservative governments potentially susceptible to Lords defeat.

The number of defeats in the House of Lords over time is also well-documented, and was reproduced earlier in this report (see Table 3, p. 17). Under Labour post-1999 this number

sharply rose – which could be seen simply as a reversion to behaviour under the previous Labour government in the 1970s, but on closer inspection was more complex than that. As shown in Table 6, in the 1970s the Lords rarely challenged the House of Commons’ response to its defeats, but by the 1990s this behaviour had become commonplace. (N.b. the figures in the table indicate how many *bills* the Lords sent back following Commons’ disagreement with its amendments, so the number of amendments involved was far higher.)

Table 6: Number of bills per parliament which the House of Lords has returned to the Commons following disagreement with its amendments, 1974-2012

Parliament	Rounds of insistence*				Total
	1	2	3	4	
1974-79	2	1	1	0	4
1979-83	0	0	0	0	0
1983-87	1	0	0	0	1
1987-92	0	1	0	0	1
1992-97	1	0	0	0	1
1997-01	3	1	0	1	5
2001-05	12	3	0	2	17
2005-10	13	0	0	2	15
2010-13**	6	0	0	0	6
Total	38	6	1	5	50

Source: Russell (2013), based largely on Joint Committee on Conventions (2006b).

\* Here “insistence” is interpreted broadly, as sending the bill back to the Commons after it has rejected Lords amendments. This includes the Lords agreeing a different amendment rather than insisting on its original wording.

\*\* Parliament incomplete.

As we have seen, financial privilege only comes into play when amendments are returned by the Commons to the Lords. In an environment where the Lords routinely backed down on its amendments, friction was therefore unlikely. But if the Lords insists on an amendment or wishes to propose an alternative – as has occurred increasingly post-1999 – the question of financial privilege becomes more salient. Indeed it was noted earlier that there have been 22 amendments in lieu passed by the Lords in response to a financial privilege Reason from the Commons since 1974. Notably, 21 of these have been since 1997, and 10 since the 2010 general election.<sup>42</sup>

After the initial change post-1999, financial privilege rose even further up the agenda with the establishment of the coalition government in 2010. During Labour’s period in office tensions between the chambers were only rarely over explicitly financial matters, and the public finances were anyway under no great pressure. Many of the biggest and most protracted conflicts arose over issues of civil liberties and constitutional propriety (Russell, 2013). Furthermore, the government often gave in – at least in part – to the demands of the Lords, meaning that even if financial privilege was engaged, it was not necessarily invoked. Post-2010, the coalition is operating in an environment of austerity, and making many controversial spending cuts. And the Lords – for the first time in modern history – is opposing broadly from the left. Defeats require the support of the Labour opposition, which is naturally resistant to many of the coalition’s spending cuts, plus some Crossbenchers and/or government rebels. Policy changes with significant financial implications are thus, unlike pre-2010, at the very centre of partisan and intercameral conflict. Meanwhile, outside groups that seek to engage with parliament have come to focus increasingly on the Lords, given its balanced political make-up and ability to defeat the government. Such groups are understandably disappointed if Lords defeats are rejected out of hand.

All of this explains why financial privilege has become gradually more salient. But it is also important to think about the future, and the extent to which tensions could further rise. There are two sets of circumstances that may bring financial privilege even more under the spotlight: another change of government post-2015, and the possibility of future Lords reform.

Tensions over financial privilege have heightened under the coalition, but could have been far worse had the Conservatives formed a single-party government. When Labour was in office the Liberal Democrats frequently joined with the Conservatives in bringing about Lords defeats (Russell and Sciara, 2007). This party was particularly assertive in pressing such claims, in part due to a conviction that the Commons electoral system was fundamentally unfair (see Russell, 2013: 83, 234). Liberal Democrats have thus been less cautious about preserving conventions, on matters such as manifesto bills and delegated legislation. But in 2010 this previously assertive party entered government. The coalition is stronger numerically in the Lords than Labour was 1999-2010, and has (thus far) suffered fewer problems in terms of the Lords returning bills repeatedly to the Commons. But a single-party Conservative government would find itself in a very different position. If the Liberal Democrats and Labour could join forces (alongside Crossbenchers and others) in the Lords, defeats and insistences would almost certainly both become more common. Given the traditional dividing lines between left and right (and particularly if these occurred in a period of continued austerity), clashes over financial matters could become relatively commonplace. The current, somewhat unclear and largely convention-based, system of financial privilege might well come under significant strain.

The second future scenario is Lords reform. It is widely anticipated that if the Lords were reformed to include elected members – as both the coalition and the previous Labour government have proposed – it would become more assertive in using its powers. This was a particular preoccupation of the joint committee which met to consider the coalition’s draft bill in 2011-12. Such concerns extended explicitly at times to financial matters. In his written evidence to the committee, Labour peer Lord Howarth of Newport for example alleged that “in due course, an elected Second Chamber will challenge the financial privilege of the House of Commons” (Joint Committee on the Draft House of Lords Reform Bill, 2012b: 99). This possibility was also acknowledged by the current Clerk of the House of Commons, Robert Rogers, in his oral evidence to the committee (Joint Committee on the Draft House of Lords Reform Bill, 2012a: 391). When the bill was debated in the Commons, the rights of an elected upper chamber on financial matters were raised several times (e.g. HC Deb 10 Jul 2012, cc216, 222, 233, 239). The likelihood of a largely or wholly elected replacement for the House of Lords may remain low (for a discussion see Russell, 2013), but reform remains very much on the political agenda. It could well form part of inter-party negotiations following a close result in 2015. Should such a reform ever be implemented, the current arrangements for financial privilege seem unlikely to hold.

When thinking through the possible reform options, it is thus important to consider both the present situation and the future. Financial privilege has become controversial, both inside and outside parliament. It has led to allegations – particularly from pressure groups and the media – that parliament (i.e. the Lords) is being sidelined in the policy process. But there are bigger political questions hanging over this debate: how powerful do we think the unelected (but increasingly proportional) second chamber should be on issues of finance, compared to the first? To what extent should provisions with financial consequences be treated differently to the rest? How could and should the bicameral relationship change if we moved to a more obviously democratic second chamber? These are large and imponderable questions, beyond the scope of this report. But they necessarily frame any decisions about how the system should be reformed.

## Financial privilege: what if anything needs to change?

This report has considered the current operation of financial privilege at Westminster, and some of the complaints that have been levelled against the process, plus international comparisons and the broader political picture. In this final substantive section we consider what if anything should change. We have identified complaints ranging from the opacity of the current process to how financial privilege is defined, and ultimately the extent to which it can and should prevent the House of Lords from scrutinising government legislation. The latter is obviously a highly political question.

Given the range of complaints, there is unlikely to be agreement on a simple set of reforms. But it seems clear to us that the present arrangements are unsatisfactory. Even among people closely involved with the legislative process (including MPs, peers and parliamentary staff) there is lack of clarity about how financial privilege works. It is hard to defend a situation where misunderstandings are so rife, and where even determined attempts to establish basic definitions prove unsuccessful. At the very least, therefore, more transparency is needed. We begin with this point, but acknowledge that a move in this direction would necessarily shine light on other aspects which in themselves can be questioned. We thus discuss possible changes in four areas: transparency, definitions and boundaries, streamlining the process, and the bigger politics.

### Transparency and the process

The most obvious conclusion based on our research is that far greater transparency is needed regarding how financial privilege works. The documents circulated by the clerks following recent controversies (Beamish, 2012; Rogers and Sharpe, 2012a; 2012b) have certainly helped, and we hope that this report will also do so. But ideally there should be a single authoritative source to which parliamentarians, outside groups, journalists and other interested parties can turn. At present, a search for the term “financial privilege” within the parliamentary website leads to the glossary page (<http://www.parliament.uk/site-information/glossary/financial-privilege/>), which links to a version of the 2012 briefing by the Commons clerks,<sup>43</sup> but notably nothing from the Lords. The glossary page itself provides no definition (compared, for example, to the entries for “Money Bills” or “Parliament Acts”), while the clerks’ memorandum offers no clear indication of what falls in or outside the terms of financial privilege, and describes this judgement as “normally very straightforward”. Erskine May provides more detail, but is also somewhat unclear and is in any case not freely available online.

**We recommend that the authorities in both Houses should consider how clearer information could be provided on the parliamentary website with respect to financial privilege. At a minimum, the current glossary entry should be expanded, and link to Lords as well as Commons briefings. Preferably, a more detailed and integrated briefing could also be provided in a note from the House of Commons or House of Lords Library (or ideally by both acting jointly). In due course, the description in Erskine May might also be expanded and clarified.**

There is a peculiarity in the arrangements for financial privilege, that these are policed by clerks in the Commons, but primarily affect amendments proposed by members of the Lords. This helps account for some of the confusion, as peers do not normally have direct contact with Commons clerks. One obvious solution might be for Lords clerks to play a bigger part in advising members on financial privilege: for example, with respect to whether a specific amendment tabled is liable to be judged to engage it. Lords clerks do give such advice to members who consider tabling an amendment which risks engaging “unwaivable privilege” (i.e. because it applies to a bill for which there is no money resolution or ways and means resolution,

or where the terms specified in the resolution do not cover the charge proposed), and would therefore be ruled out of order by the Commons Speaker. But while widening this advice might seem helpful to peers, it would place the Lords clerks in a difficult position. Fundamentally, it is for the Commons to defend its financial privilege, and therefore this must remain for the Commons authorities to judge. But if Lords clerks were to constantly seek advice from their opposite numbers in the Commons on how to advise peers, this would risk placing too many limitations on the Lords. As further developed below, the two chambers may ultimately choose to take different positions on the boundaries of financial privilege, and clerks supporting them must retain some independence from each other.

**We do not believe that clearer briefing for peers should extend to advice being given in advance about which specific amendments are likely to engage financial privilege. This could in practice only come from the Lords clerks, which could risk them – rather than the Commons clerks – being seen to police the system. Yet there is an inherent tension in a system where officials in one chamber take decisions which primarily affect members in the other.**

If Lords clerks cannot work closely alongside peers to identify which amendments are likely to engage financial privilege, this risks peers feeling shut out and confused by the decisions taken on their amendments. Ultimately, we believe, greater clarity of communication is therefore required on the part of the Commons authorities with respect to why amendments are judged to engage financial privilege. Such communications could come in the form of a statement relating to each amendment, printed at the same time as the order paper for Commons debate. Notably, clear statements of this kind are provided in similar circumstances in both Canada and Australia (with examples quoted above). Introducing such a system in the UK would aid MPs as well as peers, allowing them to raise questions on the floor should they wish. It would clearly increase the workload for the Commons Clerk of Legislation (and parliamentary counsel) somewhat, and could prove tricky under the compressed timescales of the later stages of ping pong. But such pressures could be lessened by other changes, as discussed below.

**We believe that peers deserve a clear indication of why their amendments – particularly non-government amendments – on occasion engage financial privilege, and this information should also be available to MPs. Notably in other similar parliaments (Canada and Australia) statements to this effect are published. In the UK the appropriate timing for publication of such statements would be before the Commons debate, overseen by the Speaker. The work generated would be greatly reduced through clearer published definitions of the boundaries of financial privilege and the criteria against which amendments are judged, as suggested below.**

A more specific question concerns the “de minimis” rule, which we noted earlier is particularly unclear. We know that there is such a rule, but cannot identify the threshold. Like the previous point, this is partly a problem of definition. But greater transparency would be achieved if (as has happened in Canada) some indication was formally given of the sums of money involved.

**We believe that it would be reasonable for the amount of expenditure associated with an amendment to be included in this statement, as seen above with respect to Canada. Realistically, such estimates could only be provided by the government (via parliamentary counsel), which might be prone to inflate the costs. But these estimates would at least then be open to public examination.**

## **Definitions and boundaries**

Much of the difficulty with publishing fuller briefing material comes from the lack of clear definitions about which amendments will and will not be judged to engage financial privilege. The fullest published statement on this question to date is in Erskine May (24th edn., 2011: 785-98), but this is hard to interpret in borderline cases and in any case is not readily available to most outside observers. Hence there is considerable space for dispute. We uncovered a somewhat clearer statement in an unpublished document used by parliamentary counsel (reproduced in Appendix 2). But even this is not wholly clear, and cannot be considered authoritative. It would obviously be inappropriate for the fullest definition of what the Commons authorities will judge to constitute financial privilege to come in a document produced by the government, rather than by parliament. This risks blurring the boundaries about who is policing financial privilege, which is already the subject of considerable confusion and complaint.

**We believe that the process would be much improved if the Commons published a clear definition, under the auspices of the Speaker, of what it believes constitutes financial privilege based on precedent. This would ideally set out clear categories, illustrated by examples. It should also set out the “de minimis” rule. Of all of our recommendations, we believe that this is the most important.**

Producing such a definition might in practice prove difficult, as ultimately such boundaries are disputed. As we have seen, some claim that financial privilege is based on “smell”, rather than precedent. But the lack of a published definition is difficult to defend, and without one controversies are likely to recur.

A second problem, however, is that there may well be disagreement between the two chambers over what should be judged to engage financial privilege. Hence this could only be the start of the process. While the Commons authorities may define financial privilege in one way, peers may not always agree. For example, an amendment which requires increased expenditure (beyond the “de minimis” threshold) would be a relatively clear-cut case. But amendments which reduce expenditure, or which make changes to administration (e.g. in terms of future parliamentary oversight) are far less clear-cut. We have seen that in all three comparable parliaments discussed above financial privilege is defined more narrowly, with restrictions applying solely to amendments that increase spending. There could be some merit in adopting such a position in the UK – though also some counterarguments.<sup>44</sup> The Lords might in particular feel that restrictions are less justified with respect to purely procedural amendments which neither increase nor reduce spending. If peers chose to be bound by some parts of the definition, but not others, they would be free to do so – since current arrangements rest on convention alone.

**Once the Commons definition has been published, peers may wish to reflect and comment upon it, considering whether House of Lords procedures should be revised in any way as a result. The natural forum for such discussions could be the House of Lords Constitution Committee, followed if necessary by the House of Lords Procedure Committee for any detailed implementation.**

Ultimately the two chambers may not agree on the definition of amendments with financial implications on which the Lords by convention will not insist. If this proves to be the case it would be more transparent to admit the disagreement. For example in both Canada and Australia it is explicit in the official published documents (the equivalents of Erskine May and the Lords Companion) that definitions are interpreted differently in the two chambers. The UK documents might in future do the same.

While the Lords Companion currently indicates that peers should not insist on amendments where the Commons has invoked financial privilege, there is disagreement over whether the Lords can respond with amendments in lieu which “invite the same response”. The Lords has never incorporated into the Companion this proposal from the Joint Committee on Conventions (2006a: 67), and it is indeed unclear exactly what “invite the same response” means.

**If the Lords does not wish to accept the recommendation of the Joint Committee on Conventions, it might also be helpful to clarify this in the Companion. Words (even in a footnote) such as “Some have argued that the Lords should not offer amendments in lieu that ‘invite the same response’, but this principle has not been agreed by the Lords” could aid understanding.**

### **Streamlining the process**

The above categories constitute the most important areas where change is needed. But there may also be some merit in reforming the process for the Commons claiming financial privilege, to bring this more up-to-date. There are two aspects in particular, following our review of the process, that seem worthy of consideration.

The first is the giving of Reasons. Currently if a Lords amendment is disagreed by the Commons there is a meeting of a Reasons Committee, and where an amendment has engaged financial privilege only a financial privilege Reason (rather than anything based on the substance of the policy) is given. It has been suggested that this process might be revised, in order that dual reasons could be given in such cases – citing financial privilege and also the substantive merits. This could help transparency at the margins. But the bigger question is whether in the modern age – with televised proceedings and the provision of Hansard – it is necessary to give Reasons at all. During the Modernisation Committee inquiry on the legislative process in 2005-06, the then Clerk of the Commons Roger Sands proposed abolition of the Reasons Committee, while the then First Parliamentary Counsel Stephen Laws suggested that Reasons might be abolished altogether (Modernisation Committee, 2006: Ev 128-29, Ev 93). Laws noted that the primary purpose of Reasons is to enable the Commons to communicate in cases of financial privilege, but that some other alternative might easily be found. The Reasons Committee meanwhile helps perpetuate the impression of a shadowy process. Notably in Australia the equivalent committee was abolished in the 1990s, and in both Australia and Canada Reasons (or their equivalent) are instead agreed more transparently on the floor.

**We recommend that the House of Commons Procedure Committee should review the current arrangements for providing Reasons on Lords amendments to which the Commons disagrees. Options under consideration should include: the abolition of the Reasons Committee, the abolition of Reasons altogether, or (if these remain) the giving of dual reasons in the case of amendments that engage financial privilege. Since financial privilege is automatically invoked if a Lords amendment is rejected by the Commons, the abolition of Reasons could be facilitated by indicating on the Lords order papers any amendments that were previously identified in the Commons papers as engaging privilege.**

In addition, we are struck by the extent to which Lords amendments that engage financial privilege are dominated by those proposed by the government itself. The majority of agreed Lords amendments have explicit government backing, and these are routinely accepted by the Commons on the advice of ministers. In such cases, the designation process appears simply to take up the time of clerks and parliamentary counsel. It also muddies the waters somewhat with



respect to the Commons' treatment of Lords defeats: as indicated earlier, the official published figures give the impression that the Commons almost always waives its financial privilege, when in fact most such cases refer to government amendments. One way of streamlining the process would be to designate amendments only after the Commons had disagreed to them, but this would run counter to the desire for greater transparency – as MPs would not know the financial privilege implications of amendments before they voted, and would not have the benefit of statements upon them (which in practice would be considered only by the Lords). Yet producing such statements on all amendments with financial implications, when in practice government amendments are routinely accepted, would significantly add to the workload of parliamentary counsel and the Commons clerks. An alternative would be a frank acceptance of the politics of the situation – with statements produced on non-government Lords amendments only (whether or not the government intends to recommend to the Commons that these should be accepted).

**The review of the Commons process should consider whether the current practice of designating both government and non-government Lords amendments with respect to financial privilege is appropriate. It should also consider whether statements of why an amendment engages privilege (as recommended above) should apply to both categories of amendment, or to non-government Lords amendments alone.**

### **The bigger politics**

The central difficulty in agreeing procedures and definitions with respect to financial privilege is that this forms part of a wider dispute about the appropriate powers of the two chambers in the legislative process. As discussed in the previous section, the political environment surrounding financial privilege has changed substantially. Since 1999 the House of Lords has become more assertive, and various conventions have come under pressure as a result. For example, there have been more threats (and some actual examples) of the Lords voting down secondary legislation, or government bills at second reading, and the coalition's Health and Social Care Bill (2010-12) was also subject to the first attempt at outright rejection at third reading since 1970 (Russell, 2013). All three main political parties have sought to stretch the conventions somewhat when in opposition. Most recently the Lords has become a key platform for Labour in opposing coalition cuts.

Disputes between the two chambers about their respective powers and rights to influence the policy process are always likely to be present; indeed, such disputes could be seen as central to bicameralism itself. The conventions governing relations between the two chambers are clearly fragile, and could become significantly more so in the future. The Joint Committee on Conventions (2006a) emphasised that existing conventions might not hold if the Lords were further reformed. Similar – albeit perhaps less substantial – pressures may occur if the balance of parties in the two chambers changes after a future general election.

**It must be recognised that the arrangements for financial privilege rest wholly on convention, and are thus susceptible to political pressure and potential erosion over time. Such pressures are particularly likely to increase in new political circumstances – including a change of government, or Lords reform.**

Few would disagree that the elected House of Commons should ultimately have primacy over financial matters. But in fact, the House of Commons has primacy over most legislation. This is ultimately set down in the Parliament Acts, but is the subject of negotiation at Westminster day-by-day over Lords amendments, whether they have financial implications or not. Although the Lords has become significantly more assertive, it will normally back down in the face of

concerted Commons resistance. There is thus a genuine question about the extent to which financial matters should be treated differently to other policy objections raised by the Lords.

Except for money bills and bills of aids and supplies, it is clear that the Lords retains significant freedom with respect to amendments that have spending implications. There is no limitation on these being passed (although it is strongly discouraged by Lords clerks in the special case of amendments likely to engage “unwaivable privilege”), while restrictions on the Lords insisting on amendments rejected on which the Commons has invoked financial privilege rest purely on convention. Some in the Commons might like to see greater restrictions placed on the Lords, for example to prevent the agreement of an amendment that would “invite the same response” once the Commons has invoked financial privilege. But firm restrictions could only be achieved through legislation, which is unlikely – and they could even prove counter-productive, for example through the Lords retaliating by failing to pass whole bills. In the past the government may have tried to avoid inflaming such tensions, for example, by emphasising that financial privilege is a process run by impartial clerks, not ministers, and even proposing minor changes in the Commons via amendments in lieu to avoid financial privilege being invoked. While arrangements remain as fragile as they currently are, and dependent on convention, this approach on the part of government seems advisable.

**It must be recognised that arguments about financial privilege are ultimately part of a bigger political debate about the powers of the Commons and the Lords, and that for so long as arrangements rest on convention they remain extremely fragile. These tensions are unlikely to be resolved any time soon – with or without Lords reform. All parties, and particularly the government, thus need to apply caution in not inflaming tensions too far.**

## Conclusions

This report has sought to clarify existing arrangements with respect to financial privilege, and to explore whether changes are needed. Through review of parliamentary records and interviews we have uncovered a number of complaints about the present system, which have been assessed. We have also considered parallel arrangements in other bicameral parliaments.

Although the report does not uncover evidence that financial privilege has been in any way “abused”, it nonetheless strongly concludes that there is a need for change. There is an immense lack of clarity about existing arrangements, and they are likely to come under increasing pressure. As one official suggested to us in interview “financial privilege is a serious bubble waiting to burst”.

The biggest problem is a simple lack of transparency. There is no readily available single account of how financial privilege works that may be used by parliamentarians, journalists and outside groups seeking to influence parliament. Another official described the process as a “meaningless ritual not understood by anyone” – which is clearly a very undesirable state of affairs in a 21st-century parliament. We hope that this report will help at least to some extent to clarify matters. But it is no substitute for official material emanating from parliament itself, plus clearer guidance to members on a day-to-day basis.

The facts set out in this report go significantly beyond those published in recent briefings from the parliamentary authorities and others. In particular, we have highlighted how official published statistics tell only half the story. Financial privilege may be “waived” or “invoked”, and the former is undoubtedly the course most commonly taken. But previously published figures have not clearly distinguished between government amendments in the House of Lords (which make up the great majority of those passed), and amendments resulting from government defeats in that chamber. In fact financial privilege is invoked almost exclusively on government defeats, which have become markedly more common in recent years, and are also more often being insisted upon by the Lords. This pushes the question of what the Lords can do with respect to such amendments to the fore. The situation has been inflamed further by the key battleground between government and opposition (and therefore Commons and Lords) becoming one over public spending post-2010. Such arguments may further intensify following future political changes – notably a change of government, or Lords reform.

Our conclusion is that the current arrangements for financial privilege are fragile, and in serious need of change. Without far greater transparency there will be continued muddle, at the very least, and probably further allegations of misbehaviour as well. This risks damaging the reputation of parliament. We have suggested publication of clearer definitions, and more explicit involvement in the process by the Commons Speaker. Scrapping the most outdated elements of the Commons system – the giving of “Reasons” and the Reasons Committee – would probably also be a good idea. Adopting a clearer system may require confronting some of the differences of interpretation between the two chambers; but this would not in itself be unusual, simply bringing us into line with other countries such as Canada and Australia. Yet in the end, financial privilege remains governed by convention rather than hard rules, and there is little real restriction on what the House of Lords can do. Changing political circumstances, in particular, may bring new challenges.

## Appendix 1: Baroness Royall's 2009 memorandum

This is the text of a memorandum deposited by Baroness Royall of Blaisdon (then Leader of that chamber) in the Lords Library in February 2009. It was written in response to controversy over financial privilege in late 2008, and accompanied by a briefing written by Michael Pownall, then Clerk of the Parliaments (subsequently published by the Constitution Committee, 2011: 8-11) and some summary statistics about the use of financial privilege (see Table 1, p. 15).

### Memorandum by the Leader of the House

#### Commons Financial Privilege

The issue of the use of Commons' financial privilege was raised at the end of the last session during 'ping-pong' on the Counter-Terrorism and Planning Bills.

In the debate on these two Bills, strong feelings were expressed in the House on this issue. As Leader of the House, I take very seriously the task of upholding the right of this House to debate and amend legislation and I undertook to take steps to pursue those concerns.

I did so on the basis that the operation of Commons financial privilege is a matter for the House of Commons alone. It is not subject to alteration by this House and therefore, I believe that it would not be sensible for this House to review the issue.

My first step was to meet a number of Members who expressed concern in those debates and those discussions proved constructive. I have also discussed the issue within the Usual Channels.

At my request, the Clerk of the Parliaments has produced a paper setting out the background to how financial privilege works. That paper is attached and makes clear that financial privilege and its application is ultimately a matter for the House of Commons.

I also attach some statistics on the recent use of financial privilege. These show that the issue of financial privilege has not often given rise to difficulties for the Lords; and Members of the House may find it helpful to know that in many cases, the Commons decides not to exert its financial privilege.

However, the use of financial privilege comes at the end of a process of dialogue between the two Houses. As Leader of the House, I see it as my duty to defend the role of this House, and to ensure that that dialogue is respected within Government. I am taking steps to ensure that the operation of Government reflects fully the House's concerns; and that, wherever possible, dialogue between the two Houses can be resolved without similar conflicts arising.

I have discussed the issue with First Parliamentary Counsel who I know is very much aware of the issue and who has assured me that he will ensure that Government departments are fully aware of the implications of financial privilege for policy during the bill drafting process. I have ensured that the issue of financial privilege is considered before the text of any Government bill is approved for introduction in Parliament.

Finally, I have asked officials in my Office and that of the Chief Whip to give me early warning when the issue may arise from dialogue between the two Houses so that I can take steps to promote the House's position within Government.

**Baroness Royall of Blaisdon, 10 February 2009.**

## Appendix 2: Parliamentary counsel internal guidance

The following is taken from internal Office of Parliamentary Counsel guidance about the types of amendment that are likely to engage Commons financial privilege. It was provided to us by parliamentary counsel in September 2013 in response to an email request.

### **What kind of Lords amendments will infringe the Commons' privilege?**

On financial privilege generally, see *Erskine May* (24th edn) pp 786-788. The Commons take a wide view of what matters they consider infringe their privilege. These may include the imposition of a charge, an increase or decrease in the amount of a charge, an alteration in the duration of a charge, or a change in the administration of a charge. In this context “charge” is used to mean either public expenditure or the raising of revenue to meet public expenditure. Here are some examples.

- Amendments about fees chargeable by a public body have been held to engage privilege on the basis that the less the body charges by way of fees the more it needs by way of public funding.
- Amendments dealing with commencement arrangements for charging provisions, and applying a “sunset” to such provisions, have been designated as infringing privilege.
- An amendment to change the Parliamentary procedure for secondary legislation making financial arrangements (eg changing negative to affirmative, or making Commons-only instruments bicameral) will probably be regarded as infringing privilege.
- Where several clauses, taken together, provide for some new financial arrangement, the Commons may regard an amendment to any part of that structure as infringing privilege.

It seems that a Lords amendment can infringe Commons privilege without triggering the need for a financial resolution in the Commons. For example, an amendment has been held to involve public expenditure large enough to be “significant” for privilege purposes but not large enough to cross the “de minimis” threshold for financial resolution purposes. On the other hand, in 2012 the Commons took the view that a Lords Amendment to the Welfare Reform Bill did not engage privilege on the basis that the cost which it involved would be absorbed within the normal costs of the Department.

## Bibliography

- Beamish, D. (2012). *House of Commons financial privilege and the Welfare Reform Bill*. London: House of Lords. [<http://www.parliament.uk/documents/lords-information-office/Note-on-HC-financial-privilege-Welfare-Reform-Bill-2012-02-13.pdf>]
- Blackburn, R., and Kennon, A. (2003). *Griffith and Ryle on Parliament: Functions, Practice and Procedures*. London: Sweet & Maxwell.
- Constitution Committee. (2011). *Money Bills and Commons Financial Privilege (Tenth Report of Session 2010-11)*. London: House of Lords.
- Erskine May. (18th edn., 1971). *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*. London: Butterworth.
- Erskine May. (24th edn., 2011). *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*. London: LexisNexis.
- Greenberg, D. (2011). *Laying Down the Law: A Discussion of the People, Processes and Problems That Shape Acts of Parliament*. London: Sweet & Maxwell.
- House of Lords. (2009). *Financial Privilege – Some Statistics*. London: House of Lords.
- House of Lords. (2013). *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*. London: House of Lords.
- Joint Committee on Conventions. (2006a). *Conventions of the UK Parliament (Report of Session 2005-06, Volume I)*. London: House of Commons and House of Lords.
- Joint Committee on Conventions. (2006b). *Conventions of the UK Parliament (Report of Session 2005-06, Volume II)*. London: House of Commons and House of Lords.
- Joint Committee on the Draft House of Lords Reform Bill. (2012a). *Draft House of Lords Reform Bill (Report of Session 2010-12, Volume II)*. London: House of Commons and House of Lords.
- Joint Committee on the Draft House of Lords Reform Bill. (2012b). *Draft House of Lords Reform Bill (Report of Session 2010-12, Volume III)*. London: House of Commons and House of Lords.
- Keyes, J.M. (1997). 'When Bills and Amendments Require the Royal Recommendation: A Discussion Paper and Guidelines'. *Canadian Parliamentary Review*. 20(4): 15-21.
- Modernisation Committee. (2006). *The Legislative Process (First Report of Session 2005-06)*. London: House of Commons.
- O'Brien, A., and Bosc, M. (2009). *House of Commons Procedure and Practice*. Ottawa: House of Commons.
- Odgers, J.R., Evans, H., and Laing, R. (2012). *Odgers' Australian Senate Practice (13th edn.)*. Canberra: Department of the Senate.
- Parliamentary Counsel. (2013). *Financial Resolutions*. [[http://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/273364/Financial\\_resolutions\\_pamphlet\\_010613.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/273364/Financial_resolutions_pamphlet_010613.pdf)]
- Rogers, R., and Sharpe, J. (2012a). *Financial Privilege: A note by the Clerk of the House and the Clerk of Legislation*. London: House of Commons. [<http://www.parliament.uk/documents/commons-commission/Financial-Privilege-note.pdf>]
- Rogers, R., and Sharpe, J. (2012b). *Waiving of Financial Privilege*. London: House of Commons. [<http://www.parliament.uk/documents/commons-commission/Waiving-of-financial-privilege.pdf>]
- Rogers, R., and Walters, R. (2006). *How Parliament Works*. Harlow: Pearson Education.
- Russell, M. (2000). *Reforming the House of Lords: Lessons from Overseas*. Oxford: Oxford University Press.
- Russell, M. (2010). 'A Stronger Second Chamber? Assessing the Impact of House of Lords Reform in 1999, and the Lessons for Bicameralism?'. *Political Studies*. 58(5): 866-885.

- Russell, M. (2013). *The Contemporary House of Lords: Westminster Bicameralism Revived*. Oxford: Oxford University Press.
- Russell, M., and Sciara, M. (2007). 'Why Does the Government Get Defeated in the House of Lords? The Lords, The Party System and British Politics'. *British Politics*. 2(3): 299-322.
- Senate of Canada. (2013). *Companion to the Rules of the Senate of Canada*. Ottawa: Senate of Canada. [<http://www.parl.gc.ca/About/Senate/Rules/pdf/Companion-Rules-Senate-2nd-Nov13-e.pdf>]
- Shell, D. (1985). 'The House of Lords and the Thatcher Government'. *Parliamentary Affairs*. 38(1): 16-32.
- Shell, D. (1992). *The House of Lords*. Hemel Hempstead: Harvester Wheatsheaf.
- Shell, D. (1999). 'To Revise and Deliberate: The British House of Lords'. In S.C. Patterson, and A. Mughan (Eds.), *Senates: Bicameralism in the Contemporary World*. Columbus: Ohio State University Press.
- Wright, B.C., and Fowler, P.E. (2012). *House of Representatives Practice (6th edn.)*. Canberra: Department of the House of Representatives.

---

<sup>1</sup> Claudia Wood, 'Welfare Bill: An Abuse of Privilege', *Public Finance*, 6 Feb 2012, <http://opinion.publicfinance.co.uk/2012/02/welfare-bill-an-abuse-of-privilege/>.

<sup>2</sup> See Acknowledgements section for details.

<sup>3</sup> Our distinction between the terms "financial privilege" and "financial primacy" reflects their most common usage. However, the terms are not always used consistently in this way by others. A report by the Joint Committee on Conventions (2006a: 64-67), for example, uses the term "financial privilege" to refer to a broader set of issues associated with the Commons' financial primacy.

<sup>4</sup> A money resolution must be accompanied by a recommendation from the Crown (sometimes known as the "Queen's recommendation"). The glossary on the parliament website defines it as follows: "The Queen's Recommendation must be signified to any measure which proposes the raising or spending of public money. It sets out the maximum charge on public funds or on the public, and also the purpose for which money is being raised or spent."

<sup>5</sup> In the case of bills beginning in the Lords, it should be noted that financial privilege does not apply to any amendments made during the bill's initial passage through that chamber. This is because the Commons does not receive individual amendments, but instead receives a complete version of the bill that incorporates any changes made by the Lords.

<sup>6</sup> Polly Toynbee, 'The Welfare Reform Bill will Incentivise People: to Turn on David Cameron', *The Guardian*, 2 Feb 2012, <http://www.theguardian.com/commentisfree/2012/feb/02/welfare-reform-bill-america-frightening>.

<sup>7</sup> Caroline Davey, 'A House Divided: The Cost of Financial Privilege', *Huffington Post UK*, 17 Feb 2012, [http://www.huffingtonpost.co.uk/caroline-davey/a-house-divided-the-cost-\\_b\\_1285583.html](http://www.huffingtonpost.co.uk/caroline-davey/a-house-divided-the-cost-_b_1285583.html)

<sup>8</sup> Jeff King, 'Welfare Reform and the Financial Privilege', *UK Constitutional Law Group*, 3 Feb 2012, <http://ukconstitutionallaw.org/2012/02/03/jeff-king-welfare-reform-and-the-financial-privilege/>

<sup>9</sup> Tim Ross, 'Cameron Uses Privilege Rule to Prevent Lords Blocking Welfare Reform', *The Telegraph*, 2 Feb 2012, <http://www.telegraph.co.uk/news/politics/9055739/Cameron-uses-privilege-rule-to-prevent-Lords-blocking-welfare-reform.html>

<sup>10</sup> Patrick Wintour, 'Coalition Overturns Lords Amendments on Welfare and Bans Further Dissent', *The Guardian*, 1 Feb 2012, <http://www.theguardian.com/politics/2012/feb/01/coalition-overturms-welfare-reform-amendments>

<sup>11</sup> Erskine May (24th edn., 2011: 631-33) identifies a total of five ways by which the Commons may return an amendment to the Lords without formally disagreeing it, all of which fall within this category of proposing an alternative. Somewhat confusingly, however, these are not mentioned in the section on financial privilege. Recent briefings and our interviews indicate that all of these would result in the amendment being returned to the Lords without a financial privilege Reason. They are: amendment and agreement; agreement with consequential amendment or amendment instead; disagreement with amendment in lieu or amendment to words so restored; splitting the amendment into different parts with separate decisions on each; and agreement with transfer to another part of the bill.

<sup>12</sup> The numbers do not match because more than one amendment in lieu may be tabled in response to a single invocation of financial privilege; likewise, a single amendment in lieu can respond to more than one amendment on which financial privilege was invoked.

<sup>13</sup> There were in fact four such bills that session. The other was the Housing Bill, on which the amendments in lieu were sponsored by the government.

---

<sup>14</sup> Previous editions of Erskine May have noted a similar practice by the Lords in the past. Referring to occasions in the late 19th and early 20th centuries, the 1971 edition states: “On some occasions, however, when the Commons have rejected amendments on the ground of privilege, and have indicated the fact in their formal statement of reasons, the Lords have not insisted on the amendments but have asserted, by a resolution, that they made no admission in respect of any deduction which might be drawn from the reasons offered by the Commons, and did not consent that these reasons should thereafter be drawn into a precedent” (Erskine May, 18th edn., 1971: 784).

<sup>15</sup> E.g. the Criminal Justice (Mode of Trial) (No. 2) Bill (1999-00) and Fraud (Trials Without a Jury) Bill (2006-07). With respect to second reading, such “dilatatory” motions are now considered obsolete, and the Companion instead advises peers to table a “reasoned amendment” against second reading itself.

<sup>16</sup> As Blackburn and Kennon (2003: 334) note “the Commons do not appear particularly distressed by the frequent infringement of their privilege. Given the volume of government [Lords] amendments involving privileges, it would be a major constraint if this were the case”.

<sup>17</sup> But see n11 above.

<sup>18</sup> HL Deb 22 Nov 1976, c1694; HL Deb 24 Nov 2008, c1292; HL Deb 23 Apr 2013, c1261.

<sup>19</sup> HL Deb 21 Jul 1998, cc736-39, 742; HL Deb 10 Nov 1999, c1373.

<sup>20</sup> HC Deb 17 Sep 2003, c1033; HL Deb 14 Feb 2012, c694; HL Deb 23 Apr 2012, cc1561-62.

<sup>21</sup> HL Deb 25 Nov 2008, cc1358, 1364-65.

<sup>22</sup> HL Deb 8 Nov 1988, cc544-45.

<sup>23</sup> HL Deb 26 Jul 1988, c172-73.

<sup>24</sup> The Journals of the House of Commons, vol. 186, 1930-31: p. 392.

<sup>25</sup> See, for example, the North Midland Railway Bill, 28 June 1836, The Journals of the House of Commons, vol. 91, 1836: p. 577.

<sup>26</sup> This procedure is on the basis of standing order no. 78(3) and, strictly speaking, only applies to amendments that lack sufficient cover from a money resolution. Prior to the introduction of this standing order in 1983, the practice was for the Speaker to ask the minister to move to disagree to the amendment without debate, and this continues to be the practice where there is insufficient cover from a ways and means resolution (as on the Films Bill in 1985).

<sup>27</sup> The others were on the Shipbuilding (Redundancy Payments) Bill (1977-78), Inner Urban Areas Bill (1977-78), Films Bill (1984-85), Education (Student Loans) Bill (1989-90), the Criminal Justice Bill (1990-91), the National Insurance Contributions Bill (2007-08), and the Personal Care at Home Bill (2009-10).

<sup>28</sup> This happened in 2004 on the Hunting Bill, on which the Lords agreed four amendments that engaged financial privilege (including to establish a Hunting Tribunal and to allow the government to make grants to certain animal welfare bodies). The government did not whip its members on the bill and so wished to allow MPs to debate the Lords amendments (HC Deb 16 Nov 2004, cc1261-64). The Commons went on to reject all four amendments, and they consequently returned to the Lords with financial privilege invoked.

<sup>29</sup> Claudia Wood, ‘Welfare Bill: An Abuse of Privilege’, *Public Finance*, 6 Feb 2012, <http://opinion.publicfinance.co.uk/2012/02/welfare-bill-an-abuse-of-privilege/>.

<sup>30</sup> 4Children, ‘4Children Comment on Welfare Reform Bill’, 3 Feb 2012, <http://www.4children.org.uk/News/Detail/4Children-comment-on-Welfare-Reform-Bill>.

<sup>31</sup> Chris Wimpers, ‘Government to Declare Financial Privilege on Welfare Reform Bill’, *Huffington Post UK*, 2 Feb 2012, [http://www.huffingtonpost.co.uk/2012/02/01/government-to-declare-fin\\_n\\_1248403.html](http://www.huffingtonpost.co.uk/2012/02/01/government-to-declare-fin_n_1248403.html)

<sup>32</sup> See n25 above.

<sup>33</sup> The “relevant defeats” figure excludes three types of defeat on the basis that financial privilege could not possibly apply: defeats that were not on legislative amendments, defeats that occurred during the initial passage of a bill that was introduced to the Lords, and defeats for which the amendment in question did not stand when the bill left the Lords. The figure also excludes two further categories of defeat: defeats on amendments that were later amended by the government in the Lords (on the basis that it was impossible to tell whether the government modification had removed a financial implication), and defeats that were on non-government amendments to a government amendment in the Lords, where privilege was engaged on the resulting Lords amendment (on the basis that it was impossible to distinguish whether its designation was because of the government or non-government component).

<sup>34</sup> Unlike in the tables above, we did not record whether amendments that were consequential on these defeats engaged financial privilege.

<sup>35</sup> Dáil standing orders 155(3) and 156(3), Seanad standing order 41. This derives from Article 17.2 of the Irish constitution, which states that “Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach”.

<sup>36</sup> As noted in n4 above, there is a similar mechanism in Westminster, where the Queen’s recommendation is required for any money resolution.

<sup>37</sup> House of Commons Debates (Canada), 9 May 1990: p. 1668.

<sup>38</sup> Hence “a Senate alteration which would reduce ‘savings’ from the level proposed in a bill can be made as an amendment where the alteration would not lead to expenditure beyond that provided under the existing law”



---

(Wright and Fowler, 2012: 452) – in the UK context the reversals of benefit cuts in the Welfare Reform Bill would be a clear example. In the House of Representatives, non-government members are also not prevented from moving such amendments (ibid: 427).

<sup>39</sup> This decision is not guaranteed support in the House of Representatives, which may sometimes respond to a Senate amendment by claiming that it should have come in the form of a request.

<sup>40</sup> Senate Hansard 22 Aug 2011, c93.

<sup>41</sup> For details see Odgers, et al. (2012: 458-59).

<sup>42</sup> Three of these (including, as noted above, two that themselves engaged privilege) were sponsored by the government: one in 1998 and two in 2004.

<sup>43</sup> This version of the briefing differs in minor ways from the version cited above, and is available at <http://www.parliament.uk/documents/commons-information-office/financial-privilege.pdf>.

<sup>44</sup> It could be seen as problematic if the Lords was barred from increasing spending, but free to decrease spending, because – this might place more limitations on Labour than Conservatives – assuming that Labour governments are more likely to legislate to increase public spending, and Labour oppositions more likely to resist spending cuts.

At Westminster the House of Commons has primacy over the House of Lords on most matters, and this applies particularly with respect to finance. Notably if the Lords passes an amendment that could affect taxation or spending, MPs may reject it citing the Commons’ “financial privilege”; convention then suggests that the Lords should not insist on the amendment. Recent claims of financial privilege – most prominently on the Welfare Reform Bill in 2012 – revealed significant confusion about this procedure, and led to allegations that it had somehow been abused by government to unfairly deflect opposition. This report clarifies how financial privilege operates, and carefully evaluates the complaints that have been made against it. Built on this analysis, plus some consideration of arrangements in overseas legislatures, it offers recommendations for how arrangements at Westminster could be improved.

The Constitution Unit is an independent and non-partisan research centre based in the Department of Political Science at University College London. It is the UK’s foremost independent research body on constitutional change. The Unit conducts academic research on current and future policy issues, organises regular programmes of seminars and conferences, and conducts consultancy work for government and other public bodies. We work closely with government, parliament and the judiciary. All of our work aims to have a sharply practical focus and to be clearly written, timely and relevant to policy makers and practitioners.

Meg Russell is Reader in British and Comparative Politics and Deputy Director of the Constitution Unit at UCL, where she leads the Unit’s work on parliament. She has written widely on both the Commons and the Lords, and held various advisory roles including to the Leader of the House of Commons (2001-03) and the “Wright committee” on Commons reform (2009).

Daniel Gover has been a Research Assistant at the Constitution Unit since 2011. As well as working on financial privilege, he has conducted substantial broader research on the Westminster legislative process. He was formerly a researcher in the Commons.



This research project was funded by the Nuffield Foundation

**Web:** [www.ucl.ac.uk/constitution-unit](http://www.ucl.ac.uk/constitution-unit)

**Blog:** [www.constitution-unit.com](http://www.constitution-unit.com)

**Twitter:** @ConUnit\_UCL

**Facebook & Flickr:** Constitution Unit