

Procedure Committee

Oral evidence: Exiting the European Union: Scrutiny of Delegated Legislation, HC 386

Wednesday 11 October 2017

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Members present: Mr Charles Walker (Chair); Bob Blackman; Mr Peter Bone; Mr Christopher Chope; Ronnie Cowan; Nic Dakin; Helen Goodman; Mr Ranil Jayawardena; David Linden; Melanie Onn; Mr William Wragg.

Questions 1 - 16

Witnesses

[I:](#) Rt Hon Dominic Grieve QC MP

[II:](#) Dr Ruth Fox, Director and Head of Research, Hansard Society and Joel Blackwell, Senior Researcher, Hansard Society.

Examination of witness

Witness: The right hon. Dominic Grieve QC MP

Q1 **Chair:** Dominic, there is obviously a lot of concern about the scope and range of the secondary legislation that is going to flow out of the European Union (Withdrawal) Bill. Can I just read something to you—because you are a political brain and mind; sorry, a legal brain and mind as well—that Lord Donaldson said about secondary legislation and then if you could respond to that?

Mr Dominic Grieve: Yes.

Chair: Then there are a number of colleagues who wish to ask you other specific questions.

Lord Donaldson, when Master of the Rolls, outlined the approach of the courts to broadly defined delegated powers to amend primary legislation. He said the following, “The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the fact that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach”. What I think he is saying—I hope he is saying—is that primary legislation is not justiciable in the courts but secondary legislation is and the wider you draw it and the more you throw in, the more likely it is that the courts are going to feel they can take a look at it. Am I right in this and does that chime with some of your concerns?

Mr Dominic Grieve: Yes, entirely. In a sense, my concern is to try to avoid things ending up in court. Parliament in a sense has not done its job properly if we end up with lots of legal challenges to secondary legislation enacted with the passage of this Bill. I first acknowledge the Government’s difficulty. The Government are having to try to carry out what is by any account a revolutionary change in our legal structures and to do it within a short timeframe and to carry it out smoothly. I am the first to accept that the idea that the Government can do it without taking secondary legislative powers to amend primary legislation is a fantasy. We would be here for the next 10 years.

The question is: can we do this in a way that, if I may use this expression, does credit to Parliament for keeping control of this process or are we going to end up with a process where, in fact, lots of things can then be changed that Parliament may not have intended or would have wanted to debate or look at first, and then we end up with legal challenges and we ask the judiciary to try to disentangle some of these things at the end of it, which is in itself not, I am sure, what the judges would like to be doing?



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The purpose of my amendment is entirely in keeping with what Lord Donaldson said. It is to try to see that, seeing that we are facing what I think is a wholly exceptional piece of legislation, Parliament should try to put in place an exceptional mechanism for dealing with it in a way that allows the sift and allocation of the work to be properly done so that Parliament can show it debated the things that needed to be debated and where the things that are purely technical end up not being debated.

I would like to emphasise the purpose of this amendment is not to try to put a spanner in the works of carrying out Brexit; far from it. If we are leaving, we have to have a credible piece of legislation for carrying it out.

Q2 Chair: What you are suggesting is that if a Government Minister could demonstrate to the courts that there were measures taken to ensure Parliament had oversight and ensure Parliament was satisfied with what was being classed as a negative SI and how affirmative SIs would be treated, in a sense that would be a defence if there were challenges made through the courts?

Mr Dominic Grieve: That must be the case because it seems to me that one is allowed to refer to Hansard and I think it would be strange for the judges not to take cognisance of the fact that Parliament had set up a specific structure for dealing with an extremely complex and controversial piece of legislation, which involved an unusual amount of parliamentary input in determining negative and affirmative procedures. I would have thought in the long run that was rather to the Government's benefit that such a system should be operating.

Chair: Thank you. Now, which colleague wanted to come in immediately after me? Ranil.

Q3 Mr Ranil Jayawardena: It is generally accepted that implementing Brexit is going to mean significant changes to legislation by virtue of having to incorporate law that is in effect into English law and Scots law to provide the certainty at point of exit, and the Government estimate 800 to 1,000. You yourself said in the Second Reading debate, "I recognise that there will have to be Henry VIII clauses. Of course, we cannot carry out this massive revolutionary transformation by primary legislation." You have affirmed that today. To what extent are you concerned less with how this Government uses those powers and more with how future Governments might use those powers? Are you not satisfied by the sunset clause provisions?

Mr Dominic Grieve: There are sunset clause provisions for some things. There are one or two things for which there are not sunset clause provisions. That is a matter that we may look at separately; it is perhaps a bit less to do with procedure. Yes, it is right that there are sunset clause procedures, but the period during which this is going to be live is quite a long one. The possibility of misuse is there. Perhaps I would like to emphasise I happen not to have a view about conspiracy views about politics. If the Government say, "We do not intend to try to use this to



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carry out dark and dangerous changes to the laws of the United Kingdom”, I think on the whole I am prepared to give certainly a Conservative Government the benefit of the doubt. I think I would probably even give a Labour Government the benefit of the doubt.

But that is not a reason why Parliament should just roll over and say, “Oh, this is all fine, you do whatever you like”. We are supposed to be the guardians of the constitution. I think that is why we are given a portcullis as our emblem. I always thought that; it is the portcullis of the nation. Parliament makes law. Handing to the Executive the power to make law effectively by decree with a separate form of scrutiny is something that we should give very sparingly to any Government. I am afraid it is a modern trend that we have been doing it more and more. It is a profound irony that one of the reasons why we have been doing it more and more is partly because of our membership of the European Union, and now that we are leaving we are about to do it even more for the purpose of going. I think that it is time Parliament woke up and actually did something about it.

Going back to my very early years in Parliament—we may move on to this—I sat on the Joint Committee on Statutory Instruments. If I may say so, it is an incredibly professional and very worthy committee, which enjoys very good advice from Speaker’s Counsel. But its ability to influence how statutory instruments are dealt with is, except in exceptional circumstances, utterly negligible.

Q4 Mr Ranil Jayawardena: Of course, many things will not be by SI at all. We will have to, of course, check with the College of Arms about the rationale for the use of the portcullis because we would not want to mislead anyone on its origination. On SIs, I agree that some issues will be extremely important and I agree with what you say, that those sorts of issues would need to be discussed on the Floor of the House. Those issues will be coming forward in the form of Bills anyway, I would contend, the Customs Bill, the Trade Bill, the Immigration Bill, the Fisheries Bill, the Agriculture Bill, and so on. Indeed, my understanding—correct me if I am wrong—is that the Government propose restraints on delegated powers so that it cannot be used for certain things, such as, of course, taxation, making retrospective provision, creating criminal offences and, indeed, implementing the withdrawal agreement. Would you not recognise that many systems are in place already to ensure that the Government bring forward legislation so that it is discussed by all Members when it needs to be and that those matters get the scrutiny that our voters deserve?

Mr Dominic Grieve: I am afraid that 20 years in this place have convinced me that we could improve the processes and procedures of this House enormously if we had the will to do it without messing the Government up or preventing it getting its legislation and that we do not do it. This is isolated because it is the most extraordinary example of arrogation of power to the state that I have seen in my 20 years in the



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House. I do not suppose there has been anything quite like this in peacetime ever. For that reason, I think we should be very cautious.

Just picking up the point, I do have other amendments trying to limit—

Chair: Dominic, we have a vote.

Mr Dominic Grieve: Oh, we have the Division. Sorry, I beg your pardon.

Chair: I understand we have three votes, so we shall try to return here soon after 3.35 pm. We have three back-to-back votes, I understand. Sorry, public gallery.

Sitting suspended for Divisions in the House.

On resuming—

Chair: I am afraid I have to go.

Mr Dominic Grieve: It lasted a very long time.

Chair: Almost an hour so, Chris, would you take over as Chair?

Mr Christopher Chope: Okay.

Mr Christopher Chope took the Chair.

Q5 **Mr Ranil Jayawardena:** I was just simply outlining the suggestion that could be made that given that so many Bills will be coming before the House as a whole on the important issues that we would all agree should be discussed by the House and given that there are restrictions on what delegated powers can be used for anyway—for example, not on taxation or on criminal offences—given those safeguards, would you not agree that there are sufficient systems in place to make sure that Parliament discusses and decides as a whole those things it needs to and, indeed, the efficiency and effectiveness of Parliament is not compromised by putting those things that do not need to be discussed by the House as a whole in committees?

Mr Dominic Grieve: I will start with your last point first. Yes, of course, that is right. If everything got put into the Committee for debate and discussion, of the 1,000 statutory instruments that are expected as a result of this legislation it could be argued that Parliament is both wasting its time, wasting the Government's time and wasting public money. That is not what I envisage.

The whole purpose of this proposal, although it would require changes to the Standing Orders in both Houses and probably co-ordination between



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both Houses, is to set up a system by which there can be a triage of those statutory instruments to enable those that are important to be considered, if necessary, on the Floor of the House or upstairs in committee or, for that matter, simply rubberstamped and go through. Hopefully, the vast majority would require very little scrutiny indeed, particularly if the system that I have suggested of providing a memorandum, of enabling people to make a rapid assessment of the importance or unimportance of the measure, can be given due consideration.

However, I disagree that the safeguards, while they are welcome—I have to say that if those safeguards were not there one would say this was a quite astonishing piece of legislation, but it still gives enormous scope to the Government by statutory instrument to change the laws of the land. While one can try to address some of that by amending the Bill in other ways, and indeed I do have some amendments tabled to try to restrict the use of the Henry VIII powers, as I indicated at the beginning, I acknowledge that some Henry VIII powers are going to have to be used. Therefore, I think we need a better system than we have at the moment for implementing them and giving the proper scrutiny for doing it. That does not alter my view and I still think that it is something that Parliament ought to pay attention to.

Q6 **Chair:** Can I ask you this? Would your amendment 3 be capable of being justiciable in the courts?

Mr Dominic Grieve: Just remind me for a moment about the numbers of my amendments. This is the big one?

Chair: Yes.

Mr Dominic Grieve: No, I do not see how this could be justiciable in the courts at all. Well, certainly not the triage, and the changes to the Standing Orders of the House as to how we deal with our business are certainly not justiciable in the courts. As this would be a change to primary legislation, I think it would be very surprising that this could be justiciable in the courts either. It was not the purpose of leading to justiciability. There is much greater risk of issues ending up in the courts if we have challenges to statutory instruments that are made by the Government and are passed through without the scrutiny of the House than there is in anything I am proposing here.

Q7 **Chair:** You think that this is dealing with the process? You think the challenges would come on the process rather than the substance of these SIs?

Mr Dominic Grieve: I think that the risk if you stick to the current procedure and you have a very large number of SIs that go through, SIs are capable of being challenged. We know that. It does not happen very often and the courts are sparing, but I can see that this is precisely the sort of area where, because of the controversy surrounding it, if it was thought that—and the obvious challenge would be to say, “If you look at



the Bill as a whole it does not empower the Minister to do this in this particular case". That may or may not succeed in court, I have no idea, but I can see how the risk of challenge is likely to arise. Here I am setting out a process that I would have thought is going to minimise the risk of challenge.

Q8 Chair: In the triage system you describe, if somebody said that that had not been exercised properly, that would surely be justiciable.

Mr Dominic Grieve: I cannot see how the triage system is going to be dependent upon the Standing Orders of the House. Therefore, the Standing Orders of the House are not capable of being impugned in any court in the United Kingdom.

Q9 Mr Peter Bone: I agree enormously with what our witness is saying, and I have always thought we agreed on many things. One thing I did not know is we had both served on the Joint Committee on Statutory Instruments. I want to talk about the Sifting Committee. In fact, probably very few people in the House know that the Joint Committee exists. Basically, one of its roles, of course, is to look at statutory instruments before they come to the House and then advise the House about them. In fact, one of the draconian things is the Committee can say they are ultra vires, so it is a very powerful and very important Committee. Would Mr Grieve agree, with his experience, that, of course, that Committee could handle looking at the 1,000 SIs that are before it?

Mr Dominic Grieve: I am sure the Committee could. I do not know how many SIs per annum were being handled by the Committee when Mr Bone was on it. I think we were doing, I seem to remember, somewhere around the 3,000 mark was my recollection.

Mr Peter Bone: Six thousand.

Mr Dominic Grieve: So, 6,000 now. Well, things have got worse. In a sense, the question was answered by yourself as you posed it. The powers of the Committee are there to scrutinise, to comment on unusual use of powers, potentially to say they are ultra vires, which is a very powerful tool. Indeed, the Committee has done quite recently in a very important case, and in my view quite right, too. Actually, it can also summon the Minister and give the Minister advice at the present time. I have done that in my time on the Committee when I served on it.

What it cannot do is carry out the triage and allocation because that is not its role. You could give it that role, but I think that is going to be a very onerous burden on the Committee. I will say that I have at times, and it is no disrespect to the Committee and its members, been concerned in my time in Parliament—but this is a bit going off at a tangent—about whether, in fact, this sort of scrutiny ought not to be being done by the departmental committees for the SIs that fall within their area of responsibility. Because unfortunately, despite the best attempts of the Select Committee, the Joint Committee on Statutory Instruments, there is, unless it is a really major case, a bit of a



disconnect between the very sensible work it is doing and people realising what it is saying. That is no criticism of its members or its officers at all.

I just happen to think that this Bill is by any standards quite exceptional and for that reason I think it needs an exceptional mechanism for dealing with it. Of course, if it works, then Parliament might wish to think about whether that might lead to wider, longer-term reforms, but I have tried to focus on this Bill. You could change the Standing Orders to give the Joint Committee special powers and turn it effectively into the body we want, but there might be a few problems associated with that, partly because it would be a joint committee. I find it difficult to see how to do a triage and allocation you can do it with a joint committee of both Houses because of the privilege of both Houses in terms of their own processes, but that is just a suggestion.

Q10 Mr Peter Bone: Mr Chairman, that was the point. You obviously anticipated where I was going on this. It does seem to me that is one of the advantages because it is a joint committee. If it takes a view, it would be a joint view. I think the Clerks and the counsel that serve that Committee are outstanding.

Mr Dominic Grieve: They are.

Mr Peter Bone: It is also, reluctantly in my view, one that is appointed. The chairman is appointed and the members are appointed. We have heard earlier, or I think we have both heard in other places, for instance, that one of the options would be—this triaging is a very good idea and everyone thinks that, but it should be left to the usual channels. Now, my view of the Whips may be different from Mr Grieve's, but I do not think that is transparent and it is certainly not good for parliamentary sovereignty. The point I am trying to get at is: does Mr Grieve agree, given that the appointment on the Joint Committee on Statutory Instruments is made effectively by the Government and Opposition, would that not be the ideal vehicle for doing this triage? I would take one other point. Surely if we are going to change Standing Orders, it should be a permanent change, not just exceptional for this Bill.

Mr Dominic Grieve: I will take each in turn. First, I do not pretend to be an expert on the Standing Orders of this House or the questions of our own privilege. I simply raise the issue that I continue to have that it is one thing to say that a measure is ultra vires; it is another thing to engage in a triage as a joint committee as to the way each House handles its own business. I simply flag it up. I may be wrong about that and, indeed, the Clerks or Speaker's Counsel might be able to advise that, in fact, there is a perfectly good way of dealing with this that still preserves the House's privilege to run its own affairs. Ultimately, of course, the House collectively can always overturn a decision of a committee, so perhaps it is less of a problem than I anticipated.

The second one is about the Committee's workload. You mentioned 6,000 statutory instruments.



Mr Peter Bone: No, sorry, that is what it was; it has now dropped to something like 1,000.

Mr Dominic Grieve: Right. Clearly, it has other business to consider other than the business that is going to flow as a consequence of this piece of legislation. I do think this piece of legislation is exceptional. I take your point, which is that you can argue we should not set precedents because of an exceptional piece of legislation, but on the other hand I have always slightly been of the view in my 20 years in this House that a bit more flexibility in the way we work our processes to meet particular challenges might not be such a bad idea. It does not mean to say that we then have to introduce this system forever, although we can see how it might work, but it does suggest to me that we are able to respond to a challenge in a way that meets the needs of the House.

Finally, on the point of the usual channels, I fully understand that the usual channels are a working system for this House, but ultimately they do marginalise the opinion of Back-Benchers. I think that one thing that we absolutely know about this legislation is that it has controversial issues that cross party boundaries completely. That might, therefore, be a good reason why it should be a committee that determines it. As I say, at the end of the day, when I put up an amendment of this kind I am conscious of two things. First, I am not a parliamentary draftsman and somebody is perfectly capable of coming along and saying, “We can do better”. I have been around long enough to know that Back-Bench tabled amendments are very rarely accepted in their entirety. When it does happen, it is usually because you are deleting a word that is completely unnecessary and there is not much else you can do. I am well aware of that.

I am also well aware that there may be alternative ways of approaching this issue, but I do think that the House is at risk of being seen to have given up its key role of scrutinising legislation properly if it simply accepts the Government’s proposals of steady as she goes, notwithstanding the extraordinary aspects of this piece of legislation.

Q11 **Chair:** Before asking Helen Goodman, can I just make a suggestion? That is because we are quite short on numbers—I know that Helen has to go at 25 past, I think—and we have another panel of witnesses. If it was all right with you, Mr Grieve, would you be content to be joined by our two panellists from the Hansard Society?

Mr Dominic Grieve: Yes, totally.

Chair: So the next groups of questions can be answered by all three of you if you need to.

Mr Dominic Grieve: Yes, of course. It would be helpful to have some idea of the end time. It is only because I had a meeting programmed for 4.30 pm and if I need to move that back or get rid of it, if the Committee would like to tell me, I will do it. I had anticipated being here for a period of time starting, obviously, at 2.45 pm.



Chair: Okay. The challenge is to wind up at 4.30 pm.

Mr Dominic Grieve: In that case, that is fine and I will tell my office to act on that basis.

Chair: Can I ask Dr Ruth Fox from the Hansard Society and Joel Blackwell to join us?

Examination of witnesses

Witnesses: The right hon. Dominic Grieve QC MP, Dr Ruth Fox and Joel Blackwell.

Chair: Thank you so much. Helen, over to you.

Q12 **Helen Goodman:** Mr Grieve, I wanted to ask you what you thought the sifting criteria of the triage committee ought to be.

Mr Dominic Grieve: It seems to me that the triage committee ought to be considering is this merely a technical amendment; is this amendment, in fact, a change to primary legislation; what is its significance and its implications? It seems to me that in a nutshell that is what we need to be looking at. Beyond that, I do not think I am prescriptive. Others may have views as to how the Committee should go about its work, but what I think is important is that we ensure that if as a consequence of this legislation there are going to be significant changes to primary legislation that are of importance that this takes place with proper debate. That must mean probably on the Floor of the House. I think that is the absolute bottom line on this but, as I say, I very much hope, particularly in the light of what the Government said, that 90% of all this, perhaps even 95% for all I know, turns out just to be straightforward technical amendment.

The Government must have some anxiety and doubt about this because if it did not it would not have had to have cast its powers so widely. That suggests to me that within Government there is an understanding that there are unpredictable aspects to this legislation, which could require at different moments the Government to bring about significant change to existing primary legislation in order to achieve its objectives.

Q13 **Helen Goodman:** I think there are a lot of people who share that view. There is a question mark about how big the problem is and then there is a question mark about whether it is the right solution. On whether or not your proposal is the right solution, it does not actually take us to making statutory instruments amendable, does it?

Mr Dominic Grieve: No, it doesn't. In order to do that, we would have, I think, to change the Standing Orders of the House.

Q14 **Helen Goodman:** Wouldn't we have to do that in any case?



Mr Dominic Grieve: I think we will. If people wish to make statutory instruments amendable, that would be a very interesting development. Being a good conservative—with a small “c”—and not wishing to let off an atom bomb, I have tried to be as restrained as I can in my proposals. Yes, many have argued that statutory instruments ought to be capable of amendment and that our inability to do that is a failure of our processes and that, in fact, it would be an advantage because it tends to give people inevitably a binary choice. However, that having been said, the process that is being proposed would allow for the possibility of somebody being able to flag up something that is really problematic and say to the Government, “For goodness’ sake, go away and deal with this before you present it”.

Perhaps I can just say one other thing. I do appreciate that the anxiety Government tend to have is that seeing that we operate in a Parliament that is adversarial, and indeed it is one of its strengths, there is a belief that the moment you give Parliament or Members of Parliament a power or possibility of challenging things, they will exploit it to the maximum, thus causing the Government inevitable problems getting its business through even though the challenges are entirely unreasonable. I personally do not adhere to that view. I think that if you treat Parliament in a mature and responsible way, Parliament on the whole tends to respond that way. Quite apart from anything else, we would have rather too much of other things to do in order to get totally bogged down in this. As long as obviously the makeup of the Committee is of individuals who are likely to be sensible, as I see from time to time serving on other committees drawn from all parties of this House, I think one can make some very good progress.

Q15 **Helen Goodman:** I think the argument that you have just presented for not making them amendable could be used for primary legislation as well. Since these statutory instruments are going to be used to replace primary legislation, I am not sure that you have yet made an absolutely clear distinction as to why in this instance we should not have the power of amendability.

Mr Dominic Grieve: I was not trying to, but I think that if you start moving towards the amendability of statutory instruments for this, then actually the argument is rather more persuasive: why are you not doing it for all statutory instruments? Because that is, as I say, a rather major change, not necessarily a bad one—I would strongly recommend that some thought might be given to this in the long term—I confined myself to trying to set up a triage system because I did not want to give the impression that I was trying to obstruct the process of the scrutiny of this Bill. What I was trying to do was to improve it.

Q16 **Helen Goodman:** Does the Hansard Society have any proposals relating to this in your very long report?

Dr Fox: In terms of the amendment power specifically?



Helen Goodman: Yes.

Dr Fox: We do not propose an amendment power. Building on what Dominic has said, if you were to propose that, you are essentially undermining the principle of delegation. Our starting point would be there are arguments in favour of it, but we would think that that needs to be taken in the context of a much wider review of the legislative process. Looking both at the interaction between primary and secondary and where the line is drawn between principle and detail and so on and how that has disappeared over time, or at least has become more murky than it is thought to have been in previous years, what underpins our system that we have proposed essentially is the principle of conditional amendment. Through the procedural mechanisms, you build in pressure on the Government to respond to the concerns of the scrutiny committee to address those. You put in procedural thresholds such that the Government have to respond and it has the option, as it does now, to take away an instrument and revise it, relay. It gives Members more influence and a voice in the process in a way that they simply do not have now. It puts more pressure on the Government to respond.

In terms of the strengthened scrutiny procedure, it specifically sets out that the Minister has to respond to the concerns of the Committee and has to explain their response in a written and oral statement. That then is open to Members in terms of the debate that might take place on an instrument that goes to the floor. They would have to respond in those circumstances. By raising the bar and the pressure, there is a greater chance of the Government going away and revising in response to the concerns of Members.

Chair: Okay. Dr Fox has managed to get a few words in, but I am told that we have not just one Division but potentially more Divisions, so I fear that we have no option but basically to adjourn and perhaps reconvene on another occasion as appropriate. Certainly, I do not think we can do any more business at this sitting this afternoon, so it just remains for me to thank our witnesses for coming along and thank those members who have stayed to the end. I hereby declare the Committee adjourned.