

Procedure Committee

Oral evidence: Exiting the European Union: scrutiny of delegated legislation, HC 386

Wednesday 18 October 2017

Ordered by the House of Commons to be published on 18 October 2017.

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

Questions 17-76

Witnesses

I: Pete Wishart MP, SNP Shadow Leader of the House of Commons.

II: Rt Hon Andrea Leadsom MP, Lord President of the Council and Leader of the House of Commons, and Mr Steve Baker MP, Parliamentary Under-Secretary, Department for Exiting the European Union.

Examination of witness

Witness: Pete Wishart MP.

Q17 **Chair:** You know why you are here.

Pete Wishart: Why am I here again?

Chair: Because this great Committee is looking at the various issues flowing out of the European Union (Withdrawal) Bill, the secondary legislation. Tell us of your frustrations.

Pete Wishart: Well, they are manifest, many and overwhelming, Chair. When we look at what is being proposed in the Repeal Bill, we have great exceptions and objections with the whole swathe of the so-called Henry VIII powers. But I think what concerns us most, and I know it is possibly not in the remit of this inquiry your Committee is undertaking, is the provisions under clause 11, the impact that has on the devolution settlement, the presumption that if something is not listed as reserved it is devolved. These extend to issues to do with powers of agriculture, fisheries and environment. We also look at the remit of your Committee where it comes to the Henry VIII powers and we recognise, of course, that the Scottish Parliament will acquire most of these powers with real conditions and reservations that we have great difficulty with.

It does, of course, allow us to address deficiencies in retained EU law. What it does not allow us to do is to look at some of the shared competencies of the regulations and that concerns us greatly. What we see is the UK Government making all these regulations, changing legislation from retained EU law across the United Kingdom framework that would not have any input from the Scottish Government, as something that we find deeply unsatisfactory and concerning about how this is going to be addressed. I am going to leave it there, Chair.

Q18 **Mr Ranil Jayawardena:** Perhaps I can look at this slightly more broadly from the Opposition parties' perspective, because the Opposition parties clearly have a role in holding the Government to account and that is a really important part of our parliamentary democracy. In the case of affirmative instruments, this means that Front-Benchers from your party might well serve on delegated legislation committees to debate the statutory instruments. What is your party's view of your own effectiveness to that process and the effectiveness of the process as a whole?

Pete Wishart: I had the great privilege, if you could call it that, of being a whip and business manager for the most part of 10,12 years in a group of six, so I had the great joy and pleasure of serving on many of these delegated legislation committees. I think I would not be alone in saying that it was a particularly frustrating experience. You would turn up for one of these meetings to observe various Members in many uninterested states, reviewing their mail, attending to other things, things that were obviously much more important. I think most of these committees I



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attended lasted possibly 20 minutes out of the allocated 90 minutes without anybody making any significant contribution.

We took an interest when several powers were devolved to the Scottish Parliament through DL committees and we, of course, had a specific interest in that. The way I observed it, unless you had a concern or a specific interest in an issue you tended not to be particularly engaged with them. When I observed my Conservative, Labour and even Liberal Democrat colleagues at that point, they seemed to be on these SI committees and DL committees as some form of punishment and just could not wait to get out of that door as soon as the “order, order” was shouted from the chair. I hope I am not being too negative about my experience on these committees.

Q19 Mr Ranil Jayawardena: I appreciate your candour. In that case, given that, to use your words, there are things that are much more important to be done, do you think the debates of perhaps up to 90 minutes are actually merited?

Pete Wishart: I do not know how we have managed to get into this mindset and culture when it came to delegated legislation committees. It seems to be historic and culturally inbuilt into the workings of this House, particularly since the time I have been here. We are moving on and obviously the nature of your inquiry is going to the European Union (Withdrawal) Bill where these committees will be very important because what we will be looking at here is things that are critical to not just the constituents I serve but the constituents of everybody up and down this country. I think we have to try to design—and I know that it is the work of this Committee—a form where we could look at these things that makes them I wouldn't say interesting but compelling for Members of Parliament where they can properly represent their constituents' interests and concerns and look at that.

Q20 Mr Ranil Jayawardena: The principle that you are alluding to is that it is specifically in relation to the statutory instruments that will be laid in relation to Brexit that is garnering interest among Members. But looking more broadly at this, I personally would not want to see a system that is working in one respect being fundamentally changed across the board and perhaps to negative effect. If you believe that there are things that are much important to be done on SIs today, and therefore perhaps I could lead you by suggesting that the current SIs that are debated in committees don't always themselves merit 90 minutes of debate, quite apart from what might be coming down the road, do you not agree that there could be a danger that we end up seeking to sift negative instruments that could end up wasting further time as we go through Brexit, which undoubtedly will see much secondary legislation coming forward, and quite rightly?

Pete Wishart: I think you have taken me into a number of particular avenues and perhaps cul-de-sacs with the nature of your question. What I would say in response is that I think we need to design a structure that



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will allow us to do that so we can have effective scrutiny of any Orders in Council, anything that might be appearing as a statutory instrument. I don't know how commonly they are viewed among Members of Parliament. I have been in the House 16 years and I struggle sometimes to understand the complexities of statutory instruments, the negative procedure for example. There is all this talk about praying against. I have never seen great examples. I think it is only 0.9% of all negative statutory instruments are debated in the House and it is just the whole laying out of the process of how that is going to be debated. Part of the work that this Committee is looking at is trying to design a structure that allows this to happen.

I think the difference from where we are now and where we were when you and I may have sat on statutory instrument committees in the past is they will assume an importance way beyond what has gone previously with the whole swathe of legislation when it comes to do with the European Union Repeal Bill. I think it is incumbent upon us to design a structure that accommodates that.

Q21 Mr Ranil Jayawardena: Perhaps I could ask you a yes/no question to save time and allow others. Does the SNP, as a party, fundamentally oppose or support the delegation of powers to Ministers?

Pete Wishart: Our view on that is we see it as necessary. There is no other way to design the system whereby it will be a matter for Ministers to decide this. What we are in the business of trying to do is to ensure that there is as much democratic oversight built into that system as possible and that Members of Parliament, where there are concerns, have the opportunity to address that through a structure they feel they could buy into and feel it is useful to them.

Q22 Mr Peter Bone: With the negative SIs, the reason none of them are debated, is that, of course, they should be totally uncontroversial to be a negative SI. With the affirmative SIs, you are absolutely right that some go through very quickly because they are not controversial but because the Act requires them to be affirmative they are an affirmative. The Minister will speak, the Shadow Minister will say something, and that will be the end of it. But there are on occasions very important SIs in the past. I can remember one where the three Front-Benchers agreed, which is always a bad sign, and what happened was the room was packed with Members because, of course, any Member can speak at an SI. You don't have to be on the committee. There was one mistake here. It was said that the Opposition scrutinises the Government. Actually every Member of Parliament scrutinises the Government and if you are not a Government Member, and I will certainly never be one, I have a role to scrutinise as well.

Pete Wishart: It is the Government's loss, Mr Bone.

Mr Peter Bone: Do you agree that for something that is important, maybe through a sifting committee, we have to find extra time to debate



down an SI? We should not be somehow limited to one and a half hours.

Pete Wishart: We already have the Joint Committee on Statutory Instruments, which is the first port of call for Orders in Council, where the definition of statutory instruments will be defined. I think we are possibly going to be coming on to some questions about the sift and scrutiny committee, particularly the very useful example and model that has been presented and proposed by the Hansard Society, which I very much support because it aims to try to deal with some of these issues. You are right, there are very important debates. I think I have been to a couple of these debates—I don't know if you were part of them—where there have been quite robust exchanges and very interesting contributions from Members of Parliament.

As we design this system as we go forward to the Repeal Bill, we have to make sure that we build that sort of feature into this. We are going to be spending quite a bit of time in these committees looking at the whole swathe of retained legislation that we are going to have and about how we will have to try to clear up some deficiencies within EU legislation. I would suggest probably most members of this Committee will be spending a good proportion of their time addressing some of these issues, so we have to make sure that whatever is going to be designed will be worthwhile, will be useful to Members of Parliament and allow everyone to make a contribution.

Q23 **Mr Peter Bone:** At the end, it will come to the floor of the House as an affirmative to be voted on, so the whole House will decide.

Pete Wishart: Well, absolutely. There is nothing much wrong with the affirmative procedure where it does give us 90 minutes allocated in order for that to be debated and then goes to the floor of the House. The House is then invited to either support or reject what was decided in that committee. As a feature of the system, it is not all that bad in its current design. There are more issues, I would suggest, with the negative procedure and the various weird ways that we have to try to bring that to the House. The whole system of praying through an early day motion is bewildering to most Members of Parliament and is spectacularly unsuccessful because the Government are still in charge. It is up to the Government to find available time for a prayer against a negative procedure statutory instrument to come to the House and it is totally within the gift of business managers and the whips whether that gets an opportunity to be debated.

Q24 **David Linden:** You mentioned earlier on about this idea of a sifting committee, so that spikes one of my questions already. For instruments of greater significance, should the sifting committee be able to find some sort of route for them to be debated on the floor of the House? Is that a view that you would share?

Pete Wishart: I think that would be a really useful suggestion. Other than what we have seen from the Hansard Society's proposal, there are



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very few views from Government. I have not heard the views of the Leader of the House or anybody from Government about this. I know you have the Leader of the House coming in later on. When we have things that will be very important I think the whole House should have some sort of procedure available so that every single Member can contribute and participate in that and enough time is set aside to debate the really important issues. More and more of these issues are being debated on the floor of the House so that there is no reason why some of the very important issues to do with the Repeal Bill should not be debated on the floor.

Q25 **Mr William Wragg:** A very brief question: legislation or standing orders?

Pete Wishart: That is a very good question. From talking about the creation of a sifting committee, I think we are probably looking at the standing orders of the House. We have created a couple of new Select Committees, for example, over the past years, most notably as a result of the Wright commission where we got the Backbench Business Committee. I know Mr Bone continually goes on about the House Committee that was further presented and proposed by Mr Wright in his commission. I think that the first port of call would have to come from standing orders of the House to create a new committee. It should be beyond legal challenge too, because I am pretty certain there will be lots of people wanting to make mischief with the creation of a new committee and anything that comes through legislation is obviously justiciable and you will have the opportunity for members of the public to take that forward. I think how we then firm that up might be a matter for some legislative process in order to progress that.

Q26 **Mr William Wragg:** What are the flaws of the Joint Committee on Statutory Instruments? If you were to tolerate their continued existence to deal with this, how might you amend that?

Pete Wishart: We have a great deal of difficulty with the Joint Committee on Statutory Instruments given that our unelected friends from the other House can be participants in any sort of joint committee.

Q27 **Mr William Wragg:** In that case, the Select Committee on matters of financial privilege, if we keep it to this House.

Pete Wishart: I think there are ways and means of trying to resolve some of the difficulties of that issue. I look at the workings of the House of Lords and you would have to conclude that they are much more elegant than the working arrangements we have in the House of Commons when they are dealing with issues to do with statutory instruments, but that does not make it right that unelected people who happen to be the placed men and women of the political parties are designing and shaping and allowing us to have a say on particular issues. I think that the House of Commons has to design its own feature when it comes to this. We are elected Members. We are discharged from our constituents in order to make the decisions on their behalf but we don't



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give it to unelected hereditary peers in order to do that. We have to design the new structures to deal with this.

Q28 **Mr William Wragg:** Hypothetically putting aside the membership of it, what technically would need to change with the function of that committee?

Pete Wishart: This is the first port of call. I do not think many people see there is a great deal of difficulty with how the Joint Committee assesses the range of Orders in Council they have and making designations for the negative and positive procedure. It is what happens beyond then and this is why I am attracted to the Hansard Society's model of having a new sift and scrutiny committee as a place where these things would go next. I am particularly attracted to the idea of having subcommittees that would look at specific pieces of delegated legislation and report back to a sift and scrutiny committee that would then be able to deal with these issues properly and make a decision about where it goes to.

I think Mr Linden's point is an important one, that sometimes it might be necessary to have these particularly big meaty issues brought to the House of Commons for every single Member of Parliament to have an opportunity to contribute. I know in DLs that Members of Parliament, through the chair, can make a contribution but I have never ever been to one where I have seen a whole host of Members of Parliament rushing in urging to make a contribution at a delegated legislation committee.

Q29 **Mr William Wragg:** My final point is that they can do, though, can't they?

Pete Wishart: Yes, they can, but I have never seen it done.

Q30 **Bob Blackman:** Can I push you a bit further on the scrutiny role? In your preferred option would these subcommittees do that scrutiny role or would they tease out the issues that then could be looked at by someone else? I want to clarify your suggestion.

Pete Wishart: My understanding from what the Hansard Society was suggesting about this model is that the sift and scrutiny committee would have 50 members appointed and the Members of the other House, which I think—

Q31 **Bob Blackman:** Sorry, I understand that but—

Pete Wishart: Then the subcommittees would be of seven to nine members. I would suggest that is possibly a bit small and might restrict the availability of Members from smaller parties being part of it. Having 12 years experience of being a party of six Members, I know how difficult it was to get them on committees. I would suggest that if we were going to progress with that particular model they could be bigger. The smaller subcommittees would have an opportunity to look in depth at some of the issues of some of the delegated legislation to be considered and then



report back to the sifting scrutiny committee. I would be very surprised, given they were discharged to look at these particular issues, that a bigger sifting scrutiny committee would then overturn or reject their views.

Q32 **Bob Blackman:** Obviously that could take some time. Do you have a view about how long that process would be compared to the current process?

Pete Wishart: I don't have a view about all that. I think it would have to be led by just how meaty and important and significant some of these issues that they are considering would be. I don't know if it would be wise to be prescriptive. Obviously all of this is going to have to be done in a reasonably short time and there is going to be a lot of work to be considered so I think it is imperative to get things done timely, but I don't know how prescriptive one could be in order to try to ensure that work discharged could be done in a timely manner.

Q33 **Chair:** Pete, thank you very much, as ever.

Pete Wishart: Thank you. That was short and swift today.

Chair: Do you feel that you have unburdened yourself?

Pete Wishart: If the Committee is happy, I am happy, Chair, as always.

Chair: And you have remained perfectly within time. In fact, we have robbed you of a minute. Thank you very much for coming.

Examination of witnesses

Witnesses: Rt Hon Andrea Leadsom MP and Mr Steve Baker MP.

Q34 **Chair:** It is not often we have two Ministers here. How exciting, the Leader of the House and a colleague from DExEU—well done! Leader, I am just going to throw myself into this. On scrutiny of SIs, should we have a House sifting committee to look at the SIs coming out of the European Union (Withdrawal) Bill? If you agree that there might be some merit in such an approach, how would you see that sifting committee being constructed? You may think it is an appalling idea.

Andrea Leadsom: Thank you very much for having us. We are totally delighted to be here and this is an incredibly important piece of legislation at a very important time for our nation. As we have said all the way through, as I have said all the way through, we are listening very carefully to the suggestions and ideas from right across Parliament.

What I would like to put to you, first, Mr Walker, is that we do recognise that in the past secondary legislation has not been as well managed as it could be. One of the things that I am doing specifically in this Parliament, because of the amount of secondary legislation that we are going to have to get through before we leave the EU, is to better control and oversee all secondary legislation. The Cabinet Committee that I chair, the



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Parliamentary Business and Legislation Committee, is now overseeing secondary legislation as well. It is looking to ensure that it is properly timetabled, the quality is improved, the explanatory memoranda are better, there is more of a rational flow of business for Parliament to have to deal with, to try to improve the service that Parliament gets for secondary legislation. I think that is going to upgrade what we can do and that is something that we will be listening very carefully to feedback on and very keen to make progress on.

As to a sifting committee, Steve, do you want to answer that question more directly?

Mr Baker: By all means. The crux of the matter, Mr Walker, is time. It is imperative that we deliver a functioning statute book on exit day and I hope and believe that all parliamentarians would agree with us on that point. There are some other matters of fact, the parliamentary arithmetic and the amendments that are done, and therefore it is incumbent on us to think extremely carefully about the consequences of any amendments. When we look to a sifting committee, clearly Parliament has expressed a strong view and we have listened very carefully to parliamentarians in what they have said and what has been proposed, but we are very mindful of the imperative to deliver a functioning statute book on time.

Q35 **Chair:** The sifting committee I have rattling around in my brain would have an upward direction and a downward direction, so it would not just be taking everything and increasing the level of scrutiny but you could also look at some affirmatives and decide in the committee that, "These don't need to be affirmatives, they can be negatives. They are non-contentious but here is a negative we have discovered that probably demands further scrutiny." It would not be a one-way street.

The other thing I think is important is it is accepted that the SIs coming out of the European Union (Withdrawal) Bill may be quite widely drawn and have serious policy implications potentially. Lord Justice Donaldson pointed out, and this is a fact I think, that the wider an SI the greater the chance it could end up in a court of law. I understand judges do not want to get involved in interpreting this, but surely if the House of Commons had a sifting committee that looked at SIs and tagged them to say that they had reviewed them and felt comfortable with them going under a certain heading, that would give the Government greater protection from the courts.

Mr Baker: I think the point is very well made and it is certainly something that we can bear in mind. If I may, Mr Walker, I will just pick up on the point you made about policy. I think it does bear repeating that this Bill is about certainty, continuity and control and that we are committed to making no major policy changes beyond those that are necessary to correct the deficiencies that would otherwise arise. Under the Bill we may not make changes to legislation just because Ministers do not like the law and we have committed to bringing forward, as you know, standalone Bills that do make policy changes that will go through



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as primary legislation. You will know that the Delegated Powers Memorandum includes some examples of what might be done.

On the point about policy, you are right that in some areas there may be some amendments to policy that people would wish to debate because there is scope for argument but nevertheless, even in such circumstances, the purpose of any delegated legislation would be only to make the law work appropriately in the context of our exit from the EU.

Q36 Mr Ranil Jayawardena: Could I ask you both, whoever would rather answer, about two points of fact? The first is that the Government have previously estimated between 800 and 1,000 SIs through the Withdrawal Bill. Is that currently the volume you remain fixed at?

Mr Baker: Yes.

Q37 Mr Ranil Jayawardena: On that basis, I think it is very clear that to deliver the legislation that we need by March 2019 we do need those wider powers.

Could I ask you another point of fact before I go into my substantive question? In light of the powers that you want, some have claimed that the Government have not proposed any new safeguards, but my understanding—perhaps you can assure the Committee and our voters—is that the Government will not exercise powers to impose taxation, for example, or make retrospective provision. Could you confirm those points to us?

Mr Baker: There is no intention to make retrospective provision. In relation to taxation, the power to circumscribe is in the Bill. For example, fees and charges appear in there and in relation to taxation there are certain powers to allow us to continue to collect monies that the EU would require us to collect during the last days of our membership and then to pay those forward. The powers on taxation are tightly circumscribed in the Bill.

Q38 Mr Ranil Jayawardena: Leader, perhaps I could ask you. You mentioned that the Government were listening to the various suggestions that were being put forward but what consideration did the Government give to an enhanced scrutiny mechanism?

Andrea Leadsom: For a start, as I pointed out, we are trying to improve and upgrade the management of secondary legislation, including appointing a Minister responsible for secondary legislation in each Department and a senior civil servant whose job will be to oversee that so that we can make sure that Parliament gets better notification of the volume and type of legislation that is coming forward. We are still working through the proposals made through amendments to the European Union (Withdrawal) Bill and the Department will be responding to those once we get into the committee stages.

Q39 Mr Ranil Jayawardena: Mr Baker, we have already seen Members of



the other place voting against Brexit legislation. Are you worried that a sifting committee, whether joint with the Lords or one in each House, would become an anti-Brexit bazooka for those who want to thwart the will of the British people?

Mr Baker: Mr Jayawardena, I think you make your own point, with great eloquence, if I may so. I do not really want to be on that territory. We must respect both Houses and both Houses will have their own concerns that we will need to listen to very carefully, but it is clear that the public have voted to leave the European Union and we are now seeking to carry that through with this legislation.

Q40 **Mr Ranil Jayawardena:** What assessment have you made of the risk that these broad powers, and potentially any sifting committee, could lead to interpretation from the courts and that being the barrier to the implementation of the legislation we need by exit day?

Andrea Leadsom: I think that can work both ways. There has been a lot of discussion about how putting procedures into legislation then does invite court approval or otherwise over matters that are traditionally for Parliament to decide through its own standing orders. That is one challenge. Equally, others will argue that if, for example, we have a negative SI that can be interpreted by the courts as should have been an affirmative SI under our own triggers then that too could be assessed by the courts. These are the sorts of arguments, as you quite rightly point out. At the moment we are still considering those issues but I do want to assure the Committee that we are absolutely determined to give Parliament the proper appropriate scrutiny while bearing in mind, as Mr Baker says, the absolute imperative to have a statute book that is ready for the date of departure from the EU. It is an obvious obligation on the Government to make sure that the statute book works the day we leave the EU.

Q41 **Melanie Onn:** Are you at all concerned—we must have a statute book that is fit for purpose when we have left—that there may well be unintended consequences that, particularly through negative SIs, we may be losing critical areas of legislation? Do you think that what we will have in place will be sufficient to make sure that we do not have any unintended consequences that we would have to go back and rectify later?

Andrea Leadsom: I think what you are suggesting is that there may be negative SIs that are laid that then have to be amended?

Melanie Onn: Yes, if they are important. We have just been having a discussion that hopefully the negative SIs would not be of critical relevance requiring such scrutiny as we would expect of the affirmative ones. Are you concerned at all that some may find their way into the negative arena that ought not to be there?

Andrea Leadsom: What is very important, and Mr Baker will come on to that in a moment, is that we are very clear that a great number of the



changes needed to make the statute book ready are tweaks. They are changes to wording, they are relatively minor issues that it would not be necessary for the House to need to positively debate under an affirmative SI. However, what Mr Baker might like to comment on is what those triggers are. To be clear, Mr Walker, as you well know, the Statutory Instruments Act of 1946 set out the basis for our SI scrutiny a very long time ago. This House has made amendments to that over the years but essentially this is a very tried and tested method of scrutiny that we believe is entirely appropriate to use for much of our Brexit legislation. I do not think that there are unique difficulties, as you seem to be suggesting, but perhaps Mr Baker can clarify with regards to the Withdrawal Bill.

Mr Baker: The Departments will be working through that matter particularly carefully, but if I could draw your attention—it is an example within a wider one—to something that might be considered for a negative procedure, “In paragraph 1, for ‘agency’ substitute ‘executive’ and in paragraph 2 omit ‘harmonised’, for ‘commission’ substitute ‘Secretary of State’ and for ‘agency’ substitute ‘executive’.” These are the sorts of things that I think objectively we might call tidying-up exercises.

If I may touch on the triggers in schedule 7 under which we would have to go to the affirmative if a statutory instrument establishes a public authority, provides for a function to be exercised instead by the UK instead of the EU, provides for any function of an EU entity or public authority in a member state of making an instrument of a legislative character to be exercisable instead by a public authority, fees and so on, if we were to create or widen the scope of a criminal offence, or if we created or amended a power to legislate. Those are the triggers. I am confident that Departments will be able to go through the legislation that they need to make and distinguish between these two characters for change.

Q42 **Mr Peter Bone:** That is exactly the point. We have two different Ministers here. We have the departmental Minister who is absolutely sure that he has got it right and really Parliament should just pass it all because they know best and the Leader of House protects the scrutiny of business. Those two things are not always compatible. As Mr Baker said, his Department will know which is a negative and which is an affirmative. I am afraid with this legislation the Government are asking Parliament to trust them a lot on it and it seems to me it is not unreasonable to have a committee of the House decide what is affirmative and what is negative. I very much appreciate that the Leader of the House has put off the debate next week of the European Union (Withdrawal) Bill to consider amendments, and that has been reported on the BBC today, and that sort of listening is very helpful. I would urge the Government to come fairly quickly up to say that it is in favour of a sifting committee, that it does not want to keep all this control to itself. I will go to the Leader first and then Mr Baker can tell me I am wrong.



Andrea Leadsom: I am delighted to be discussing the matter of a committee of the whole House again with you, Mr Bone. As I think I have set out, there are very well tried and tested procedures and the Government are indeed looking very carefully at whether there are extra levels of scrutiny that are necessary for the European Union (Withdrawal) Bill. The statutory instrument scrutiny methods are very well established, very clearly set out. I would be very happy to go through them but I am quite sure you know them even better than I do.

Q43 **Mr Peter Bone:** I served on that committee for a number of years and one of the things I put to a previous witness is why don't we just expand that excellent committee to make the additional thing of whether it should be a negative or affirmative. Other people have a different opinion but it seems to me that it is a very simple, straightforward matter.

Mr Baker: If I may, Mr Bone, I will come back to the crux of the matter that I raised earlier, and that is the imperative to deliver a functioning statute book on exit day. I hope you won't mind me saying, Mr Bone, that you and I together have waged certain campaigns to assert the supremacy of Parliament and I am not aware of my views changing on the importance of parliamentary democracy and the rule of law. But if I may say so very gently, I am conscious I have become a Minister and, as a member of the Government, I do not want the Government to be directing the House on how it should arrange its committees. I think there are some sensitivities around that area that we must bear in mind even as we go through this process.

I would just reinforce that, as you know, the Bill does use existing well established processes for scrutiny. There is no question of any of these statutory instruments going through in private, which has been suggested by some groups and there is no question of that. We have talked about the triggers. The heart of this is the balance between scrutiny, which the House finds appropriate, and this imperative to deliver with timeliness, with flexibility and in particular bearing in mind with some of the powers the fact that we currently do not know what we will need to implement, particularly in relation to the withdrawal agreement because it remains to be negotiated.

Q44 **Chair:** The current SI system has not gone uncriticised by this Committee, so it is not an entire defence to say that it is a well worn path, because it is a pretty rocky path with a few puddles in it.

Mr Baker: If I may say so, Mr Walker, at the despatch box at my first go at questions I think I said I was invigorated that there was now such attention paid to statutory instruments. I have not done the exercise but I think if someone were to go through the record they would find that I spoke in statutory instrument committees much more often than is usual because I have always taken my duty to scrutinise secondary legislation seriously. I have a great deal of sympathy but I do come back to the fact that this is a historic Bill with an imperative to meet a deadline.



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Q45 **Helen Goodman:** I would like to ask the Leader of House whether in her attempt to improve the management of secondary legislation she is going to offer the House explanatory memoranda on all the SIs?

Andrea Leadsom: That is indeed the plan. One of the absolutely core functions of improving the secondary legislation is to improve the quality, accuracy and timeliness of explanatory memoranda, as I say to the point that we now have a Minister responsible for secondary legislation in each Department and also a senior responsible civil servant. We are really cranking up a gear and I do hope that this Committee and others will notice the difference. I think the management is going to be significantly better than it has been in the past.

Q46 **Helen Goodman:** In future, will explanatory memoranda make it clear whether or not there is a straightforward translation of the law or whether it is doing what Mr Baker was describing, correcting a deficiency?

Andrea Leadsom: Yes. In terms of Brexit legislation it is absolutely the intention to make very clear exactly what the law is seeking to achieve.

Q47 **Helen Goodman:** Good. We are starting well, so I am hoping we are going to get some more positive responses from Mr Baker.

Mr Baker: We have committed that explanatory memoranda will do three things: to explain what any relevant EU law did before exit day, to explain what is being changed or done and why, and to include a statement that the Minister considers that the instrument does no more than what is appropriate.

Q48 **Helen Goodman:** That was not actually what I asked, was it? Appropriate is not the same as necessary, as you know, Mr Baker, and nor is it the same as saying whether there is a substantive change, is it?

Mr Baker: As we know, these matters will come forward to the House for scrutiny in accordance with the triggers and the House would have the opportunity to call out such things but we are all going to be acutely conscious of the level of scrutiny. As you said, Mr Walker, we have an unusual number of people here today. We are acutely aware of the level of scrutiny that all this legislation will face. We all here know that even given the criticisms that have been made of the secondary legislation process, it is all a matter of public record.

Q49 **Helen Goodman:** One of the powers that the Bill, for which your Department is responsible, has put forward is the power to set the exit date. That is correct, isn't it?

Mr Baker: That is correct.

Q50 **Helen Goodman:** So why are you under such time constraints?

Mr Baker: It is just a matter of fact that exit day could be extended by mutual agreement and so the Bill reflects that fact but the Government—

Q51 **Helen Goodman:** Were it to be the case that the statute book was not in



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the good order that we all agree it needs to be on exit date, you could set an exit date where you were confident that the statute book was in good order?

Mr Baker: The Government have no intention of changing the exit day or extending exit day.

Q52 **Helen Goodman:** What do you mean changing the exit day?

Mr Baker: The exit day is 29 March 2019.

Q53 **Helen Goodman:** Sorry, I thought the Bill set the exit date.

Mr Baker: Under treaty law, as you know, we triggered article 50 and so we will exit from the jurisdiction of the treaties on that day but what we have—

Q54 **Helen Goodman:** How can you be proposing to take this power then if it is already sorted out?

Mr Baker: As a matter of treaty law, it is possible by mutual agreement to extend that date. It just reflects the facts not the intention. I think it is worth saying that we are well aware that there is pressure to put the exit day on the face of the Bill from multiple sides of the argument and it is something that we are considering the implications of very carefully.

Chair: One more question because we are up against time, Helen, and there are others that want to come in. It is nice to see two former members of the Treasury Select Committee going toe to toe. What a joy for us all here.

Mr Baker: Well, perhaps three.

Q55 **Helen Goodman:** One of the things that Mr Baker said in his opening remarks was that he wanted certainty, and we understand that. He also said he wanted control and I was not quite clear what he meant by control. Control for the Executive? Control for Parliament? What exactly did you have in mind, Mr Baker?

Mr Baker: As you will know, the referendum campaign was largely fought on taking back control to Parliament and that is what we intend to deliver but the purpose of this Bill is to correct the statute book, making only such policy changes as are appropriate to ensure the proper functioning of the law on exit day so that people face, insofar as it is possible, the same law the day after we leave as they faced the day before. For substantive changes in policy we will bring forward primary legislation in the usual way.

Q56 **Mr Peter Bone:** I wanted to make sure that the Minister is absolutely clear on this point. If the exit date cannot be later than 29 March, why don't we say it? The truth of the matter is the Minister knows it can be because the Government and the EU could agree to extend negotiations. Would the Minister like to say here and now on the record that there is no chance whatsoever that the date will be extended past 29 March 2019?



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Mr Baker: Mr Bone, you and I both know what the treaties say and it could be by mutual agreement that the date changed, but it is also a matter of record that you and I not only campaigned for this result and this exit but at some points we competed with one another to do so.

Mr Peter Bone: And you won.

Mr Baker: I can assure you I am as committed to smoothly and successfully leaving the European Union in a way that works for the whole country as anyone. At the moment the Bill reflects the position under treaty law, but your point is, of course, well made and heard.

Q57 **David Linden:** You have mentioned that time is of the essence and we must rush this process. I am a new Member of the House although I have not been unacquainted with the rules and conventions of the House. Last Wednesday the Government presented the Nuclear Safeguards Bill and I think they already had its second reading scheduled much quicker than would normally be the convention. Can I ask the Leader of the House is that something that is going to happen more often, that that kind of breach will happen—because there is numerous Brexit legislation coming before the House—or is that a one-off?

Andrea Leadsom: First of all, it is a great pleasure to meet you. I don't think we have exchanged words before and it is very welcome. In terms of the Brexit legislation, it has been announced in the Queen's Speech that there will be a number of Brexit Bills. Some of them are in there and it is possible that there will be others that are not yet announced. We will always give as much notice as is normal to the House of the introduction of any brand new legislation, but I am sure you will be very aware that the Nuclear Safeguards Bill was discussed and was long anticipated, so I do not think it was a surprise to anyone.

Q58 **David Linden:** There has been a lot of discussion this week about what the consequences would be of a no deal on the statutory instruments. Has that been built into the Department's thinking?

Mr Baker: I am sorry would you mind rephrasing that?

Q59 **David Linden:** There has been a discussion this week about what would happen in the event of a no deal. We have a huge number of statutory instruments. Where would that fit into that?

Mr Baker: Yes, of course. I was dubbed the Minister for No Deal, which is not strictly accurate. In a sense, I am the Minister for All Possible Deals. What the director in my Department is responsible for is policy and delivery co-ordination across all of Government and we have a clear understanding of what needs to be done in different scenarios. In some cases that understanding is developing, as I expect you would realise, particularly as the negotiations proceed. Departments will be factoring into their plans as a matter of course now what they would need do in secondary legislation in the unlikely event that we were not able to secure an arrangement with the European Union. I think I should take



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the opportunity, Mr Walker, to say we are aiming to secure both the withdrawal agreement and the future relationship with the agreement in accordance with the Florence speech.

Q60 **David Linden:** One final question, if I may, Mr Chairman, because I think it would be remiss of me not to ask, with the Leader of the House here. Mr Speaker gave a speech to the Hansard Society last week, and the establishment of a House Business Committee was discussed. The House has obviously voted for that. Where are we with that?

Andrea Leadsom: As I have been very clear, I will always listen to suggestions. I think that that idea definitely has some merit. I think there are very big question marks about it. It does require a lot of careful thought because, as we have discussed a number of times already in this Parliament, it is vital that Government are able to govern and Parliament is able to scrutinise and those two things need to be both given equal weight otherwise we just grind to a halt. The question for such a proposal would be whether it would be compatible with that. We do have long established procedures for agreeing the business and timetabling of the House across the parties, which has worked well for many years. I know a number of colleagues would like to change that. It is always of interest to see new proposals but I would not say I am enormously in favour of it.

Q61 **David Linden:** As a new Member, having come into the House these last three or four months, I think there is definitely a case for reform because in some cases it has managed to grind to a halt and I am not necessarily sure that is on the part of Parliament; it is more the Government.

Chair: Right, well, that has cleared the gallery.

Andrea Leadsom: You have definitely upset everybody.

Q62 **Mr William Wragg:** Clearly a great deal of the attention of the nation is wrapped up in the interest in terms of secondary legislation, which is refreshing and our constituents are experts with their carefully crafted e-mails on all matters to do with secondary legislation, but still skulking in the shadows of all of this is tertiary legislation, which was almost a new concept to me. Would both the Minister and the Leader of the House care to comment on any safeguards that there may need to be if tertiary legislation should indeed prevent Members of Parliament taking back control?

Mr Baker: That is a very good question, Mr Wragg. It is our intention, as you know, to make sure that Parliament determines the law in the United Kingdom and I think we can undertake to take the steps necessary to ensure that legislation is scrutinised.

Andrea Leadsom: It is of long standing that powers are given to bodies who then themselves have powers, so your concept is of tertiary legislation where there is not direct parliamentary oversight. That is another longstanding parliamentary procedure through successive Governments over many years. It is something that is always worth



looking at, and particularly in the context of leaving the EU, what steps we can take to improve on parliamentary oversight and so on, but at the same time, as I think Mr Baker and I both made clear, it is absolutely vital, bearing in mind the time constraints and the volume of work that needs to be done to have an orderly departure from the EU, that we don't start radically changing things that could then mean we did not have an orderly exit from the EU.

Mr Baker: Sorry to come back in. I recall sitting on a statutory instrument committee that discussed chemical substances, so-called legal highs, and as I said in a speech on that statutory instrument, it was an entirely impenetrable subject. I am just slightly aware, in talking about tertiary legislation, that some rules and regulations do merit specialist technical expertise rather than coming through the full process of parliamentary scrutiny.

Q63 **Mr William Wragg:** Clearly it is not probably the best avenue to seek to create committees on the face of legislation, so is it the Government's intention to use the usual channels and all that to have discussions about how standing orders might be amended?

Andrea Leadsom: As I mentioned earlier, one of the challenges of putting parliamentary proceedings on to the face of a Bill is that it then becomes open for the courts to challenge or to have an opinion on it and it is not necessarily something that Parliament would want. Therein lies the question mark over whether that would be a sensible way for Parliament to go or whether we should either continue to review our standing orders as a matter for Parliament itself, which is what traditionally has been the case, or to continue through usual channels as has also been the case. If I can reiterate, we are listening carefully to proposals on how we can improve that level of scrutiny.

Q64 **Melanie Onn:** The Leader mentioned that there would be an increase in workload and I think estimates previously have been 800 to 1,000 statutory instruments. Is there any update on those figures at all?

Andrea Leadsom: The Repeal Bill White Paper estimated—very much an estimate—800 to 1,000 statutory instruments. Obviously we don't know what we don't know yet because the negotiations are not finalised, so it is perfectly possible that the final number differs from that. As I have made clear, that is 800 to 1,000 Brexit SIs and in addition to that there will be the non-Brexit secondary legislation. The workload in itself is not necessarily higher than previous Parliaments have faced. It has been quite common for one year's session to have more than 1,000 statutory instruments, so for a two-year session to have 2,000 is not of itself extraordinary. But what we anticipate is that the level of scrutiny and the level of interest may be quite significant. It is not the volume of SIs but it is the level of interest and the level of scrutiny that we anticipate for some of those. It is very difficult to give a completely accurate assessment of the number of SIs because some of them may pop up towards the end once we are much further down the negotiations.



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Mr Baker: The estimate is being refined all the time as we work with Departments. We will reach a point where we are able to give more detail on what we expect but I am not expecting any dramatic change in those numbers.

Q65 **Melanie Onn:** Are you expecting it to come all in one steady stream through the course of the two years or are we going to get a system that is clogged up?

Andrea Leadsom: As I have tried to set out, we are very much managing actively through the same system that we manage the flow of primary legislation. The Parliamentary Business and Legislation Committee, which is a Cabinet Committee that I chair, is now also looking at all secondary legislation, precisely to avoid what you are talking about, which is clogging up the system or having a great big bunch of statutory instruments all in one go, to smooth the timetable and to ensure that the quality and the drafting of the explanatory memoranda are all of the right quality, to try to make it much easier and to facilitate better parliamentary scrutiny.

Q66 **Chair:** Do you see Parliament maybe having to sit later or longer?

Andrea Leadsom: That is very difficult to assess at this point. As you know, Mr Walker, we have committed to eight full days on the floor of the House for committee stage of the European Union (Withdrawal) Bill with eight protected hours on each of those days. It clearly looks as if we may well sit late on those days if there are urgent questions or statements and so on plus the normal departmental questions. It is likely that due to the demands of Parliament there may be late sitting days but there is always a balance between not wanting to overload the system but have the proper level of scrutiny to make sure that we make this legislation as good as it possibly can be. Do you want to add to that?

Mr Baker: Yes, if I may, Mr Walker. Obviously the imperative is to deliver the statute book and I think that part of the answer to your question is bound up in the condition of the Bill after it has passed through both Houses.

Q67 **Chair:** When will the Government be in a position to open up discussions with the broader House as to any additional levels of scrutiny that will be brought into the SI process?

Mr Baker: I have had meetings and I will continue to have further such meetings and by the time we reach committee stage I hope that a consensus would be at least close to emerging.

Chair: You will never ensure that everyone is happy. It is important to ensure that about 80% of Members are happy and then we will be in a good place.

Q68 **Helen Goodman:** As you know, the majority of the statutory instruments that come through will be using the negative resolution



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procedure, because schedule 7 carves out the particular things that will use affirmative but that is not most of them. Most of them will be negative. In the case of negative resolution procedure, there is no facility whatsoever for the House to secure either a debate or a vote. Do you think that is satisfactory?

Andrea Leadsom: With negative SIs it is possible for them to be made and then prayed against and then either for Government time or Opposition time to be given on the floor of the House for a debate on them.

Q69 **Helen Goodman:** Sorry, that is not true. The Government can give time but Parliament cannot make time, can it? If it is an Opposition day debate, as the Government demonstrated a fortnight ago, the Government do not need to take part in a vote, does they? In fact, Parliament cannot force a vote on an SI. It can have a general debate on the matter of the SI but it cannot force a vote on the SI, can it?

Andrea Leadsom: Within the 40 days praying period a debate on the House, if it succeeds, then that statutory instrument would be annulled.

Q70 **Helen Goodman:** What do you mean if it succeeds?

Andrea Leadsom: If the Opposition were to hold a debate on the floor of the House and to win the vote that that statutory instrument should be annulled, then it would be annulled under parliamentary convention.

Q71 **Helen Goodman:** But the Opposition cannot ensure that there is a debate on a negative resolution statutory instrument, can it?

Andrea Leadsom: The convention is that through the cross-party discussion if a negative statutory instrument is prayed against through that discussion, through the parties, through the usual, there would be time given for a debate or the Opposition can use one of its own Opposition days to hold a debate.

Q72 **Helen Goodman:** But it is the Government that grant Opposition days, isn't it? The Opposition can't demand them. The Government grant them.

Andrea Leadsom: Opposition days are set out in standing orders but in addition the Government have always provided Opposition day debates.

Q73 **Helen Goodman:** What happened on higher education tuition fees then? Don't go through the history, but it is an example.

Andrea Leadsom: Well, you asked me what happened.

Helen Goodman: Surely it is an example of Parliament not being able to secure 40 days.

Andrea Leadsom: No, it is not an example because—

Helen Goodman: It is an example. We had no Opposition days within the 40 days after the resolution had been laid.



Andrea Leadsom: Would you like me to answer the question?

Helen Goodman: Yes.

Chair: Shall we just lower the temperature slightly?

Andrea Leadsom: The statutory instrument was prayed against and there were two or three Opposition day debates during the 40-day period. Government time was offered and unfortunately it clashed, which was unforeseen and clearly not intentional, with the vote on calling a general election. That was a coincidence and, therefore, that debate in Government time was not held but there were two or three Opposition days during which a debate could have been had within that 40-day praying period.

Q74 **Mr Peter Bone:** Leader, if we had a sifting committee that would decide whether it is affirmative or negative and would not really have to worry too much about this point because the House would have decided rather than the Government having decided. That is a groundswell for some sort of committee. That would get rid of that problem, would it not?

Andrea Leadsom: Potentially, Mr Bone, but not necessarily. I do hear your further point. Thank you.

Mr Baker: If I may, Mr Walker, it is our view that most controversial SIs such as they will be, will be subject to the affirmative procedure.

Chair: It may well be that a sifting committee would find itself 100% in agreement with you throughout the whole process and would be able to tag it, "We accept the Government's memorandum. This is a negative". I don't think you necessarily have to see the sifting committee as being hostile to the Government but it will provide the House with a level of reassurance and the Government that everybody is on board with what is going on. I think given the political sensitivities around the European Union (Withdrawal) Bill and the concerns, it would be a good thing for all of us to have a sifting committee, as Mr Bone has suggested.

Q75 **Mr Christopher Chope:** This morning I was at the Exiting the European Union Select Committee and among the people giving evidence were some lawyers. They were not too fussed, I think it would be fair to say, about the powers that are being taken in this Bill but they said ultimately it is all going to depend on trust and how important trust is in this process. I have been reassured by some of the points that the Leader has just made in relation to what happened to the SI. What assurance can we have that if, for example, there is an SI that is put down as a negative one and there is a lot of strength of feeling about it, that the Government will not use the rulebook but will try to, in the spirit of creating and generating trust, facilitate debates on the issues about which Parliament is concerned, rather than saying, "You have missed your chance" or "the rules say this"?

Mr Baker: Mr Chope, what I would go back to is what I said a moment ago, that we are confident that controversial statutory instruments will go



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through the affirmative procedure. We know that the political circumstances today are a matter of fact, the arithmetic is a matter of fact, the level of scrutiny of this legislation is a matter of fact. On the point of trust, I think there is a danger of people misinterpreting what is meant. All of these instruments will be on the record and we will conduct ourselves within the law as specified in the Bill at the point that it receives Royal Assent. I don't think it requires any trust to see those instruments on the record and know what we have done and, as ever in a democracy, we will answer for it.

Q76 Chair: I am going to call a halt to this because that was a robust and mostly good natured session of questioning. I thank the Leader of the House and the Minister for their responses. It was a fine performance. I don't think many boundaries were hit but there was a very straight bat played and you are both to be congratulated for that. Without further ado, I will bring this to the end, but can I say to the Leader we would love to see you at some stage in the future to discuss more wide-ranging issues if we could find a date in your diary to do that?

Andrea Leadsom: Of course. I would be delighted. Thank you.