Written evidence submitted by the National Secular Society to the Joint Committee on Human Rights (JCHR) on the human rights implications of the EU (Withdrawal) Bill.

20 November 2017

Summary of recommendations

1. **EU directives, including their preambles, should be incorporated into UK law.**
2. **Legislation not compliment with (current) EU directives should continue to be able to be read across, including by the courts, and in effect read subject to the directives.**
3. **Human rights should be protected from erosion by simple parliamentary majorities, e.g. by requiring a super majority and/or a Supreme Court declaration that any change does not remove or dilute human rights.**
4. **The 'Henry VIII' powers assumed by the Government to introduce law by statutory instruments should be restricted where they could lead to a depletion of human rights. The positive and negative resolution procedures should be radically improved to enable effective scrutiny and amendment, or *ad hoc* procedures established.**
5. **Radical overhaul of approval process for statutory instruments**
6. **Alternatives should be found to replicate as realistically as possible the independent monitoring role currently fulfilled by EU agencies and mandatory reporting requirements. The EHRC would seem an ideal independent body to oversee human rights.**
7. **The retention in UK law of the EU Charter of Fundamental Rights**

About the National Secular Society

8. The National Secular Society is a party-politically neutral organisation which works for the separation of religion and state, and for equal respect for everyone's human rights so that no one is either advantaged or disadvantaged on account of their beliefs.

9. We regard secularism as an essential feature of a fair and open society, in which people of all faiths and none can engage with society on the basis of equal citizenship. While we take no position for or against Brexit, we seek to ensure that Brexit does not result in a deterioration of human rights and equal citizenship. We therefore welcome this opportunity to make a submission to the Joint Committee.

10. We have been in Special Consultative status with the United Nations Economic and Social Council since 2016.

Our observations and recommendations

EU directives (including preambles) and 'reading across'

11. We recommend that EU Directives, including their preambles, as at the time of our exiting the EU, should be incorporated into UK law and that UK courts should take them into account, including in 'reading across' non-directive-compliant legislation. The degree to which the directives should be binding will need to be decided but we would hope this should be as much as possible. We understand that the preambles are important in informing courts of the overriding intent of the directives and the direction of travel.

12. As an example we cite the Employment Equality Directive 2000/78/EC. Without that being written into law we cannot see how the discrimination protections it confers can be preserved.

13. A particular problem that will arise unless the directives are not incorporated will be that legislation not compliant with a directive cannot be read across with the directive (as it now can be) and in effect the non-compliant element ignored. This would be deeply regressive. HMG have argued against calls for the amendment of non-compliant legislation (including by the Commission on the example given below) because it can (currently) be read across in this way.

14. An example non-compliant legislation is s.60 School Standards and Framework Act 1998. S.60(5) licenses, for example, without any reference to proportionality or occupational requirements, that:

> *"…preference may be given, in connection with the appointment, remuneration or promotion of teachers at the school, to persons:*
>
> *(i) whose religious opinions are in accordance with the tenets of the religion or religious denomination specified in relation to the school under section 69(4), or*
>
> *(ii) who attend religious worship in accordance with those tenets…"*

15. Lucy Vickers, Professor of Law, Oxford Brookes University, who also advises the European Commission, states in her paper *Religion and Belief Discrimination and the Employment of Teachers in Faith Schools* (2009) at pages 18-19 "The protection of the religious rights of staff in schools in the UK would be improved if proportionality were to be required and such a requirement could bring the SSFA back into line with the EU Equality Directive."

16. In response to a series of PQs from Graham Allen MP, the Department for Education has implied that the School Standards and Framework Act complies with the Directive. But that is only true to the extent that the 1988 Act is read in accordance with the Directive.

Preventing the removal/reduction of human rights by a simple majority

17. We recommend a mechanism to embody human rights and protect them from erosion by simple parliamentary majorities. Possibilities include requiring a super majority of say ⅔ or ¾, and/or that no changes could be made without a declaration from the Supreme Court that human rights were not removed or diluted.

18. Most countries have written constitutions which are difficult to change. Without one, the UK is highly vulnerable to rights being stripped away by a simple majority. An unscrupulous Government could even schedule rights-stripping legislation for debate on a Friday when few parliamentarians attend, and the numbers needed to secure a majority can be minimal. A further safeguard could be that any diminution of rights would also require a minimum proportion of members voting e.g. requiring a (super) majority of the membership of the House, rather than simply of those present.

Preventing the removal/reduction of human rights by statutory instrument

19. The EU (Withdrawal) Bill will introduce so called 'Henry VIII powers' to enable Ministers amend primary legislation through statutory instruments – essential to adapting and importing EU law into domestic law within a manageable timeframe.

20. We recommend that an oversite mechanism is established, to ensure that these statutory instrument are not used to undermine fundamental human rights protections. Such mechanisms could include the Bill being amended to explicitly exclude the depletion of human rights protections from the scope of these powers, and/or an oversight committee could certify which legislation has a clear human rights impact and should not be subject to amendment by statutory instrument. The second approach could be more flexible, and reflect the reality that laws need not primarily address human rights to have significant human rights implications.

21. The above problems are hugely compounded by the almost total ineffectiveness of the positive and negative resolution procedures which are supposed to allow secondary legislation to be challenged. In practice this is almost unknown. Furthermore there is no ability to amend the statutory instruments, solely to accept or (in theory) reject them.

22. These procedures have been recognised as unfit for purpose but resolving them has not been a priority as statutory instruments have not been thought to be sufficiently important. This could not be said of the statutory instruments about to be tabled in connection with Brexit.

23. To help remedy the problem described in paragraph #19, we recommend an urgent overhaul of the positive and negative resolution procedures to enable proper scrutiny and amendments and/or a special procedure being set up to facilitate this at least for the Brexit-related Statutory Instrument at the very least those that could directly or indirectly deplete human rights protections.

24. Further dangers come from the transfer of powers to HMG from independent regulatory agencies such as the Fundamental Rights Agency, and the cessation of reporting requirements to external (currently EU) bodies. This is likely to result in the Government not holding itself to account as those agencies would have, and that problems and infractions which would have been revealed by such reports are not recognised or highlighted.

25. We recommend that a list of the agencies and reporting mechanisms be compiled, and that a thorough cross-party review mechanism be established as to how these can best be independently replicated, particularly for human rights. An obvious candidate for an independent scrutiny body would be the Equality and Human Rights Commission.

The Charter of Fundamental Rights

26. We deeply regret that the HMG have (through Clause 5(4) of the Bill) explicitly indicated that the Charter of Fundamental Rights will not be part of UK domestic law following Brexit. This is inconsistent with the stated aims of the Bill: to provide legal continuity and "not aim to make major changes to policy".

27. If HMG intends to replace or amend the Charter, thus establishing a comparable/improved means for UK citizens to hold their government accountable to basic human rights standards, then HMG should do so through primary legislation. Befitting the scrutiny demanded of such constitutionally significant changes.

28. Even with the political will to do so this could not be done in the short term, leaving a period of uncertainty over how legislation will be interpreted, and the degree to which fundamental rights protections will be read in.

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