

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's Submission to the Procedure Committee's Inquiry into 'Exiting the European Union: scrutiny of delegated legislation'

October 2018

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
<http://www.liberty-human-rights.org.uk/policy/>

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INTRODUCTION

1. Liberty urges the Procedure Committee – when taking oral evidence from Ministers at the Department for Exiting the European Union on the Government’s White Paper *Legislating for the Withdrawal Agreement* – to seek clarity on the following issues:
 - Whether the Government fully appreciates the extraordinary breadth of the delegated powers conferred on it under the EU (Withdrawal) Act 2018;
 - The Government’s justification for seeking to amend the EU (Withdrawal) Act so soon after it received Royal Assent;
 - What if any guarantee can the Government provide to ensure that the proposed amendment to the sunset clause provision in the EU (Withdrawal) Act does not set a precedent for repeated extension, thereby undermining the purpose of the clause;
 - In seeking to amend parts of the EU (Withdrawal) Act, will the Government consider increasing the degree of scrutiny applied to statutory instruments created under it?

2. Liberty has longstanding concerns about the use of delegated powers and in particular their use as part of the UK’s exit from the European Union (EU). Liberty was vocal about this during the passage of the EU (Withdrawal) Act 2018.¹ It was our view then as it is now that the extraordinarily wide powers conferred on Ministers to amend ‘retained EU law’ under the Act threaten rights and equality protections. This is in addition to clear concerns about the impact of such powers on the UK constitutional settlement and the sovereignty of Parliament.

3. The fact that the Act as passed contains such extraordinarily wide powers should not mean that we consider this the ‘new normal’. There is a worrying trend in recent Government-proposed legislation – including the EU (Withdrawal) Bill and the Data Protection Bill – of seizing broad law-making powers from Parliament and granting Ministers the ability to amend primary legislation for a range of reasons.

4. The undeniable complexity of legislating for the United Kingdom’s (UK) departure from the EU – and indeed the on-going uncertainty surrounding the outcome of negotiations – should not and cannot be used to gloss over the threat faced to both

¹ See for example, Liberty’s Written Submissions to the House of Lords Constitution Committee

fundamental rights and the UK constitutional settlement by the proliferation of such unprecedented delegated powers. Sight cannot be lost of the fact that under the Act as it stands, Ministers have the power to amend domestic primary legislation like the Equality Act 2010, the Modern Slavery Act 2015 and the Data Protection Act 2018 with little to no Parliamentary oversight.

5. Liberty firmly believes that this must be the backdrop against which the prospective EU (Withdrawal Agreement) Bill is approached. Of particular concern is the ease with which the Government is proposing to amend the EU (Withdrawal) Act. The Government's White Paper *Legislating for the Withdrawal Agreement* was published less than one month after the Act received Royal Assent. The sweeping nature of the delegated powers contained in the EU (Withdrawal) Act was acknowledged and much debated during the Act's passage. In seeking to amend that Act already the Government shows itself as lacking sufficient appreciation for the extraordinary nature of the powers granted by the Act.
6. The Government's proposed amendments to the EU (Withdrawal) Act must therefore be subjected to the highest levels of scrutiny. This is particularly so in relation to the amendment to the sunset on the correcting power at section 8 of the Act. The reason for this is that in seeking such an extension, the Government is asking for the extraordinarily broad powers in the Act to bite for even longer – further swelling executive power and undermining the democratic control of Parliament. Such an extraordinary request must not be granted lightly.

SIFTING BY THE EUROPEAN STATUTORY INSTRUMENTS COMMITTEE

7. The European Statutory Instruments Committee (ESIC) was established by the House of Commons to "sift" proposed negative instruments following the passing of the EU (Withdrawal) Act 2018.² Given the sheer volume of statutory instruments expected to be made dealing with the "deficiencies in retained EU law" it is welcome that a designated committee has been established.

² European Statutory Instruments Committee
<https://www.parliament.uk/business/committees/committees-a-z/commons-select/european-statutory-instruments/>.

8. However Liberty considers it a major flaw of the EU (Withdrawal) Act procedure that sifting committee recommendations are advisory, not binding.³ This puts the procedure out of line with previous legislation which has included powers of similar – though comparatively less sweeping – breadth and scope to the EU (Withdrawal) Act, for example the Legislative and Regulatory Reform Act 2006 and the Public Bodies Act 2011. Under these Acts, Parliament has made the exercise of those powers subject to a strengthened scrutiny procedure which obliges the government to accept the recommendation of the designated committee in each House and upgrade the scrutiny of a statutory instrument (SI).
9. The procedure under the EU (Withdrawal) Act however has the result that there is little stopping a Minister from ignoring an ESIC recommendation. This is highly concerning given the broad definition of ‘retained EU law’ under the Act and the threat this poses to domestic primary legislation as well as all EU laws that will be incorporated after exit day.
10. With these concerns in mind it is nevertheless in Liberty’s view both logical and necessary that any SIs made under the prospective EU (Withdrawal Agreement) Bill be subject to sifting by ESIC. Paragraph 71 of the White Paper states that the amended correcting powers in the EU (Withdrawal) Act would allow them to correct deficiencies arising from withdrawal *and* the end of the implementation period. These processes are clearly linked and it would not make sense for the sifting process to be undertaken by a different committee where one has been established for this designated purpose.

PARLIAMENTARY CONTROL

11. Liberty’s concerns over the insufficiency of the sifting procedure under the EU (Withdrawal) Act augment existing concerns around the inadequacy of scrutiny procedures for both negative and affirmative SIs in general. The proliferation of delegated powers has been criticised for many years and by diverse actors because of the threat it poses to Parliamentary sovereignty.⁴ In the context of the UK’s exit from the European Union this concern is even more acute. The sovereignty of

³ The new sifting procedure is set out in Schedule 7 of the EU (Withdrawal) Act.

⁴ See for example, The Rt. Hon Lord Judge, ‘Ceding Power to the Executive; the Resurrection of Henry VIII’, 12 April 2016, King’s College London (speech) <https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf>.

Parliament was a central theme of the Brexit referendum. The inadequacy of the current sifting procedure attacks the very principle of Parliamentary sovereignty.

12. The fundamental inadequacy of the current system for House of Commons scrutiny of delegated legislation has led experts to conclude that the scrutiny system is “unfit for purpose and in need of wholesale reform”.⁵ In short the current negative and affirmative process for scrutinising SIs simply does not provide the necessary amount of parliamentary control. The EU (Withdrawal) Act makes no mention of strengthened scrutiny procedures of which a number exist.⁶ The Government’s proposal to amend the EU (Withdrawal) Act therefore could serve as an opportunity to remedy this significant defect and strengthen the degree of scrutiny applied to the uniquely expansive powers under the Act.

TIME CONSTRAINTS

13. In seeking such unprecedented delegated powers under the EU (Withdrawal) Act the Government asked for a considerable amount of public trust. The sweeping powers conferred on Ministers by the Act have no modern comparator. To mitigate the real danger posed by the powers they were supposed to be strictly limited by a two-year sunset clause. The White Paper now proposes to amend section 8 of the Act so that the ‘correcting powers’ should be extended to sunset in December 2022. By proposing this amendment less than one month after the Act received Royal Assent the Government has already broken the public’s trust.
14. Liberty acknowledges the internal logic of the Government’s argument for extending the section 8 sunset clause in the White Paper.⁷ However any logic is undermined by the Government’s failure to raise this as a possibility at any point during the 18-month passage of the Act through Parliament. Sunset clauses are included in legislation when it is felt that Parliament should have the chance to decide on the merits of a provision again after a fixed period. To propose the extension of the section 8 sunset clause so soon after the passage of the Bill suggests that the Government does not

⁵ Hansard Society, ‘Taking Back Control for Brexit and Beyond: Delegated Legislation, Parliamentary Scrutiny and the European Union (Withdrawal) Bill’ (September 2017) <https://www.hansardsociety.org.uk/publications/taking-back-control-for-brexit-and-beyond-delegated-legislation>.

⁶ As are seen in Acts including the Human Rights Act 1998, the Local Government Acts 1999 and 2000, the Legislative and Regulatory Reform Act 2006, the Public Bodies Act 2011 and the Localism Act 2011.

⁷ As set out in paragraphs 68-77 of the White Paper.

take seriously even the limited safeguards in place to keep its power in check as the UK prepares to the leave EU.

15. Liberty recommends that the Procedure Committee scrutinise closely the Government's justifications for this proposed extension. While there are important practical and technical questions to be asked about the constraints imposed by the exit timetable on the exercise of delegated powers there are equally important questions to be asked about whether the Government can be trusted to act in good faith with respect to the proposed extension to the section 8 sunset clause.
16. The purpose of the EU (Withdrawal) Act 2018 was to provide legal certainty over the UK's exit from the EU. A sunset clause which does not mean anything and can be extended at the whim of the Government does not provide legal certainty and in fact threatens both fundamental rights and the UK's constitutional settlement. The Government must explain why it did not seek a longer sunset provision during the passage of the Act, provide a robust justification for why it seeks the extension now, and offer a firm commitment that this does not signal a new and very dangerous pattern of the Government seeking to avoid limits being placed on its power.

CONCLUSION

17. Amid the legislative and political chaos of the UK's exit from the European Union it is vital that Government, Parliament and other relevant actors do not lose perspective. The delegated powers under the EU (Withdrawal) Act are extraordinary in their breadth and the proposal to extend the sunset clause less than one month after the Act received Royal Assent is most exceptional. Extraordinary and exceptional exercises of Government power must be subject to the highest levels of scrutiny. It is vital that the Government address these concerns head-on when justifying its proposals for the prospective EU (Withdrawal Agreement) Bill.

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