

The Civil Society Brexit Project: *Information* BREXIT AND EQUALITY RIGHTS

About the Civil Society Brexit Project

The Civil Society Brexit Project is a collaboration between the **Scottish Universities Legal Network on Europe (SULNE)** and the **Human Rights Consortium Scotland**, funded by the **Legal Education Foundation**. We give information, insight and independent advice to make sure that organisations in Scotland are able to influence Brexit as much as possible. The Project will also help organisations to prepare for Brexit consequences for themselves or their beneficiaries.

www.hrcscotland.org/brexit

Who is this Civil Society Brexit Project: *Information* for?

This briefing is written for civil society organisations working in Scotland. For more information, contact hrcscotland@gmail.com

What areas of rights does this Brexit Information briefing cover?

This briefing covers equality rights which are derived from EU law. There is some overlap with human rights which are covered in a separate briefing. Equality rights are mainly implemented in Great Britain by the Equality Act 2010 (Northern Ireland has its own separate equality law regime). The Equality Act provides protection against discrimination on the grounds of 'protected characteristics' (PCs): age; disability; gender reassignment; marriage or civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

Under EU law all PCs are protected against discrimination in the employment context, including recruitment, and some enjoy wider protection. For example gender and race are protected against discrimination in relation to the provision of goods and services and race has additional protections relating to housing, education and social protection. The Equality Act's scope is broad as it places duties on employers and those providing services and public functions including education.

EU law also provides the right to equal treatment for those who work under non-standard arrangements. For example, part-time workers are entitled to equal treatment to their full-time counterparts. These provisions are covered in a separate briefing on employment available at www.hrcscotland.org/brexit.

Which legal rights that particularly affect equality protection in Scotland are currently reserved to the UK Parliament and which parts are devolved to the Scottish Parliament?

Equality is a reserved area which means that equality rights are decided at Westminster and are currently provided by the Equality Act 2010. Relevant rights include:

- Women's right to equal pay for the same or similar work or work of equal value as that performed by a man. 'Pay' is defined broadly to include occupational pensions and other work-related benefits.
- The right not to be *directly* discriminated against on the grounds of a PC. This occurs when a person is treated less favourably than another person on the grounds of a PC.
- Direct discrimination can occur where the person who is treated less favourably does not actually

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have the PC but the perpetrator believes they have or where the discrimination occurs because the person is associated with someone (e.g. a family member or friend) who has a PC and is treated less favourably because of it. For example, if a father is discriminated against because his son is gay.

- The right not to be *indirectly* discriminated against on the grounds of a PC. This occurs when practices, policies or procedures have the effect of disadvantaging the members of a group who share a PC and the action cannot be justified. For example, a rigid requirement to work at night could amount to indirect sex discrimination because it would disadvantage those with care commitments, most of whom are women.
- In the case of disability discrimination, which covers both physical and mental disability, the law also protects against discrimination which occurs because of something arising from the disability, for example, dismissal because of disability-related absence from work.
- The law also imposes a duty to make reasonable adjustments where pre-existing arrangements place a disabled person at a substantial disadvantage in comparison with persons who are not disabled, for example, by providing wheelchair ramps to aid accessibility of buildings.

The Scottish Parliament does have some restricted powers under the Equality Act which enable it to regulate the Public Sector Equality Duty (PSED). The PSED requires public authorities to pay ‘due regard’ to the need to eliminate discrimination and advance equal opportunity in respect of all of the protected characteristics covered by the Act. In addition, the Scottish Government has recently announced its intention to implement the socio-economic duty (SED) under the Equality Act which requires public authorities to take action to tackle the inequalities of outcome caused by socio-economic disadvantage. However, neither the PSED nor the SED are underpinned by European law and therefore there would be no change to the current position post Brexit.

What do we *know* will happen to these legal rights when the UK leaves the EU?

According to the provisions of the EU (Withdrawal) Bill currently making its way through the UK Parliament, these rights will be unaffected at the point when the UK leaves the EU. This is because they are already implemented by UK legislation and so fall into the category of ‘EU derived domestic law’ which clause 1(2) of the Bill states will continue to have effect ‘on and after exit day’.

What do we not *know* yet?

- We do not yet know what exactly will happen during a transition period between the official date of Brexit and the entry into force of the new relationship between the UK and the EU. But it is likely that the UK will need to continue to conform with all EU rights during that period.
- We do not yet know whether the EU (Withdrawal) Bill as it stands at the moment will pass the House of Lords unamended. We also do not yet know whether the devolved legislatures – in particular the Scottish Parliament – will give it their legislative consent; and if they do, we do not know whether this consent will be given under the condition that the Scottish Parliament’s powers are increased, possibly even with regard to rights.
- We do not yet know what developments in rights terms will happen at the Scottish level. The First Minister recently appointed an advisory group on human rights leadership, which is due to report back to her by the end of 2018. It is possible that that group’s work will lead to policy changes and/or legislation in Scotland in the equality context but that will require greater powers to be given to the Scottish Parliament in this area.
- We do not yet know whether the Scottish Continuity Bill – a Scottish version of the EU (Withdrawal) Bill will enter into force. If it does, it will retain the Charter as far as some Scots law connected with EU law is concerned.
- We do not yet know how far the UK Government is intent on using its Henry VIII powers under the EU (Withdrawal) Bill to amend or repeal ‘retained EU

- law' protecting equality and employment rights.
- We also do not yet know how the courts will interpret the constraints regarding the justiciability of EU fundamental rights contained in the EU (Withdrawal) Bill.
 - We do not know how the rights outlined above will be developed by the EU Court of Justice in the future, i.e. the rights protections there might have been if the UK had remained in the EU.
 - We do not know how new EU legislation and policy will affect equality rights in the future.

What are the main concerns around equality protection after Brexit?

- A key concern is regression compared with current protections. Although the rights provided by EU derived domestic law will be preserved at the point of Brexit, they are not guaranteed beyond that and so there is a danger that the rights and protections will be rolled back over time which could have some serious consequences for equality rights.
- The Westminster Government will have the power to amend or repeal domestic legislation following exit day, including the Equality Act 2010 and associated regulations.
- A parallel concern is that the UK might not follow rights developments at the EU level: this relates to both legislative developments and associated policy as well as developments in the case law of the CJEU which has been of great importance in interpreting and extending anti-discrimination and equality rights.
- Equality and non-discrimination are constitutionally guaranteed by the EU's legal order by provisions in the Treaties, including legal bases for legislation, the Charter of Fundamental rights, the general principles of EU law and the case law of the Court of Justice of the EU (CJEU). There is no equivalent guarantee of equality in the UK and so EU law has stepped in to fill this gap. Although the Equality Act 2010 currently provides good coverage of EU equality laws, there is a danger of regression once the UK loses the checks and balances provided by EU law.
- An example of the CJEU's influence is the removal

- of the cap on compensation for discrimination claims which was previously part of UK law. Following a ruling by the CJEU that this was prohibited by EU law, UK law was changed so that compensation is now uncapped enabling those who suffer discrimination to claim compensation for loss of future earnings and other financial losses as well as for injury to feelings. After Brexit the UK would be free to reintroduce the cap.
- In the context of equality rights there is an additional concern about the UK's future trade deals outside of the EU. Increased competition from countries with lower rights protections could have a direct effect on UK regulation. Deregulation is likely to have a disproportionate impact on those who currently enjoy equality protections.

What about in Scotland – are there particular concerns or opportunities affecting these rights because of devolution?

- Equality is a reserved area and so the Scottish Parliament cannot take any direct action to protect the rights outlined under the current devolution settlement.

What happens now in the Brexit process?

- On 15 December 2017, the European Council agreed that the Brexit negotiations should move to phase 2. This means that key issues have been settled in principle: in particular, most issues on citizens' rights and the financial settlement.
- Phase 2 will first be dedicated to agreeing a transitional period where the UK will leave the EU, but remain bound by EU law and entitled to (most) rights under EU law. Second, phase 2 will probably result in a basic agreement on what the future relations between the EU and the UK will be.
- In terms of rights it will remain to be seen whether the EU will ask the UK to remain committed to protecting current standards, in particular in the field of employment rights, and to remain signed up to the ECHR.
- Internally, the EU (Withdrawal) Bill has received its third reading in the House of Commons and is

currently being debated in the House of Lords. If there are no amendments voted through in the House of Lords, it can probably receive its Royal Assent before the summer. If there are, this may be delayed.

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WHERE CAN I GET MORE INFORMATION?

If there is any aspect of the briefing or a particular issue around Brexit where you would like more detailed advice or information, we are happy to help! Please get in touch with us at hrcscotland@gmail.com

There is also information available online at www.hrcscotland.org/brexit