

The Civil Society Brexit Project: *Information* **BREXIT AND WOMEN'S 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 those rights derived from EU law which are likely to directly affect women's lives. EU law is mainly concerned with social and economic rights in areas such as employment and equality which are specifically covered in separate briefings in this series add 'available at www.hrcscotland.org/brexit. Such rights are equally applicable to women and to men. However women's lives are different from men's in certain respects, for example, women are more likely to be responsible for providing unpaid care within families and to balance this with paid work. Because of their lived experience, women are disproportionately impacted by changes to social arrangements including the provision and protection of certain rights.

Other areas of EU law and policy beyond employment and equality have direct impacts on the lives of women. Examples include:

- The Directive on the rights, support and protection of victims of crime which establishes an EU-wide

legal standard covering the provision of specialist services and support for victims of domestic abuse and other forms of violence against women. Support includes information, advice, practical, emotional, and psychological support.

- European Protection Orders (EPOs) which guarantee that 'crime victims who are granted protection from their aggressors in one EU member state will be able to get similar protection if they move to another'.
- The Anti-Trafficking Directive which guarantees assistance and support for victims of trafficking and provides rights to appropriate protections including compensation and integration and labour rights.
- European social funding for women's services in the UK including welfare and health services and those directly relevant to countering violence against women.

These provisions are not covered specifically in the briefing which will focus on social and economic rights. Further information on EU action on violence against women is available at <http://ec.europa.eu/justice/saynostopvaw/>

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

Employment law is reserved and so relevant rights are implemented through legislation made by the UK Parliament. EU directives in some areas provide rights which apply equally to both sexes but which are of specific importance to large numbers of women. For example, more women than men work part-time and on temporary contracts and so the protections in these areas are particularly relevant. Parental leave, although available for mothers and fathers, is more likely to be used by women. In addition EU law provides women with specific workplace protections in respect of pregnancy and maternity including paid maternity leave.

Rights of particular importance to women include:

- Pregnancy and maternity rights including entitlements to paid maternity leave, breastfeeding, risk assessments, time off for ante natal care and the right not to be dismissed or discriminated against on the grounds of pregnancy or maternity
- The right to unpaid parental leave to enable time away from work to care for children
- The right to time off for family emergencies
- The regulation of working time which includes rights to annual leave, rest breaks and overtime pay
- Part-time workers' rights to equal treatment with their full-time counterparts
- Limits on the scope and operation of fixed-term (temporary) contracts which make it more difficult for employers to use them in place of permanent contracts
- Temporary Agency Workers' rights to the same basic working and employment conditions as those recruited directly
- Other areas of employment law which have been influenced by EU law include health and safety at work, and some collective rights, notably employee participation in corporate decision-making.

Equality is also reserved which means that equal pay and sex discrimination rights, which include protection against sexual harassment, are also decided at Westminster and are currently provided by the Equality Act 2010. Relevant rights, which cover employment and training and the provision of goods and services, include:

- The 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 discriminated against because you are a woman. This includes:
 - protection against direct discrimination which occurs when a woman is treated less favourably than a man because of her sex.
 - Protection against indirect discrimination which occurs when an employer's practices, policies or procedures have the effect of disadvantaging women.
- In addition, those who provide care for people with disabilities have the right not to be discriminated against because of their association with the recipient of their care. This includes those who care for children and adults.

The Scottish Parliament does have some restricted powers under the Equality Act which enable it to regulate the Public Sector Equality Duty (PSED) which 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 which includes sex. However, the PSED is not 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 areas relevant to women's rights such as employment and equality but that will require greater powers to be given to the Scottish Parliament in these areas
- 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 women's rights in the future (see further below).

What are the main concerns around women's rights 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 women's rights.
- The Westminster Government will have the power to amend or repeal domestic legislation in the employment and equality fields following exit day. This is a matter of concern for women's rights because many of the relevant employment rights outlined above are currently provided for in Regulations rather than in Acts of Parliament. This leaves them particularly vulnerable to repeal or amendment without full parliamentary scrutiny. This includes the working time rights and those applicable to part-time, temporary and agency workers and some maternity and parental rights.
- 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 particularly in relation to gender.
- Equality between women and men is one of the EU's founding values. The principle of equal pay was included in the Treaty of Rome so that sex equality is constitutionally guaranteed in the EU legal order. This guarantee has subsequently been strengthened by the Charter of Fundamental Rights (which is covered in a separate briefing on human rights at www.hrcscotland.org/brexit) 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.

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- An example of the CJEU's influence include 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. This enables women who suffer sex 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.
- With regard to legislative developments, the EU directives in employment and equality law have been pivotal in the development of women's rights in the Member States. This influence is likely to continue post-Brexit so that the UK could get left behind. For example, there is a new proposal on work-family balance at EU level. If it makes it into EU law, the UK will be excluded. The proposal includes the introduction of five days of paid carers' leave, stronger protections from dismissal for new mothers and improved parental leave rights. This is accompanied by relevant policy proposals regarding improvements to the quality, affordability and accessibility of childcare and long-term care; raising awareness of workers' rights and improving access to justice.
- In the context of both employment and 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 in both areas is likely to have a disproportionate impact on women.

- Equality and employment law are both reserved areas 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, 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.

Professor Nicole Busby and Maria Fletcher
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What about in Scotland – are there particular concerns or opportunities affecting these rights because of devolution?



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