

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.civilsocietybrexit.scot

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

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

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

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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 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 socio-economic duty provided by the Equality Act was implemented in Scotland in April 2018. This duty, which requires public authorities to take action to tackle the inequalities of outcome caused by socio-economic disadvantage, is called the 'Fairer Scotland

Duty' (FED). However, neither the PSED nor the FED 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) Act 2018, 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 section 2 of the Act states will continue to have effect 'on and after exit day'. Such legislation can be amended by virtue of section 8 of the Act. Any amendments would have to go through the enhanced scrutiny procedure contained in Schedule 8 of the Act. This means that amendments would have to be actively approved by both Houses of Parliament.

What do we not *know* yet?

- We do not yet know when (and indeed whether) Brexit will happen. The original Brexit date has now been pushed back twice; first to 11 April and then to 31 October 2019. Brexit may, however, occur at an earlier date in two cases: 1) in the unlikely event that the UK does not hold elections to the European Parliament on 23 May, the UK will leave without a deal on 1 June 2019. 2) if the withdrawal agreement is ratified by the UK and the EU before 31 October, the UK might leave at the end of an earlier month, e.g. 30 September. Brexit might, however, be delayed further if the EU and the UK agree another extension. And indeed, Brexit may still be cancelled altogether if the UK decides to revoke the Article 50 notification. It is unlikely that this would happen without another referendum taking place beforehand.
- We do not yet know whether the House of Commons will approve the withdrawal agreement. Such approval is a pre-requisite for ratification under the EU (Withdrawal) Act 2018. If the withdrawal agreement is not approved, there is a high likelihood that the UK will leave the EU without a deal on 31 October 2019.

- If the withdrawal agreement enters into force, the UK will leave the EU on the date specified in it (e.g. 31 October 2019). Brexit will be immediately followed by a so-called transition period during which the UK will need to continue to conform with all EU rights including the EU Charter of Fundamental Rights. The period is meant to bridge the time between Brexit and the new relationship between the EU and the UK coming into force. The transition period will last until 31 December 2020, but can be extended for up to two years, i.e. until 31 December 2022 at the most. It is still unclear, however, whether the dates for the transition period might be changed again given the overall delay in Brexit.
- We do not yet know what exactly will happen during any possible future 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. For example, the EU recently adopted the Transparent and Predictable Working Conditions Directive, which is aimed at strengthening the rights of casual workers and improving their working conditions. The Directive needs to be implemented by EU Member States into their domestic law within the next three years and so would apply to the UK should Brexit (and any subsequent transition period) be delayed.
- We do not yet know the contents of the European Union (Withdrawal Agreement) Bill, which will give domestic force to the withdrawal agreement.
- We do not yet know what developments in rights terms will happen at the Scottish level. The First Minister appointed an advisory group on human rights leadership in early 2018. The group's report recommends the adoption of a new Act of the Scottish Parliament containing the human rights of people in Scotland. The group recommends in particular the incorporation of social, economic, cultural and environmental rights into Scots law following a public participatory process. However, in the employment context this would require greater powers to be given to the Scottish Parliament in this area. The First Minister endorsed

the report's direction and announced the establishment of a task force to implement the recommendations.

- We know that the Supreme Court declared the Scottish Continuity Bill to have been (largely) outwith the competence of the Scottish Parliament. We do not yet know, however, which parts of the Scottish Continuity Bill that the Scottish Parliament could lawfully adopt will be reintroduced into the legislative process. The Scottish Government promised in particular that it would bring back the provision on keeping pace with EU law though no bill has yet been tabled.
- We do not yet know how far the UK Government is intent on using its Henry VIII powers under the EU (Withdrawal) Act 2018 to amend or repeal 'retained EU law' protecting employment or equality rights.
- 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 possible 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 14 November 2018 the UK and the EU agreed a withdrawal agreement, which remains, however, unratified. The agreement would have seen the UK

leave the EU as planned on 29 March 2019. The UK Government has so far been unable to ratify the agreement and it is not clear whether it will enter into force at all. The withdrawal agreement is accompanied by a political declaration

- For the UK Government to be allowed to ratify the withdrawal agreement, the European Union (Withdrawal) Act 2018 requires that the withdrawal agreement (plus the political declaration) is approved by the House of Commons and that the legislation implementing it – the European Union (Withdrawal Agreement) Bill – is passed. So far, the House of Commons has rejected the withdrawal agreement on three different occasions.
- The EU also has not yet ratified the withdrawal agreement. At EU level, ratification requires the approval of the European Parliament and a qualified majority in the Council.
- For this reason, the UK was unable to leave the EU as planned on 29 March 2019. The Brexit negotiating period was therefore extended until 31 October 2019. If the UK and the EU manage to ratify the withdrawal agreement before then, the UK might leave at an earlier date. If, however, the UK fails to hold European Parliament elections on 23 May, the UK will leave on 1 June without a deal.
- There remain three options for the UK at this stage:
 - 1) leave with a deal, which requires ratification of the withdrawal agreement;
 - 2) leave without a deal, which would happen automatically on 31 October 2019;
 - 3) revoke the Article 50 notification, which – as the European Court of Justice has confirmed – the UK can do unilaterally at any point in time before Brexit.
- Once the withdrawal agreement has been ratified, the EU and the UK will start negotiating their future relationship. The political declaration negotiated alongside the withdrawal agreement contains a rough sketch. It currently envisages an association agreement between the EU and the UK. This would mean that there would be a free trade agreement between the EU and the UK. The UK would agree to comply with EU rules in certain

areas of trade. In addition, there would be a security partnership that would allow for cooperation in both internal and external security. However, the political declaration is not binding and was kept deliberately vague so that another future relationship – be it closer or looser – is still a possible outcome.

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April 2019



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 civilsocietybrexitscot@gmail.com

There is also information available online at www.civilsocietybrexit.scot