



THE UNIVERSITY of EDINBURGH
Edinburgh Law School



Scottish Universities Legal Network on Europe

Equality and Non-Discrimination and Brexit

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Please note that, as Professor Robison will not be available for the roundtable meeting on 24th October, Professor Nicole Busby nicole.busby@strath.ac.uk will present this paper and respond to questions.

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In your allocated sector:

- 1. Please explain the key rights that are protected and are therefore at risk following the UK's exit from the EU?**

For the purposes of considering how Scotland may continue to protect these rights following an exit from the EU and for exploration of further future devolution of powers in certain areas to Scotland, please explain whether the rights fall within areas devolved to Scotland or currently reserved areas.

Please also identify, broadly, the main EU and implementing (UK/Scotland) legal sources (and where relevant make reference to other international legal sources for example, the Council of Europe).

a) Key rights

Equality is one of the fundamental principles underpinning European law¹. The founding treaties of the European Union contain equality guarantees, which are now to be found in the amended and consolidated Treaty on European Union (TEU), which sets out the aims/objectives of the EU, which is “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.....[which] are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”².

The consolidated Treaty on the Functioning of the European Union (TFEU) contains a number of Articles relevant to equality and non-discrimination, in particular Article 18 (nationality); Article 19 (equal treatment); Article 45 (free movement of workers) and Article 157 (equal pay).

One of the most important articles which was included in the founding treaty is A157 (equal pay) which requires member states to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. The equivalent article in the original founding treaty provided the basis for secondary legislation (directives) addressing discrimination in pay and equality of treatment between women and men in employment and training.

There are four major directives on gender equality derived from this treaty base, all as subsequently amended:

- the Equal Pay Directive³, requiring equal pay between women and men
- the Equal Treatment Directive⁴, requiring equal treatment in employment and occupation
- the Directive on Occupational Social Security Schemes⁵

¹ See decisions of the Court of Justice of the European Union (CJEU), eg. Case 13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

² TEU Article 3(3).

³ 75/117/EEC

⁴ 76/207/EEC

- the Burden of Proof Directive⁶, shifting the burden of proof where a suspicion or inference of discrimination is raised.

These have been consolidated and updated in the Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (2006/54/EC). This Recast Gender Directive is now the key directive setting out the requirement for equal treatment between women and men in the employment context, and is now implemented in this country through the Equality Act 2010 (Parts 2,5,9 and 10).

Other European Union measures of significance to gender equality in particular (and which have required amendments to domestic law) have been implemented through other treaty provisions:

- Pregnant Workers Directive⁷ addressing the treatment of pregnant women at work (including provisions addressing maternity leave, breastfeeding, time off for ante natal care, risk assessments and prohibiting dismissal⁸). This interplays however with the Recast Directive, which makes specific reference to it. It is implemented largely through the Employment Rights Act, the Health and Safety at Work Act, and related regulations in particular the Maternity and Parental Leave etc Regulations 1999 (MAPLE), as well as the Equality Act 2010
- Parental Leave Directive⁹ requiring provision for parental leave on birth or adoption, and for time off for family emergencies. This is implemented through the Employment Rights Act and MAPLE
- Part-time Workers Directive¹⁰ requiring pro rata treatment of part-time workers (implemented through the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000)
- Fixed-Term Workers Directive¹¹ limiting the scope of fixed term contracts (implemented through Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002)
- Temporary Agency Workers Directive¹² providing that basic working and employment conditions of temporary agency workers should be at least those that would apply if they had been recruited directly to the same job (implemented through the Agency Workers Regulations 2010).
- Other potentially relevant directives include Council Directive on the Protection of Young People at Work¹³ and the Posted Workers Directive¹⁴.

⁵ 86/378/EEC

⁶ 97/80/EC

⁷ 92/85/EEC

⁸ primarily a health and safety measure enacted through Directive 89/391 and (now) Article 154 TFEU

⁹ 94/34/EC now replaced by CD 2010/18/EU

¹⁰ 97/81/EC

¹¹ 99/70/EC

¹² 208/04/EC

¹³ 94/33/EC

¹⁴ 96/71/EC and 98/45/EC.

In 1997, the Treaty of Amsterdam extended the competence of the EU to deal with discrimination beyond gender and nationality. Article 19 TFEU gives the Council the power to take action to combat discrimination which “acting unanimously... [with the] consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. This Article is the basis for a number of important directives, namely:

- Race Directive¹⁵ (covering race discrimination in employment, goods and services, housing education and social protection)
- Framework Directive¹⁶ (covering sexual orientation, disability, age, religion and belief discrimination in the employment context)
- Gender Directive¹⁷ (covering gender discrimination in the provision of goods and services).

These too are all now implemented into domestic law through the Equality Act 2010.

The Race and Recast Gender Directives require the establishment of a body for the promotion of equal treatment on grounds of race and sex. This requirement is currently fulfilled by the establishment of the Equality and Human Rights Commission under the Equality Act 2006.

In 2009, following the Lisbon Treaty, TEU now has the effect of incorporating the Charter of Fundamental Rights into the legal order of TEU and TFEU such that it has binding effect and the same status as the two treaties. Equality and protection of human rights are now primary goals of the EU¹⁸.

b) Equality as a reserved area

“Equal opportunities”, and therefore equality law, with limited exceptions set out in Schedule 5 L2 and discussed later in this paper, is essentially reserved. The key European rights are therefore implemented almost exclusively through UK legal sources, and in particular the Equality Act 2010. By and large the relevant legislation has been introduced by the Westminster Parliament, although there is some limited Scottish provision, where there is an interplay with Scottish devolved legislation, in particular in education and housing, where legislative consent motions have been required¹⁹.

And while many of the provisions of the Equality Act 2010 implement the requirements of European law, a significant number of provisions derive from domestic law. In particular, the Equality Act 2010 extends to protect those with the protected characteristic of sexual orientation, religion or belief, age and significantly disability beyond the employment context, to include protection in relation to the provision of goods and services, the exercise of public functions, housing and education. Proposals to extend EU law to these areas (discussed later in this paper) have not been implemented.

¹⁵ 2000/43/EC

¹⁶ 2000/78/EC

¹⁷ 2004/113/EC

¹⁸ Article 6(1)

¹⁹ See Discrimination Law title of Stair Memorial Encyclopaedia.

Further and perhaps most significantly, the public sector equality duty (PSED) is not underpinned by European law and therefore there would be no change to the current position post Brexit (given no indications on the horizon of a similar duty at the European level).

If the Equality Act remains on the statute book post Brexit, then the current levels of protection will be maintained (although without the CJEU to adjudicate on questions of interpretation). However, given that equality law is almost exclusively reserved, there is clearly a risk that the Westminster Parliament will dilute rights where there is no longer any European Union underpinning. That will obviously depend on the political complexion of any Westminster government.

That risk is a live one in any event in respect of all aspects of the Equality Act beyond the requirements of European law. For example, there are indications that the public sector equality duty may be vulnerable to amendment or repeal by the Westminster Parliament, given the recent review into the operation of the public sector equality duty²⁰. Without the requirement for a general duty in the Equality Act, the specific duties brought into force by the Scottish Parliament placing requirements on Scottish public authorities for the better implementation of the general duty will fall.

c) Other international legal sources

Westminster's powers will of course be limited by other international legal sources. All international and regional human rights instruments contain equality guarantees. Of particular significance is the European Convention on Human Rights (ECHR), which the UK has signed and ratified and, as a member state of the Council of Europe, is bound by its terms. Significantly in international law terms, its terms have largely been given effect to by the enactment of the Human Rights Act, which essentially means that they can be relied upon by individuals in courts and tribunals in this country. All of the Convention Rights including in particular the right to family life, freedom of expression and freedom of religion, are relevant for equality law because all must be secured without discrimination in terms of Article 14 which states that: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". It should be noted that this is not a standalone equality guarantee, but is limited to those areas which are covered by relevant Convention rights. Given that the requirements of the HRA require primary and secondary legislation to be interpreted "so far as it is possible to do so" in a way which is compatible with Convention rights, a certain level of protection that will be afforded in a range of areas (although only to a limited extent in the employment context). This is of course assuming that the Human Rights Act (or equivalent) also remains on the statute book or at least (to a lesser extent) the UK remains a member of the Council of Europe.

²⁰ Government Equalities Office, Review of the PSED: Report of the Independent Steering Group, 6.9.13

2. Please explain as clearly as possible the impact these rights have; what are the public benefits of these rights? Give specific examples where possible.

These are fundamental rights relating to equality and non-discrimination. All international and regional human rights instruments contain equality guarantees. The public benefits of these rights are axiomatic: they seek to ensure that no-one is discriminated against because of certain specified protected characteristics, not only in the employment context, but in the provisions of goods and services, in the exercise of public functions, in housing, education and even into the private sphere.

Although what that actually means in practice and how to secure equality through the law may be contested, no-one these days would dispute the value and indeed necessity of laws prohibiting discrimination. Indeed, positive duties to promote equality, such as the public sector equality duty, are increasingly considered a requirement to ensure the elimination of discrimination and to secure full equality in practice.

3. That are the reasonably anticipated developments in this area of rights? (At the EU and / or Council of Europe).

How might this be found out and explored further (contacts in Brussels/Strasbourg?)

There has been a proposal for new Directive under Article 19 on goods and services to combat discrimination based on religion or belief, age, disability and sexual orientation and to put into effect equal treatment outside the field of employment²¹. Its proposed scope is wide, encompassing “social protection, including social security and health care; social advantages; education; access to and supply of goods and other services which are available to the public, including housing”, as well as provision for positive action to ensure full in practice.

The Directive, which requires unanimous approval of Council and consent of the European Parliament, was introduced by the Council in July 2008 and referred to the European Parliament in January 2009. Amendments by European Parliament and Committee on Civil Liberties and Home Affairs were made in March/April 2009. The process stalled but was restarted in March 2010 by appointment of rapporteur. It has not however since been possible to secure the required unanimity²².

Although it is understood that this proposal was again debated in Council on 7 December 2015 and 16 June 2016, and the Directive is stated to be “awaiting final decision”, it is by no means guaranteed that Directive will be brought into force. However, were this to be implemented in its latest draft form into European law, certain (limited) amendments would be required to domestic law, including in particular stand alone provisions outlawing harassment for sexual orientation and religion or belief; provisions outlawing age discrimination in goods and services for under 18s, and provisions outlawing multiple or intersectional discrimination²³.

Also in 2008, amendments were proposed by the Commission to the Pregnant Workers Directive, including a proposed extension of paid maternity leave from 14 to 18 weeks, in line with the ILO provisions, but with a ceiling and a minimum. On 20 October 2012, the European Parliament voted to extend it to 20 weeks with 6 weeks compulsory leave. According to the Commission Work Programme 2015, Annex II, at 58, this has been withdrawn.

In contrast, agreement was reached on a Revised framework agreement on Parental Leave²⁴ which was implemented by the Parental Leave (European Directive) Regulations 2013, extending parental leave from 13 to 18 weeks and giving agency workers right to request flexible working after parental leave. Further developments might be anticipated in that areas given the Consultation on addressing challenges of parents and carers dated 11 November 2015²⁵.

²¹ COM (2008) 426 Final

²² see Employment, Social Policy, Health and Consumer Affairs Brussels 1 and 2 December 2011 17943/1/11 Rev 1 Presse 471). Also L Waddington, “Future Prospects for EU Equality Law: lessons to be learnt from the proposed equal treatment directive 2011 36 EL Rev 136 – “lack of enthusiasm among some member states and absolute opposition by others. There have been numerous amendments and continuing concerns about competence of the EU in certain areas”; “the prospects do not look good for adoption of this proposed Directive”.

²³ going beyond the provisions of section 14 of the Equality Act which have in any event not yet been brought into force.

²⁴ 2010/18/EU

²⁵ C(2015) 7754 Final

There is also a proposal for a Directive of the European Parliament and Council on improving the gender balance among non-executive directors of companies listed on stock exchanges²⁶, which is backed by the European Parliament, and although introduced in 2012, is apparently still being discussed by Council.

Most recently, there is also a proposal for a draft Directive on accessibility requirements for products and services, seeking to ensure that products and services are accessible to disabled people, dated 2 December 2015²⁷.

Sources such as EU monitor could be checked to ascertain the latest up to date position regarding these initiatives. However, given other pressures on the EU, not least Brexit and the migrant/Schengen crisis, it would seem unlikely that further immediate developments in this area can be anticipated.

²⁶ COM/2012/0614 Final

²⁷ COM (2015) 615

4. What is the sectoral potential for Scotland to progress/lead in this area of social protection/rights? Practically, how might it do so? (For example what kind of engagement could Scotland pursue with supra-national and international treaty bodies or organisations?)

You may wish to consider: a) current devolved position;

b) with further devolution of powers (explaining which powers would need to be devolved to enable Scotland to be a leader);

c) as an independent nation.

a) The current devolved position²⁸

Equality law, with very limited exceptions in respect of equal opportunities, is currently reserved. As originally enacted, these exceptions extended to give the Scottish Parliament the power:

- to encourage equal opportunities and compliance with equal opportunities legislation, except where this involved prohibition or regulation, and
- to impose duties on Scottish public authorities to perform functions in a way which pays due regard to meet the requirements of the laws relating to equal opportunities.

For the purposes of this provision, “equal opportunities” is defined to include language and social origin or other social attributes, as well as sex, marital status, race, disability, age, sexual orientation and religion or other political opinions.

The scope of the exceptions has been expanded by the Scotland Act 2016, that is the power of the Scottish Parliament to legislate in this area has extended in respect of public sector bodies in Scotland to include the following:

- In relation to non-executive appointments to the boards of Scottish public authorities
- In relation to Scottish public authorities (other than board appointments) to introduce protections and requirements that supplement but do not modify the existing provisions of the Equality Acts
- Replicate or apply to new legislation implemented under these provisions any part of parts of the Equality Acts, provided that this does not affect how these provisions currently operate.

This is intended to give the Scottish Parliament the power to add to and supplement the Equality Act 2010, for example by introducing gender quotas on boards.

b) Further devolution of powers

Equality and employment law would require to be devolved to enable Scotland to be a leader. Some respondees, most notably the STUC, proposed in their submission to the Smith Commission that employment and equality law should be devolved. The STUC recommended at paragraph 4 that:

²⁸ Although not up to date, all of these issues were discussed in ‘Research report 33: The place of equal opportunities in the devolution settlement: a legal analysis’ by Professor Colm O’Cinneide (EHRC, 2009), available: <https://www.equalityhumanrights.com/en/publication-download/research-report-33-place-equal-opportunities-devolution-settlement-legal>

- “employment law and equality law not be separated with respect to further devolution proposal
- The full devolution of equality law, provided that employment law is also devolved.
- In the case that employment law is not devolved, the STUC favours the devolution of equality enforcement along with the industrial tribunals and health and safety enforcement.
- There should be no impediment under a devolved settlement to the Scottish Parliament legislating for mandatory 50-50 gender representation in the Scottish Parliament and local councils, or for gender equality on company boards”.

Devolution of equality law would allow for the current protections in the Equality Act to be extended to re-enact provisions already repealed, including:

- provisions outlawing third party harassment in the employment context and
- Re-introducing the power for tribunals to make recommendations beyond the individual.

Other extensions to protection could include:

- extending the protected characteristics (perhaps to bring this in line with the definitions in the Scotland Act, or to include for example caste, socio-economic status, carers, appearance)
- limiting exceptions, eg in relation to the age protected characteristic (eg removing national minimum wage exception)
- introducing stand alone harassment provisions for sexual orientation and religion or belief beyond the employment context
- introducing provisions to protect those suffering intersectional discrimination on multiple grounds
- expanding family friendly laws (particularly shared parental leave which could be a standalone right for fathers as well as mothers)
- radically overhauling equal pay laws to introduce an equal pay duty with teeth through an organisational or collective approach rather than individual enforcement.

c) an independent nation

A constitutional right to equality could be included in any written constitution. This would afford the opportunity for legal developments in this area to formulate laws which would seek to ensure full equality in practice. In particular, it would afford the opportunity to extend the scope of the positive action provisions, allowing for special measures to address historical disadvantage and under-representation, even making such action mandatory in certain prescribed circumstances.

In the five years before the implementation of the Equality Act, there were proposals for a much more radical approach to Equality law to better secure the goal of full equality in practice.²⁹ These might include an approach to securing equality which focussed on dignity and respect for all citizens or a duty to make reasonable accommodations for identified protected groups.

²⁹ See B. Hepple, M. Coussey, T. Choudhury, ‘Equality: a new Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation’, (Hart Publishing, 2000).

In an independent nation (or indeed in the event of further devolution), a body such as a Scottish Equal Opportunities Commission, may require to be established to oversee the enforcement and promotion of equality.