

The Civil Society Brexit Project: *Information*

BREXIT AND THE CONTINUITY BILL

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

THE UK WITHDRAWAL FROM THE EUROPEAN UNION (LEGAL CONTINUITY) (SCOTLAND) BILL

What does this information briefing cover?

- This briefing covers the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, which was introduced into the Scottish Parliament as emergency legislation on 27 February 2018. It will refer to the bill as the Continuity Bill.
- This briefing is written to provide an overview of the rights elements of the Bill to enable organisations to discuss the Bill's content and implications. As more detail is discussed and becomes evident, an updated briefing will be available at www.hrcscotland.org/brexit

Why is there a need for a Continuity Bill?

- The Continuity Bill mirrors most of the provisions of the EU (Withdrawal) Bill, which is currently debated at Westminster. The EU (Withdrawal) Bill aims to translate into UK law all currently

applicable EU law. This will be known as retained EU law.

- The Scottish Government and Scottish Parliament consider the EU (Withdrawal) Bill to be problematic, however, as it would prevent the Scottish Parliament from legislating on those bits of retained EU law that would ordinarily be in its devolved competence. For this reason, the Scottish Government currently does not recommend that the Scottish Parliament give the EU (Withdrawal) Bill its legislative consent.
- Consequently, the Scottish Government considered it necessary to make provision in case the EU (Withdrawal) Bill is either not enacted in time for Brexit; or changed so it does not apply to Scotland. The Continuity Bill therefore aims to prevent gaps in Scots law that might arise due to Brexit and due to the EU (Withdrawal) Bill not making provision for Scotland.
- NB: a very similar Continuity Bill was introduced into the Welsh Assembly by the Welsh Government.

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What will the Continuity Bill mean for rights?

- The Continuity Bill in many respects mirrors the provisions of the EU (Withdrawal) Bill. There are important differences, however, in particular with regard to rights.
- The Continuity Bill will retain the EU Charter of Fundamental Rights in Scots law; by contrast the EU (Withdrawal) Bill expressly does not retain the Charter.
- This means that where devolved retained EU law is at stake the Charter can be used to help with the interpretation of EU law. Moreover, Scottish public authorities will need to comply with Charter rights when applying devolved retained EU law.
- In addition, the rights contained in the Charter can give a right of action under the Continuity Bill. This means that a claim before a court can be based on them. By contrast, the EU (Withdrawal) Bill excludes such a right of action not only for the Charter but also for other EU fundamental rights protected as (unwritten) general principles.
- Nonetheless, the Continuity Bill does not mean that the Charter would apply in all circumstances in Scotland. If the Bill is enacted, the Charter will only apply a) as far as (devolved) retained EU law is concerned; and b) where a Scottish authority is deemed to be implementing that (devolved) retained EU law.
- In addition, much like under the EU (Withdrawal) Bill, the Charter (or any other instrument) cannot be used to challenge the validity of retained EU law even if the European Court of Justice should later find that its original source in EU law was incompatible with the Charter.
- The Continuity Bill contains a number of powers for Scottish ministers to change (devolved) retained EU law. In doing so, they must not only abide by the Human Rights Act, but also with the Equality Act 2010. The inclusion of the latter is an important difference to the powers of ministers under the EU (Withdrawal) Bill.

Other features of the Continuity Bill

- While the Continuity Bill in many regards mirrors the EU (Withdrawal) Bill, it contains a few modifications worth highlighting in this briefing.
- The powers of Scottish ministers in making amendments to (devolved) retained EU law are more limited than those under the EU (Withdrawal) Bill. The Continuity Bill provides for stricter parliamentary scrutiny of the exercise of ministers' powers.
- The Continuity Bill contains a provision allowing Scottish ministers to make regulations allowing Scots law to continue to follow EU law in devolved matters. There is no equivalent power in the EU (Withdrawal) Bill. Due to its restriction to devolved matters, this will mainly be of relevance for environmental matters, agriculture and food legislation.

What do we *know* will happen?

- The Continuity Bill is emergency legislation and will therefore be fast-tracked through the Scottish Parliament. The final debate is scheduled for 21 March 2018.

What do we not *know* yet?

- We do not know whether the Continuity Bill will become law. Apart from having to be passed by the Scottish Parliament, there are serious questions as to whether the Scottish Parliament is competent to pass it. The Presiding Officer of the Scottish Parliament did not consider this to be the case. It is therefore very likely that before the Bill is given Royal Assent, it will be sent to the Supreme Court for a decision on the point of competence.
- We do not know whether the Bill will be needed at all. If the Westminster Parliament modifies the EU (Withdrawal) Bill – either because of a Government amendment or somebody else's amendment – and if the Scottish Parliament is happy to give it its consent, the Continuity Bill will probably be dropped.

- If the Continuity Bill enters into force and if the Scottish Parliament does not grant legislative consent to the EU (Withdrawal) Bill, it is unclear whether the UK Government will propose to amend the EU (Withdrawal) Bill so that it does not apply to Scots law. If that happens, the Continuity Bill will perform an important function.
- If, however, the EU (Withdrawal) Bill is passed without amendment and if the Continuity Bill enters into force as well, there will be a large degree of legal uncertainty over which law applies in Scotland.

Dr Tobias Lock

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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