

SPICe Briefing

Brexit: the impact on equalities and human rights

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This briefing considers the impact Brexit will have on equalities and human rights. The focus is on legislation which has a basis in EU law, the protections currently offered, and what this could mean in the future.



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EXECUTIVE SUMMARY

- The UK voted to leave the European Union on 23 June 2016.
- There is little clarity about the impact of Brexit on equalities and human rights, which arguably may not be the top priority in any Brexit negotiations.
- The free movement of workers is a fundamental principle enshrined in Article 45 of the Treaty on the Functioning of the European Union (TFEU). The UK Government has not been clear to date on what this means for EU nationals working in the UK.
- Many of the EU equality directives concern employment, and some are contained in the Equality Act 2010.
- Some opinion suggests that it is unlikely that the UK Government would roll back any equality or human rights protections as a result of Brexit, while others are concerned that protections could be weakened in the future.

- The Prime Minister has set out a plan and timetable for Brexit.
 - Trigger Article 50 of TFEU no later than the end of March 2017 – this is the mechanism for a member state to withdraw from the EU.
 - Convert all EU law into UK law. The European Communities Act 1972, which gives direct effect to EU law, will be repealed via the Great Repeal Bill. This will include provisions which automatically convert all EU law into UK law.
 - The UK Government will be able to maintain, amend and repeal any law it chooses, based on a timeframe of its choosing.
 - With regard to legal protection for workers, the Prime Minister said:

“...let me be absolutely clear: existing workers’ legal rights will continue to be guaranteed in law – and they will be guaranteed as long as I am Prime Minister.”

- In terms of human rights:
 - The Charter of Fundamental Rights of the European Union includes a broad range of civil, political, economic, social and cultural rights. The Charter is binding on the EU and its institutions, and can also bind Member States when they are implementing, derogating from or acting within, the scope of EU law.
 - Brexit is likely to mean that the Charter no longer applies to the UK or Scotland, and therefore a reduction in current and future human rights protections in areas within the scope of EU law.
 - The European Convention on Human Rights (ECHR) will not be directly affected by Brexit because it is not part of EU law. All Members of the Council of Europe, which includes all 28 EU Members have signed up to the ECHR. The Council of Europe is not linked to the EU.

INTRODUCTION

The UK voted to leave the European Union (EU) on 23 June 2016. Despite the plan for Brexit, there is little clarity about the impact on equalities and human rights, which arguably may not be the top priority in any Brexit negotiations.

On 2 October 2016, the Prime Minister, Theresa May, [spoke](#) at the Conservative Party conference and set out the UK Government's plan for Brexit. She:

- outlined plans for triggering Article 50¹ no later than the end of March 2017
- announced the introduction of the Great Repeal Bill. The Bill would repeal the European Communities Act 1972 which gives direct effect to EU law. However, the Bill will only come into force on the day the UK leaves the EU. It will also include provisions which automatically convert all EU law into UK law. The intention is that this will allow the UK Government to maintain, amend and repeal any law it chooses, based on a timeframe of its choosing.

This note covers European legislation on equalities that is incorporated into domestic law. The most obvious example of this is the Equality Act 2010 which incorporates a range of EU directives, but there are also a number of other EU directives that could be considered within the broad scope of equalities.

In terms of human rights, the Human Rights Act 1998, and the Scotland Act 1998 (Scotland Act) incorporated the European Convention on Human Rights (ECHR) into domestic legislation. However, the signatories of the ECHR are the members of the Council of Europe, not the European Union. This means it is not directly affected by Brexit, although there is a relationship between EU equality law and the ECHR.

This note refers to legal opinion, and includes views from the third sector, the Equality and Human Rights Commission and the Scottish Human Rights Commission. The views expressed were written both before and after the EU referendum result.

SPICe briefing: [Following the EU Referendum - Frequently Asked Questions](#) provides answers to some of the questions that have arisen following the outcome of the EU referendum on 23 June 2016.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The [Charter of Fundamental Rights of the European Union](#) (Charter) entered into force with the Treaty of Lisbon in December 2009. The rights set out in the Charter stem from existing general principles of EU law but also common constitutional traditions and international human rights treaties such as the Council of Europe's European Convention on Human Rights (ECHR) and the United Nations human rights treaties. A broad range of civil, political, economic, social and cultural rights are included. The Charter also articulates rights which have developed in light of changes in society, social progress and scientific and technological developments such as rights in relation to data protection. The Charter groups the rights under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice.

The Charter is binding on the EU and its institutions, but can also bind EU Member States when they are implementing, derogating from or acting within, the scope of EU law. It can, therefore, have an impact at a national level. Some of the rights in the Charter are seen as legally

¹ Article 50 of the Treaty on the European Union, is the mechanism for a member state to withdraw from the EU. It provides for up to two years to negotiate a withdrawal settlement between the leaving state and the EU.

enforceable, but some, particularly those in the solidarity chapter relating to economic and social rights, are more statements of principle which may only be invoked for the interpretation of areas in which the EU or the member state has legislated. The law is still unclear and is developing in relation to these rights or “principles”.

The [Equality and Human Rights Commission](#) has said that, on repeal of the European Communities Act 1972², “all of the treaties and the EU Charter of Fundamental Rights will no longer have effect in domestic law. Also, EU regulations, and any future or unimplemented EU legislation, could no longer be relied on in UK courts”. The [Equality and Human Rights Commission](#) provide further detail on the Charter and how it has been applied by UK domestic courts.

The [Scottish Human Rights Commission](#) (26 May 2016) said that:

“Leaving the EU would mean that the Charter no longer directly applies to the UK or to Scotland. That would mean a reduction in human rights protections and procedural remedies in areas within the scope of EU law such as privacy, data protection and a fair hearing. It could also mean the loss of a backstop of protection against regression to our national laws in areas such as anti-discrimination, environmental protections and consumer rights. Furthermore, an EU exit may represent the loss of potential for the fuller protection of social rights, or principles, contained in the Charter such as workers’ rights, access to social security and healthcare”.

This reflects the general concern that Brexit will result not only in the loss of the current Charter protections and social protections provided by EU law but also in any future improvements of fundamental rights protection at the EU level – be it through treaty change, legislation or through case law.

Although the Charter only applies when EU law is at stake, it is important to note that it can have more impact on reserved UK legislation than where the ECHR rights are applied under the Human Rights Act. This is because EU law has primacy over national law, in effect overriding it. In contrast, ECHR rights can only lead to legislation being declared incompatible with the ECHR (leaving the law as it stands until the UK Parliament remedies the problem). However, under the Scotland Act 1998 the ECHR has an equivalent status to EU law in relation to Acts of the Scottish Parliament and actions of the Scottish Government.³ The result is that, if Scottish Parliament legislation or Scottish Government action breaches either EU law **or** the ECHR, it is “ultra vires” and cannot be enforced.

There is currently little clarity as to what will happen post Brexit. However, it seems likely that leaving the EU will mean that the Charter will no longer apply in the UK. As [Tobias Lock](#) states:

“One can predict with relative certainty that the EU Charter of Fundamental Rights would cease to be binding on the UK in case of a Brexit. While it is not a legal impossibility for a non-Member State to commit to the Charter, there is no precedent for this. In particular EEA (and EFTA) membership – which would be the closest currently existing relationship between the EU and a non-Member State – does not make the Charter of Fundamental Rights binding on non-EU Member States. This would mean that people living in the UK would therefore no longer be able to invoke the rights contained in the Charter”.⁴

² The European Communities Act 1972 gives direct effect to EU law in the UK

³ S.29, s.57 Scotland Act 1998

⁴ http://www.scottishhumanrights.com/application/resources/documents/16_05_26_Lock_EUReferendum.docx p.20

If the Charter no longer applies in the UK, and no changes are made to compensate for this, there will be fewer human rights limits on both the UK and Scottish Parliaments. In this regard [Tobias Lock](#) notes that:

“If the Charter ceased to apply in the UK, the UK Parliament would face fewer legal constraints when making law. The same would be true for the Scottish Parliament considering that after leaving the EU, ... the Scotland Act would probably be amended and no longer refer to EU law.”

EUROPEAN CONVENTION ON HUMAN RIGHTS AND HUMAN RIGHTS ACT 1998

The UK is a member state of the [Council of Europe](#) (CoE), an intergovernmental body set up to promote democracy, human rights and the rule of law in Europe. All 47 Council member states must sign up to the ECHR which provides for the protection of a number of fundamental human rights (e.g. the right not to be subjected to torture; free speech; fair trial rights; the right to property; freedom of religion etc.).

The CoE is not linked to the European Union and should not be confused with the Council of the European Union (European Council), which is the institution which represents EU member state governments.

Since the ECHR is not part of EU law, Brexit will not affect it. The UK will still be bound by the ECHR and people will still be able to bring cases to the European Court of Human Rights in Strasbourg. In addition, the ECHR will still be incorporated into UK law under the Human Rights Act 1998 (HRA) and the Scotland Act 1998, which means that people will still be able to bring actions in UK courts if they think that their ECHR rights are being infringed.

Although, Brexit will not directly affect the UK's relationship to the ECHR, there is a question mark as to whether Brexit might make it easier for the UK to withdraw from the ECHR in the future. Although there is some disagreement on this point, some commentators take the view that membership of the EU requires states to sign up to the ECHR.⁵ Consequently, the argument is that leaving the EU would also make it more straightforward for the UK to leave the ECHR as the European Commission would not be able to argue that the UK has breached the EU's treaties.

The UK Government has had plans to replace the HRA with a UK Bill of Rights since the [Conservative Party manifesto](#) for the 2010 general election. The Conservative Party published [proposals](#) to reform human rights law in the UK in October 2014⁶. There was some suggestion that this policy could be scrapped post Brexit (Independent⁷ 11 August 2016), but this was followed by the new Secretary of State for Justice, Liz Truss MP, stating that the UK Government was still committed to replacing the HRA ([Guardian 22 August 2016](#)).

In [evidence](#) to the House of Commons Justice Committee on 7 September 2016, Liz Truss listed the British Bill of Rights as her third priority, after prison reform and ensuring access to justice (House of Commons Justice Committee [transcript](#) of oral evidence).

It is not the intention of this briefing to deal with this point in any depth. However, it is worth noting that Theresa May has announced the UK Government's intention that aspects of the ECHR will no longer apply to the military. The intention is to protect frontline forces from

⁵ House of Commons Research paper- Is adherence to the European Convention on Human Rights a condition of European Union membership? <http://researchbriefings.files.parliament.uk/documents/SN06577/SN06577.pdf>

⁶ See SPICe Briefing on the [European Convention on Human Rights in the UK](#) for further background

⁷ [Plans to replace Human Rights Act with new 'British Bill' could be scrapped](#)

'spurious' legal claims. The changes would mean that in future conflicts, the UK would derogate from the right to life and the right to liberty. This would be subject to a vote in the House of Commons and House of Lords. The armed forces would still have to comply with criminal law and Geneva conventions (BBC news 4 October 2016).

UNITED NATIONS HUMAN RIGHTS FRAMEWORK

The United Kingdom is signatory to a number of United Nations human rights treaties, including: the International Convention on Economic and Social Rights; the Convention on the Rights of the Child; the Convention on the Rights of People with Disabilities; and the Convention to Eliminate Discrimination against Women. Leaving the EU would not impact on the UK's obligations under international law to comply with these treaties.

HOW EUROPEAN LAW IS IMPLEMENTED IN THE UK

EU law is divided into "primary" and "secondary" legislation. The EU treaties are primary legislation and form the basis for all EU action. Secondary legislation includes: regulations, directives, recommendations and opinions ([Europa.eu](http://europa.eu)).

The various types of EU law are implemented in different ways in Member States, including the UK.

Treaty rights apply directly in the UK by virtue of the European Communities Act 1972, as do EU Regulations.

EU regulations do not need to be transposed into UK law. It is normally only necessary to amend existing national provisions if they are inconsistent with regulations, rather than drawing up new legislation.

In contrast, the UK Government must implement EU directives in domestic legislation. EU law takes precedence over domestic law, which means that all Member States have to ensure their domestic laws comply with the minimum standards set out in directives. States are sometimes free to go further than the provisions, but they cannot do less than a directive requires.

Where EU law requires UK implementation, this will occur via either primary legislation (Acts of Parliament) or secondary legislation (statutory instrument).

An example of UK primary legislation is the Equality Act 2010. The Equality Act 2010 enables Ministers to amend UK equalities legislation to ensure legislative consistency where changes are required by European law. The aim is to ensure that areas of the Act which are covered by European law and those that are domestic in origin do not get out of step, as was the case with previous equality legislation ([Explanatory Notes to s.203 of the Equality Act 2010](#)).

EUROPEAN DIRECTIVES RELATING TO EQUALITY

Equality has been a key competence at the European level since the Treaty of Rome⁸ enshrined the principle that ‘men and women should receive equal pay for equal work’ (now Article 157 of the Treaty on the Functioning of the European Union (TFEU)). In 1997, the Treaty of Amsterdam enabled the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (now Article 19 of the TFEU).

The Treaty on the Function of the European Union also:

- states, “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation” (Article 10).
- defined one of the tasks of the European Union as being to promote gender equality (Article 8).

From these key principles, a series of directives have been agreed which have progressively extended the protection against discrimination to more groups and in respect of more areas of life. The directives have either required significant amendments to UK equalities legislation, where there was already domestic law, or required the introduction of completely new domestic law. On this latter point, there had been no domestic discrimination law in relation to religion or belief, sexual orientation or age prior to directive 2000/78/EC referred to below (Reading 2010).

The main EU directives incorporated in the Equality Act 2010 are as follows:

- Council Directive [2000/43/EC](#) implemented the principle of **equal treatment between persons irrespective of racial or ethnic origin**. The directive outlaws discrimination on grounds of racial or ethnic origin in the areas of employment, vocational training, goods and services, social protection, education and housing.
- Council Directive [2000/78/EC](#) established a general framework for **equal treatment in employment and occupation**. The directive introduced protection from direct and indirect discrimination in employment in respect of age, disability, religion and belief and sexual orientation.
- Council Directive [2004/113/EC](#) implemented the principle of **equal treatment between men and women in the access to and supply of goods and services**.
- Council Directive [2006/54/EC](#) consolidated a number of previous directives and further implemented the principle of **equal opportunities and equal treatment of men and women in matters of employment and occupation** (consolidated 76/207/EEC, 86/378/EEC and 75/117/EEC, all as amended)

All of these directives are now in the Equality Act 2010, which goes further than these directives require. However, it is important to note that:

- Non-discrimination in employment on grounds of race, sex and disability existed in domestic law before the relevant EU directives were made.
- The public sector equality duty (PSED) comes from domestic legislation and requires public authorities to have due regard to the need to eliminate unlawful discrimination,

⁸ Treaty establishing the European Community 1957. This has been amended substantially over the years and, following the Treaty of Lisbon in 2007, it is now known as the [Treaty on the Functioning of the European Union](#).

advance equality of opportunity and foster good relations. This duty initially arose from [Macpherson's report](#) (1999) on the death of Stephen Lawrence which concluded that 'institutional racism' exists in the police service and other services. This led to the race equality duty in 2000, and has since been extended to all protected characteristics, except marriage and civil partnership. Scottish Ministers can impose the PSED on public authorities in Scotland.

- Non-discrimination in the provision of goods and services in EU law only applies on grounds of race and sex, but such protections already existed in domestic law when they came into force. There is no similar provision in EU law for the other protected characteristics (disability, age, sexual orientation, religion or belief), but they are covered in the Equality Act 2010. In 2008, the European Commission published a [proposal for a directive COM\(2008\) 426](#) against discrimination based on age, disability, sexual orientation and religion or belief beyond the workplace. According to the European Parliament's [legislative observatory](#), there have since been debates in Council on 7 December 2015 and 16 June 2016, and that the proposed directive is 'awaiting final decision'.

The EHRC also refer to a range of [other directives](#) under the umbrella of equality and human rights:

- Data Protection Directive which contains privacy rights, transposed in domestic law through the Data Protection Act 1998.
- Human Trafficking [Directive 2011/36](#) on preventing and combating trafficking in human beings, and protecting its victims, puts into place minimum rules around the definition of criminal offences and penalties for people trafficking. It also requires that victims of trafficking are given help, support and protection.
- Victims' Rights Directive ensures that victims of crime and their family members have the right to information, support and protection. It also sets out procedural rights for victims in criminal proceedings, and requires that EU member states provide appropriate training on victims' needs to professionals who are likely to come into contact with victims. In Scotland, the directive has been implemented by the Victims and Witnesses (Scotland) Act 2014 and the Standards of Service for Victims and Witnesses required under that Act.

Employment directives

In addition to the EU directives which relate specifically to equality, there are a number of EU employment directives which seek to address broader inequalities. For example, the Pregnant Workers Directive and Parental Leave Directive have been enshrined into existing domestic law via acts and regulations providing family leave rights, including maternity, paternity, adoption, shared parental and parental leave and pay (Russell and Maclean 2016). These directives set minimum standards for member states, which the UK will often surpass. Similarly, the EU Working Time Directive, which includes rights on rest breaks and working hours, has been implemented in the UK by the Working Time Regulations.

EU law is often enforced through secondary legislation under the European Communities Act 1972; for example the [Pregnant Workers Directive](#), which aims to protect the health and safety of women in the workplace when pregnant or after they have recently given birth, and women who are breastfeeding. This has been enforced under the Health and Safety at Work etc. Act 1974 (Civil Liability) (Exceptions) Regulations 2013. The enabling Acts for these regulations were the European Communities Act 1972, Part I s. 2(2) and sections of the Health and Safety at Work etc. Act 1974.

IMPACT OF BREXIT

POST BREXIT RELATIONSHIP WITH THE EU

In Scotland, as with the rest of the UK, the impact of Brexit on equality law depends on the UK's future relationship with the EU. The UK could:

- agree to keep the employment/equality directives as a part of a new relationship.
- become a member of the European Economic Area (EEA), like Norway, which would require the UK to adopt similar EU laws to those which currently regulate employment in the UK. However, the UK would have no vote or say in making these laws.
- negotiate bilateral arrangements with each member state. This is the case for Switzerland which has around 120 agreements with EU member states. There could be agreements, for example, to respect EU employment and equality law ([Professor Barnard, Q39, 14 September 2016](#)).
- refer to rules under the World Trade Organisation, which would leave the UK Government free, in terms of employment and equality law, to decide which laws it wants to keep ([Professor Barnard, Q9, 14 September 2016](#)) and whether it keeps pace with future developments. .

The EHRC has previously commented:

“UK exit may (but not necessarily) mean that any future equality and human rights protections from the EU are not binding in UK law. This will depend upon the manner in which the UK continues to trade with the EU. It has been suggested that prior to leaving the EU, the UK will negotiate a trade agreement with the EU. The existing models for trade agreements with the EU require an EU trading partner to comply with EU law (at least in the areas covered by the trade agreement). Therefore, leaving the EU, and conducting trade through a new trading agreement, would not necessarily result in lower protections for human rights and equality in domestic law”.

Theresa May has set out that a future model will not be based on any relationship the UK has had with the EU in the last forty years or more, and discounted the models from Norway and Switzerland. May said there will be a “cooperative relationship” with the EU, which involves free trade, in goods and services, “trading with and operating in the Single Market” ([2 October 2016](#)).

EQUALITY ACT

In terms of the Equality Act 2010, the focus of the EU directives is on non-discrimination in employment. Some opinion suggests that it seems unlikely that the UK Government would roll-back any protections as a result of Brexit, whereas others are concerned that protections could be weakened in future.

Russell and Maclean (2016) suggest that Brexit will have no immediate impact on primary legislation unless the UK Government decides it wants to make a change. Cope (2016) said:

“anti-discrimination legislation is so fundamentally engrained in British culture that any significant amendments to it (other than to extend its reach) would almost certainly be met with resistance from the general public and voters. In addition, employee-friendly laws such as the right to maternity pay and leave and holiday pay are unlikely to be altered dramatically in the future given the social policy behind their introduction”.

Slattery (2016) said that while leaving the EU would give the UK more scope to look again at the characteristics that could be protected, “changes in social attitudes make it politically unattractive to carry out a significant roll-back of anti-discrimination law.”

In evidence to the House of Commons Women and Equalities Committee, Professor Aileen McColgan said that without EU directives on equality, “it means that there would be no underpinning and maintenance, or demand for maintenance, of the current provisions. As an equality lawyer I would say it is very troubling, because the whole thing could be knocked away” ([14 September 2016](#)). At the same meeting, Professor Barnard said that it would be difficult to repeal protection from discrimination on some grounds as these would be “politically sensitive”.

The Equality Network (2016) said that there had been concern about the future of equality and human rights legal protections. However, EU equality directives are part of British law, and they argue that the Equality Act 2010 is stronger than the EU requires. The Equality Network suggests there is a danger that the UK Government could weaken the Equality Act.

Inclusion Scotland (2016) said that “human rights, equality rights and workers’ rights that could not be removed while we remained an EU member are now no longer secure”.

The EHRC supports the idea that the Equality Act 2010 will remain after Brexit, because it is primary legislation. It will remain part of domestic law unless it is repealed, irrespective of its origin. The EHRC said the same is true for secondary legislation, except where it was made under section 2 of the European Communities Act 1972, like the Pregnant Workers Directive referred to above.

“If section 2 of the European Communities Act 1972 is repealed, the secondary legislation made under section 2 would be automatically revoked. In the event of a proposed repeal of section 2, the government will need to consider carefully whether the secondary legislation should be retained, and if so, under what other legislation it could be given effect”.

Regarding the repeal of the European Communities Act, Russell and Maclean (2016) suggest that, in reality, the UK Government would likely take steps to maintain the status quo, until a more considered decision could be made about what to keep and what to change.

On [2 October 2016](#), Theresa May announced that the European Communities Act 1972, will be repealed by the Great Repeal Bill. The body of existing EU law will be converted into British law, including existing workers’ legal rights.

“As we repeal the European Communities Act, we will convert the ‘acquis’ – that is, the body of existing EU law – into British law. When the Great Repeal Bill is given Royal Assent, Parliament will be free – subject to international agreements and treaties with other countries and the EU on matters such as trade – to amend, repeal and improve any law it chooses. But by converting the acquis into British law, we will give businesses and workers maximum certainty as we leave the European Union. The same rules and laws will apply to them after Brexit as they did before. Any changes in the law will have to be subject to full scrutiny and proper Parliamentary debate. And let me be absolutely clear: existing workers’ legal rights will continue to be guaranteed in law – and they will be guaranteed as long as I am Prime Minister.”

EMPLOYMENT LEGISLATION

Russell and Maclean (2016) describe the current transposition of EU directives into domestic legislation as ‘gold plated’. This is because they generally give employees greater rights than the minimum required by EU law. They refer to EU requirements on maternity and family leave.

The UK only has to offer a minimum of 14 weeks' maternity leave and 18 weeks' parental leave. However, the UK goes much further by offering 52 weeks' of maternity leave, 39 of which are paid. The UK also offers 2 weeks of paid paternity leave and 18 weeks of unpaid parental leave, adoption leave, and the new shared parental leave regime allowing parents to transfer maternity leave entitlement between them. They suggest that Brexit is unlikely to lead to any reduction in the total amount of family leave available to individuals, but the UK could have greater freedom on how to structure any future rights to parental leave and pay.

Cope (2016) said that the consequences for UK employment law of Brexit are unlikely to be significant in the short term, given the complexities involved and the uncertainty it would bring. It could be argued, therefore, that any changes to employment law are likely to be slow and incremental.

BROADER EQUALITY ISSUES

- Free movement of workers is a fundamental principle enshrined in Article 45 of TFEU. The outcome of the EU referendum brings this freedom into question. Nicola Sturgeon has signaled that Scotland welcomes EU citizens and called for the UK Government to give a guarantee that the existing rights of the 173,000 EU nationals in Scotland will be protected. To date, no such guarantee has been forthcoming. Liam Fox, the International Trade Secretary, is reported to have said at the Conservative Party conference that the Government would "like to be able to give a reassurance to EU nationals in the UK, but that depends on reciprocation by other countries" ([Guardian 4 October 2016](#)). A SPICe briefing on EU nationals will be published at a later date. For background on the impact on free movement, and the impact on immigration and asylum policy, see the House of Commons Library briefing [Brexit and UK immigration and asylum policy: a reading list](#).
- It has been widely reported that the EU referendum has led to an increase in reported hate crime in England and Wales. The [National](#) reported that Police Scotland had not seen a similar rise (1 July 2016). The EHRC has published a factsheet on [what to do if you're worried about racism](#), in response to the rise in reported hate crime.
- Another concern is that many third sector organisations which support equality groups rely on European funding, and the future of this funding stream is now unclear (Inclusion Scotland 2016 and Lennon 2016).
- On 2 December 2015 the Commission published its proposal for a draft Directive ([COM\(2015\) 615](#)) on the accessibility requirements for products and services. The aim of the Directive is to ensure that products and services are accessible to disabled people. The Directive will require Member States to ensure that manufacturers, importers and distributors modify products and services to ensure that disabled people are able to access products and services on an equal basis. The duty applies to the production of new products and services only. Professor Barnard suggested that this is a directive the UK may "lose out on".

POTENTIAL AREAS FOR CHANGE

While it is likely to be some time before it is clear if there are any changes for the equality aspects of employment law, there may be things the UK could do differently if it is not subject to EU law. For example:

- The UK could introduce upper limits on compensation claims for discrimination as this is currently prevented by EU law (Russell and Maclean 2016, Slattery 2016, Professor McColgan 2016).

- The UK could introduce limitations on some forms of discrimination protection, such as more flexibility to treat people differently on grounds of age; more freedom to offer different benefits to men and women on family leave without it being classed as sex discrimination (Russell and Maclean 2016); and reduced protections on equal pay (Professor McColgan 2016).

Brexit may impact on UK courts' decisions as they are currently required to interpret EU law in accordance with the rulings of the Court of Justice of the European Union. The UK courts have recently read additional wording into the Working Time Regulations 1998 to give effect to decisions of the European Court (Cope 2016 and Russell and Maclean 2016).

However, Anstead (2016) suggests that with no minimum standard set by the EU, things like maternity leave and pay could change; anything that might have been considered as 'red tape' that limits business making maximum profits.

Professor Barnard expressed similar concerns about the removal of minimum standards (2016). She indicated that the current and previous UK Government had been most active in employment law in areas where there is no EU legislation, for example, with the introduction of employment tribunal fees and rules on claiming unfair dismissal (2016).

PARLIAMENTARY SCRUTINY

The impact of Brexit on equality and human rights is being scrutinised by two committees at Westminster.

The House of Commons Women and Equalities Committee [heard evidence](#) on the impact of Brexit on equality law on 14 September 2016. On the 14 October 2016 the Committee announced a call for written evidence on [Ensuring strong equalities legislation after EU exit](#). The deadline for submissions is Wednesday 9 November.

The House of Commons Joint Committee on Human Rights [launched](#) an inquiry into the human rights implications of Brexit on 15 September 2016. The deadline for submissions is 10 October 2016.

The Scottish Parliament's Equalities and Human Rights Committee has agreed to hear evidence on the impact of Brexit on 3 November 2016 ([Equalities and Human Rights Committee 6 October 2016](#)).

WHAT ABOUT SCOTLAND?

The Prime Minister said that “the negotiations between the United Kingdom and the European Union are the responsibility of the Government and nobody else” (2 October 2016). She added:

“we will consult and work with the devolved administrations for Scotland, Wales and Northern Ireland, because we want Brexit to work in the interests of the whole country. And we will do the same with business and municipal leaders across the land.

But the job of negotiating our new relationship is the job of the Government. Because we voted in the referendum as one United Kingdom, we will negotiate as one United Kingdom, and we will leave the European Union as one United Kingdom. There is no opt-out from Brexit.”

In response to this, Mike Russell MSP, the Minister for UK Negotiations on Scotland’s Place in Europe, has said that the Scottish Parliament might seek to block the Great Repeal Bill, if Scotland’s interests were not represented in negotiations ([BBC news 3 October 2016](#)).

While the UK is the member state of the European Union, the Scotland Act 1998 does give the Scottish Government and Scottish Parliament responsibility for implementing EU law where it relates to devolved matters. When the UK leaves the EU, the competencies exercised by the EU would be repatriated to the UK. Where these relate to devolved matters, an effect of withdrawal from the EU would be that the Scottish Parliament would obtain legislative competence ([SPICe briefing](#)). This is based on the assumption that the devolution settlement is not amended. However, equal opportunities, save some exceptions, are currently reserved under the Scotland Act 1998.

Scottish Ministers have the power to set the Public Sector Equality Duty for public authorities in Scotland. These are not required by EU law. Unless the UK Government wants to change the Equality Act, or the Scottish Government wants to change policy on the PSED, it seems unlikely there would be any scaling back of the duty in the short term.

In addition, the Scottish Parliament has new powers under the Equality Act 2010, as a result of further devolution in the Scotland Act 2016. These allow the Scottish Parliament to:

- Legislate about equal opportunities in relation to non-executive appointments to the boards of Scottish public authorities. This allows the Scottish Parliament to introduce gender quotas for public boards, and quotas for other protected characteristics.
- Introduce protections and requirements, in relation to public bodies, that supplement existing provisions in the Equality Act, but do not modify existing provisions.

The Scottish Parliament will also be able to legislate on the socio-economic duty, outlined in Part 1 of the Equality Act 2010. This requires public bodies to have due regard to reducing inequalities of outcome as a result of socio-economic disadvantage. This provision was never brought into force, but the Scotland Act 2016 now creates a mechanism for Scottish Ministers to commence the provision in relation to Scottish public bodies.

In a [letter](#) to the Equal Opportunities Committee (27 June 2016), Angela Constance MSP, the Cabinet Secretary for Communities, Social Security and Equalities, said:

“We will fight to defend the existing human rights safeguards enjoyed by everyone in our society by resolutely defending the Human Rights Act in the face of the UK Government’s threat to replace it with a weaker British Bill of Rights. We will now also have to factor in the potential consequences of losing the human rights and equality guarantees provided by European Union law and the EU Charter of Fundamental Rights.

...

We will now also need to reflect on what impact the decision to leave the European Union may have on equality and human rights both in Scotland and across the UK as a whole.

As we have done with the Human Rights Act, the Scottish Government will speak out for the fundamental values on which an inclusive, modern, progressive society must be based. We will do so both to protect Scotland's immediate interests, and as a responsible global citizen with an obligation to work in partnership across borders to ensure that human rights are respected, protected and implemented. We will also work to promote wider understanding of the central importance of equality as the foundation not only of fairness and social justice, but for inclusive economic prosperity".

Prior to the EU referendum, the Scottish Government gave an indication of its general plans in relation to human rights. Its manifesto for the 2016 Scottish Parliament election stated that:

"... we will also seek to use our new powers to establish social and economic rights for Scotland over all matters we have responsibility for and to further embed the European Convention on Human Rights in Scotland. We will invite a cross party group, including civic society, to establish a collaborative process, engaging with people across Scotland and learning from best global practice in participatory democracy, to advise on the guaranteed protections we should seek to enshrine in law." (Scottish National Party 2016)

It is not yet clear what the Scottish Government's position is on this point. However, it is worth noting that, although international relations are reserved to Westminster, the Scottish Parliament does have the power to "observe and implement international obligations."⁹ There are therefore arguments that the Scottish Parliament could also use its powers in relation to human rights in an attempt to respond to the potential impact of Brexit – for example by incorporating aspects of UN treaties into devolved law.

⁹ Paragraph 7(2) of Schedule 5 to the Scotland Act 1998

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