



EUROPEAN AND EXTERNAL RELATIONS COMMITTEE CALL FOR EVIDENCE ON THE IMPLICATIONS OF THE EU REFERENDUM RESULT

ENGENDER RESPONSE, AUGUST 2016

1. INTRODUCTION

Women and women's rights are affected by a great many issues that have been thrown into uncertainty as a result of the UK's vote to leave the EU. These include economic security, immigration, defence, trade, access to justice, violence against women and employment rights. The mainstreaming of gender concerns, and broader equality concerns, throughout the Scottish Government's response to 'Brexit' will therefore be vital.

Crucially, the additional layer of accountability and recourse provided by the European Court of Justice (ECJ) and related enforcement mechanisms has been lost. Over recent decades, the ECJ has ruled in a series of benchmark cases to protect women's rights, particularly in terms of equal pay and maternity law. Given that the EU has consistently forced the UK to strengthen domestic legislation and policy development with regards to gender equality, there is a real concern that hard won ground on women's rights may be lost once they are no longer underpinned by European law.

This paper sets out the need for effective gender mainstreaming and the inclusion of women's voices as the Brexit process moves forward, briefly describes current gender equality law to which EU member states are bound under the terms of their membership and Scotland is therefore set to lose, and sets out the impact that this legislation has had on UK policy, and current EU programmes, policies and funding priorities that promote gender equality. In demonstrating what the EU has done and is doing for women, we highlight areas of concern and the need for action to protect women's rights as the UK negotiates its exit.

2. MAINSTREAMING GENDER ISSUES

Gender inequality is perpetuated when it is made invisible in political and public life. Gender mainstreaming is an internationally-used mechanism for bringing gender equality to the heart of decision-making and political thinking, with the explicit aim of reducing inequality and harm to women.¹ Mainstreaming approaches are employed to counteract ingrained

¹ Gender mainstreaming was adopted by the Beijing Declaration and Platform for Action, at the UN in 1995.

institutional sexism by bringing gender issues to the surface, and providing imperatives for proactivity on women's equality.

This is highly relevant to the current political context. Equality is often side-lined during times of crisis and upheaval, with the understanding that economy or security can be considered without a gendered approach. This overlooks, of course, the fact that inequality is integrally linked to such matters and is likely to be exacerbated yet further at times of instability. As an example, the failure to gender the response to the 'crisis' of the UK deficit has seen 86% of cuts to social security spending come from women's pockets.² As the Scottish Government and Scottish Parliament develop thinking and plans related to Brexit, they must make sure that gender and other equality concerns are embedded from the outset. Indeed, there is an inherent opportunity within constitutional change to progress equality agendas. The repatriation of powers from the EU may afford Scotland with such avenues for progressive change, if they are attuned to them.³

Part of this equation will be to ensure that women's perspectives are included at all levels of debate and decision-making. It is disappointing that only five women currently sit on the standing council of experts on EU membership convened by the First Minister, from a total of 18 members.⁴ Gender balance on decision-making and policy-influencing bodies does not guarantee robust gender analysis or positive outcomes for women, but evidence is clear that equal representation for women is an essential component of progress.⁵ Equally, political spaces which lack diversity often result in poor outcomes for women and other marginalised groups.

3. EU GENDER EQUALITY LAW

As negotiations to exit the EU are undertaken, and Scotland seeks to both influence and understand the implications of these, the potential impact on human rights and equality law must be taken into account. EU member states are bound by the legal frameworks set out below and held accountable for upholding them at the European Court of Justice. At present, this means that the UK's equalities law cannot be less robust than the underpinning EU framework. When the previous UK Government was contemplating scrapping some parts of the Equality Act as part of its "Red Tape Challenge", it was prevented from doing so by the EU equalities framework. Clearly, this is no longer the case and the UK Government's plan to proceed with scrapping the Human Rights Act is perhaps an extremely alarming bellwether of their approach to anti-discrimination law.

² Between 2010 and 2020: Women's Budget Group (2016) *The impact of women on the 2016 Budget: Women paying for the Chancellor's tax cuts*

³ For further information on the gender equality and constitutional change, including with regards to employment law, see: Engender (2014) [Engender submission to the Smith Commission on devolution](#)

⁴ http://www.gla.ac.uk/news/headline_473236_en.html (accessed 24/8/16)

⁵ Engender (2016) [Equal voice, equal power: the case for gender quotas in Scotland](#)

EU law also provides legal basis for core concepts such as ‘direct discrimination’, ‘indirect discrimination’, ‘harassment’, ‘sexual harassment’, and ‘positive action’. For fuller details on the substance of respective directives and core concepts, please refer to the paper “EU Gender Equality Law”, referenced below.⁶ The following protections, therefore, will no longer apply to Scotland and steps should be taken to guarantee they will not be lost. Where this is not constitutionally possible, for instance with regards to areas of employment law, we urge the Scottish Government and Scottish Parliament to make the case to the UK Government or to push for the devolution of relevant powers.

The Directive on equal opportunities in and equal treatment of men and women in matters of employment and occupation

In 2004, the so-called ‘Recast Directive’ brought together three pre-existing directives⁷ and case law from the European Court of Justice relating to employment, vocational training, and working conditions such as pay and occupational social security schemes. It includes provisions on equal pay for work of equal value, sex discrimination in access to employment, maternity rights, positive action to achieve equality in the workplace (for instance with regard to gender balance on boards), occupational social security, mainstreaming obligations and strengthened enforcement of ‘equal treatment rights.’

Directive on equal treatment of men and women in statutory social security schemes

The ‘Statutory Schemes Directive’ protects against direct and indirect discrimination with regards to “sickness, invalidity, old age, accidents at work and occupational diseases and unemployment”. It covers “workers and self-employed persons”. Due to the complexity of the field, including the interrelation with occupational social security schemes, there is a rich body of case law on statutory social security schemes and it has had comparatively limited impact as a result.

Directive on equal treatment of men and women engaged in an activity in a self-employed capacity

This directive aims to cover gaps in the Recast Directive and Statutory Schemes Directive for the self-employed and, importantly in terms of gender equality, spouses of the self-employed who support their partner’s work in an informal capacity. It does not include rights to social protection, but does include some maternity benefits and is seen as a considerable improvement on prior legislation.

⁶ European Network of Legal Experts in the Field of Gender Equality (2013) *EU gender equality law*

⁷ The so-called ‘first directive’ on equal pay for men and women, the ‘second directive’ on equal treatment of men and women in employment, and the directive on the principle of equal treatment in occupational social security schemes, as well as elements of the directive on the burden of proof.

The Pregnant Workers Directive

The Pregnant Workers Directive of 1992 provides protection for workers who are pregnant, have recently given birth or are breastfeeding. It reiterates a number of maternity provisions articulated in the Recast Directive, including the rights to paid maternity leave and to return to the same or equivalent job, improves health and safety for pregnant and breastfeeding women and protects against dismissal related to pregnancy.

The Parental Leave Directive

Although the Parental Leave Directive is not explicitly framed in terms of gender equality, the European Court of Justice fundamentally links the reconciliation of family and work life with the achievement of gender equality. It is therefore included in the suite of legislation that is considered to comprise EU gender equality law. Increasing men's contribution to unpaid care work is also, of course, a vital element towards women's equality. The Parental Leave Directive provides for a minimum of unpaid four months leave, in addition to maternity leave, which, in the UK, can be taken up until a child is 18 years old.⁸ It applies equally to women and men. Crucially for women, it also applies to part-time, contract and temporary agency workers and parents of adopted children.

Directive on equal treatment of men and women in the access to and supply of goods and services

Introduced in 2004, this directive is the first to address sex discrimination and gender equality outwith the labour market. It aims to erode barriers to women's equal and full participation in economic and social life. It applies to all who provide goods and services to the public in the private and public sectors, and provides against pregnancy and maternity discrimination, harassment and sexual harassment. Unlike in other gender equality directives, however, its list of exceptions is not defined.

Other anti-discrimination directives

In addition to those directives which pertain directly to gender equality, diverse groups of women in Scotland are also protected by a range of other anti-discrimination directives. These include, but are not limited to, the Racial Equality Directive, and the directive on equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. There are also a number of directives that indirectly relate to gender inequality in the field of employment. Amongst these are the Part-Time Worker, Fixed-Term Worker and Working Time Directives, all of which address unequal treatment of women workers in the 'flexible', part-time and insecure jobs that can be fitted around unpaid caring roles.

⁸ Within this framework details are set nationally

Violence against women directives

The directive on preventing and combatting trafficking in human beings and protecting its victims, the Victims' Directive on common minimum standards on the rights, protection and support, and the directive on combating the sexual abuse and sexual exploitation of children and images of child abuse all contribute to tackling violence against women and girls.

The Charter of Fundamental Rights of the EU

Finally, the EU Charter of human rights includes provisions on protecting physical integrity, non-discrimination on the basis of gender, the prohibition of inhuman and degrading treatment and the prohibition of slavery, forced labour and human trafficking, all of which relate to violence against women and other gendered phenomena.

4. EU GENDER EQUALITY LAW IN PRACTICE: THE IMPACT IN THE UK

The EU's package of legislation on gender equality in the labour market has had a significant impact on women's rights as paid and unpaid workers in the UK.⁹ We highlight these here to underscore the importance of making provisions to replace the EU gender equality framework outlined above.

Equal pay

The fight for equal pay for equal work has a long history in the UK, and it is entwined with struggles of sisters across Europe. Although the UK's Equal Pay Act of 1970 preceded the UK's accession to the EEC in 1973, its provisions were much weaker than those subsequently guaranteed by the Equal Pay Directive. The Equal Pay Act only gave women the right to make equal pay claims, it did not oblige employers to pay women and men equally. Nor did it address the lack of value attached to women's work that compared to that of men in terms of skill and responsibility. Following a period of inaction by the UK Government, in spite of its obligations, the European Court of Justice forced the UK to comply with EU law and amend the Equal Pay Act accordingly.¹⁰ Many thousands of women and groups of women have since invoked European law and taken equal pay claims to the European courts on the basis of equal pay for work of equal value. Given women's over-representation in the part-time workforce, an extremely important precedent within this was that a judgement that overruled a UK employment tribunal and found that part-time workers must be paid equally to full-time workers under the terms of the Equal Pay Act. This meant that claims of indirect sex discrimination, as well as direct discrimination, have since been consistently brought under the Act.

⁹ Much of the information here is sourced from the TUC's paper 'women workers' rights and the risks of Brexit'. For fuller details please see here:

https://www.tuc.org.uk/sites/default/files/Women_workers_and_the_EU.pdf (accessed 3/6/16)

¹⁰ The Equal Pay Act was amended with the Equal Pay Amendment Regulations in 1983

Part-time and insecure work

EU legislation has resulted in significant progress for those women who are 75% of part-time workers in the UK, and 55% of temporary workers, despite representing under half of the workforce overall. Progress includes the right to challenge unfair dismissal and claim redundancy pay, the right to paid holiday leave, equal pay and maternity rights, all on an equal basis with full-time workers. The introduction of the Part-Time Worker Directive (2000) and Fixed-Term Worker Directive (2002) further improved matters, as cases no longer had to be proven on grounds of sex discrimination, but could be argued at face value.

Maternity rights

In the UK, women have the right to 39 weeks paid maternity leave and up to 52 weeks of leave in total. This outstrips the minimum period stipulated by the EU, which sits at 14 weeks. However, as highlighted by the TUC, EU legislation and case law have significantly strengthened the substance of women's maternity rights in the UK.¹¹ Improvements include the right to paid time off for ante-natal appointments, including for temporary workers, the obligation to adjust working conditions or shift patterns where women might be at risk of harm (and to paid suspension from duties if this is not possible), and vastly improved protection from dismissal on the grounds of pregnancy or maternity. However, given that 54,000 women lose their jobs each year in the UK in relation to pregnancy and maternity, even the additional protections enforced by the EU are clearly not enough to combat discrimination. Regardless of the outcome of the referendum, it is vital that we do not lose hard-won ground on maternity rights.

Parental rights

The EU's leadership on shared parenting between women and men in heterosexual couples, and on gender equality in unpaid care has also had an impact in the UK. The UK initially negotiated an exemption from the Parental Leave Directive outlined above, however it was implemented and subsequently built upon by the last UK Government.¹² This is a good example of positive dynamics between national and EU level politics, with each administration taking a lead in turn. In addition to the incentive and opportunity for men to undertake unpaid childcare, this is a particularly positive development for lone parents who are currently those most likely to take up the scheme; 95% of lone parents are women. Uptake by fathers remains low for a range of reasons, some of which are addressed in a new package of rights related to work-life balance that has been proposed by the European Commission.¹³

¹¹ TUC (2016) *Women workers' rights and the risks of Brexit*

¹² In the UK, parental leave can now be taken for a child up to 18 years old

¹³ TUC (2016) *Women workers' rights and the risks of Brexit*

Unpaid care

The Parental Leave Directive also mandates the right to time off to look after a family member in the case of emergency. This applies to unpaid carers in employment who care for disabled children or children with long-term conditions. The European Court of Justice also recently ruled that the mother of a disabled child should be protected against discrimination on grounds of disability in her role as a carer, paving the way for carers to claim protection under the Equality Act. However, current protections and rights for unpaid carers fall woefully short of those for working parents. Carers' leave, which is a crucial issue for the two thirds of working-age carers who are women in the UK, is currently under consideration within the proposals on work-life balance at the EU.

Social security

Social security is exceptionally gendered, largely due to women's position as unpaid carers and part-time workers. Unfortunately there has not been a huge amount of helpful European case law with regards to social security, except with regards to maternity rights (see above). One notable victory, however, pertains to pensions for part-time workers. Following rulings by the European Justice of Justice, the UK government was obliged to ensure that women part-time workers have equal access to pensions under the law. In practice, this meant scrapping the requirement for a mandated number of hours worked in order to join an occupational pension scheme.

Anti-discrimination law

The UK's membership of the EU has led to strengthened laws against sex discrimination and increased access to justice for women. Over the years, as European gender equality frameworks have been updated, this has included amendments to the Sex Discrimination Act to introduce a specific protection against harassment in the workplace, to shift the burden of proof in sex discrimination cases onto employers, and to remove limits on the amount of compensation a claimant is able to receive.

5. EU POLICIES AND PROGRAMMES

In addition to legislation, the EU is currently committed to a range of frameworks, policies and programmes that promote gender equality. Whilst member states are not legally bound to implement elements that fall outwith the gender equality directives, there is a significant amount of pressure to align national policy with recommendations set in Brussels. The following issues are particularly vital to the realisation of women's equality in Scotland.

Mainstreaming

The EU has strong gender mainstreaming policies, which are essential to ensure that policy measures are effective and coherent across governmental departments. Mainstreaming obligations and objectives are embedded both in overarching EU treaties and in EU gender

equality law. Since the Treaty of Amsterdam in 1999, the promotion of equality between men and women has been a fundamental aim of the EU. Furthermore, this must be actively pursued in all functions and tasks of the EU as listed in the treaty, which also enshrines equality as a fundamental principle of EU law.¹⁴ Women in Scotland would benefit enormously if UK and Scottish Governments were to similarly embed gender equality objectives in top-level legislation and policy setting.

Childcare

As part of 'Europe 2020', the EU's economic strategy, member states committed to raising the rate of women's employment to 75%. This involves a major policy push for state provision of high-quality and affordable childcare, and related funding under the European Social Fund. The UK has met the so called 'Barcelona targets' to provide childcare for 90% of children between the age of three and school age, and for 33% of children under the age of three (regardless of the numbers of hours provided). However, childcare costs are amongst the highest in Europe and wraparound care is sorely lacking. Despite the drive to support women's access to the labour market, 73% of women in the UK who do not have paid work, or work part-time report that expensive children is the main reason for this.¹⁵ Pan-European strategies, goals and funding therefore remain useful tools that will be missed.

Violence against women

The EU has played a key leadership role with various violence against women strategies, including a major initiative to tackle female genital mutilation. It has also promoted the Council of Europe Convention on preventing and combating violence against women and domestic violence, which was opened for signature in 2011. The UK has signed but not yet ratified this convention, which builds on existing treaties with its protections against domestic abuse, but is under considerable pressure to do so.

The introduction of European protection orders has ensured that protection orders imposed by courts in Scotland are upheld by other member states and vice versa, providing legal protection to women and children who have experienced domestic abuse. The European Arrest Warrant means that perpetrators of rape, sexual assault, and other forms of gender-based violence are more likely to stand trial in the member states in which they committed their offence. It is vital that this same level of protection is maintained in Scotland.

Gender balance

Finally, the European Commission has been driving the agenda to tackle gender stereotyping in certain sectors and the lack of gender balance in corporate boardrooms. Draft legislation to set a minimum objective of 40% boardroom membership for either sex was tabled in 2012. Although this is not yet law, the Commission reports improvements in

¹⁴ Burri and Prechal (2013) *EU gender equality law*

¹⁵ EC (2014) *Use of childcare in the EU member states and progress towards the Barcelona Targets*

all but six member states as a result of this drive.¹⁶ It also provides funding to combat gender stereotyping in career choices and occupational segregation in the workplace under the European Social Fund.

6. CONCLUSION

The UK's membership of the European Union has led to stronger rights and conditions for women in the workplace, maternity rights, equal pay and anti-discrimination legislation, equal access to certain social protections and vastly strengthened access to justice for women whose rights have been breached. It has also meant access to funding in support of gender equality goals and commitment to progressive EU level strategies to tackle women's inequality. The impact of the EU on gender equality in the UK has therefore been positive.

Without the legal framework provided by EU membership there is certainly a risk that current or future UK governments could row back on women's rights and vital protections could be lost. The Scottish Government and the Scottish Parliament have an opportunity to proactively seek to mitigate this prospect, by creating or pushing for replacement arrangements to guarantee these rights.

There is also a duty to ensure that gender, and other forms of equality are mainstreamed throughout all thinking and policy development undertaken in Scotland with regards to Scotland's relationship with the EU. Such an approach is vital to ensure that women's rights as currently protected by EU legislation are guaranteed, and to maximise the potential for progressive change inherent to the transfer of powers.

This applies to the work of the European and External Relations Committee as it processes the evidence submitted to this inquiry. In addition to the particular areas of concern that we raise, many responses will have gender and equality implications which are not explicitly articulated. We therefore urge the committee to include a gender mainstreaming recommendation within its report of this inquiry.

FOR FURTHER INFORMATION

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ABOUT ENGENDER

Engender has a vision for a Scotland in which women and men have equal opportunities in life, equal access to resources and power, and are equally safe and secure from harm. We are a feminist organisation that has worked in Scotland for 20 years to advance equality between women and men.

¹⁶ EC (2014) *What has the EU done for women? 50 years of EU action on gender equality for one continent*