



Law Society
of Scotland

MSP Briefing

Scotland's Place in the European Union – Protecting and Promoting Human Rights and Fundamental Freedoms



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors.

With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest,¹ a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

This paper is to inform MSPs in advance of the Scottish Government Debate entitled "Scotland's Place in the European Union – Protection and Promoting Human Rights & Fundamental Freedoms" scheduled to take place on Tuesday 10 January 2017.

If you would like to discuss this paper, or if you would like more information on the points that we have raised, please do not hesitate to contact us. Contact details can be found at the end of the paper.

General Comments

The UK's exit from the EU is arguably the most significant constitutional development to affect the UK since 1945. Other changes including accession to the European Economic Community in 1972, the development of devolution to Scotland, Northern Ireland and Wales in the 1990's, the adoption of the Human Rights Act in 1998 and the creation of the Supreme Court in 2005 were important constitutional changes most of which affected the lives of many millions of people living across the UK. However the UK's exit from the EU has so many significant aspects including economic, financial, legal, social, and cultural, which will affect many people living in the EU in some ways which

¹ Solicitors (Scotland) Act section 1

are known and understood and in other ways which are currently unpredictable. The impact of the change however will also have depth, breadth and far reaching effect for the immediate future and for several years to come. Of course if alternative arrangements are made for a bespoke Scottish – EU relationship the outcome concerning human rights could be different.

Even the specific issue of how leaving the EU will impact on human rights touches on an extremely wide range of areas, from rights to family life for those currently exercising right to free movement, to data protection and privacy rights relating to how our information is handled and used, and the underlying structure of our equalities law. In general, the rights that are enjoyed in the context of the EU are often found in a variety of sources, but may vary slightly in the detail and opinions for enforcement and remedy.

The EU is not a signatory to the European Convention on Human Rights (ECHR) and is not subject to the jurisdiction of the European Court of Human Rights. The Court of Justice of the EU however does apply the Convention and Strasbourg jurisprudence as general principles of human rights law, and Article 6 of TEU states that fundamental rights, as guaranteed by the ECHR, “shall constitute general principles of the Union’s law”. The rights which arise from ECHR are also supported by the EU’s Charter of Fundamental Rights (the Charter). The Charter sets out the civil, political, economic and social rights of European citizens and other person resident in the EU. These rights are derived from the ECHR and other international treaties.

The Charter will most likely cease to apply, subject to any other negotiated outcome, when the Withdrawal Agreement comes into effect and the UK is no longer a member of the EU. That would result in a loss of EU specific rights which Dr Tobias Lock in his paper ‘The Human Rights implications of the European Referendum² details such as the right to be forgotten, guarantee of human dignity, physical and mental integrity, the prohibition on trafficking, the right to conscientious objection, a broader right to marry, a right to asylum and a broader fair trial guarantee not limited to civil and criminal cases and the social principles contained in the Charter.

² *The Human Rights Implications of the European Union referendum, Dr Tobias Lock, University of Edinburgh, prepared for the Scottish Human Rights Commission (May 2016)*

However, following the UK's exit from the EU, the ECHR would still apply and the UK would remain bound by it. Latest reports confirm that the UK government does not intend to withdraw from the ECHR at this stage, withdrawal may form part of a manifesto commitment for the 2020 UK election, but it is still pursuing a repeal of the Human Rights Act 1998 (HRA) and replacement with a British Bill of Rights.³ However, at this stage, we have not had detailed proposals on what a new Bill of Rights would contain, and so it is difficult to comment on the potential role that this would play in either maintaining EU rights in the UK, or developing the UK's human rights laws in a different direction.

Scotland, human rights and the EU law

The Scotland Act 1998 sets out the legislative competence of the Scottish Parliament (s.29) and the administrative competencies of the Scottish Ministers (s.54). Both are required to act in compliance with Convention Rights under the ECHR and with EU law. Subject to the terms of the Withdrawal Agreement the post withdrawal UK/EU relationship and the ratification legislation there is likely to be a need to amend the Scotland Act.

'EU Law' is defined in Section 126(9) of the Scotland Act 1998 as all those rights, powers, liabilities, obligations and restrictions from time to time created or arising under the Community Treaties and all those remedies and procedures from time to time provided by or under the Community Treaties.

The HRA is entrenched within the Scotland Act so that it is expressly outwith the competence of the Scottish Parliament to modify the HRA.

However, the subject of human rights more broadly has not been reserved, and Scotland has taken steps to legislate on human rights issues (for example setting up the Scottish Human Rights Commission).

Schedule 5 Part 1, paragraph 7 to the Scotland Act also puts the Scottish Parliament under an obligation (by way of an exception from the general reservation of international relations) of 'observing

³ The Guardian, 29 December 2016, "Ministers put British bill of rights plan on hold until after Brexit". There has also been a suggestion that the Government may consider derogating from the ECHR in situations of warfare. The Guardian, 4 October 2016 "Plan for UK military to opt out of European convention on human rights".

and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law’.

There remains considerable scope for Scotland to take action on human rights, both as a subject to themselves and as they relate to devolved matters.

The close links between the HRA and Scotland Act, and the overlap of human rights (including their protection in the EU contract with devolved matters, mean that a repeal of the HRA, or significant change to how the ECHR is given effect in the UK, may trigger the legislative consent Convention and require the consent of the Scottish Parliament. However, there is a lack of clarity on this point, and quite how or at what point the Convention would be triggered is still a matter of some debate.

This issue should also be considered in the context of the Scotland Act 1998 (section 28 (8)) which incorporates the current operation of the Convention to a great extent, subject to some differences. For example, Devolution Guidance Note Number 10 (DGN 10), which explains the practical operation of the Convention requires the consent of the Scottish Parliament in respect of provisions of a Bill before the UK Parliament which would alter the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers (see DGN 10 at paragraphs 4(iii) and 9). It would seem, however, that although section 28(8) may not apply to this latter category of provision the UK Government have indicated in Parliament that the current understanding of the Convention would continue to apply. This is relevant for the purposes of changes to EU Law and also the HRA, as the legislative competence of the Scottish Parliament and executive competence of the Scottish Ministers are restricted by reference to “Convention rights” which are defined by reference to the HRA.

Other human rights protected by EU Law

We refer again to the paper by Dr. Lock, which explains some of the key areas where EU law offers protections beyond that which would remain covered by the ECHR and domestic law.⁴ However, subject to the terms of the Withdrawal Agreement or the post-withdrawal UK/EU relationship, EU law rights will cease to apply in the UK upon withdrawal from the Treaties.

⁴ *The Human Rights Implications of the European Union referendum*, Dr Tobias Lock, University of Edinburgh, prepared for the Scottish Human Rights Commission (May 2016)



For further information and alternative formats, please contact:

Michael P Clancy
Director Law Reform
DD: 01224 226 8163
E: michaelclancy@lawscot.org.uk

The Law Society of Scotland
Atria One
144 Morrison Street
EDINBURGH
EH3 8EX

www.lawscot.org.uk