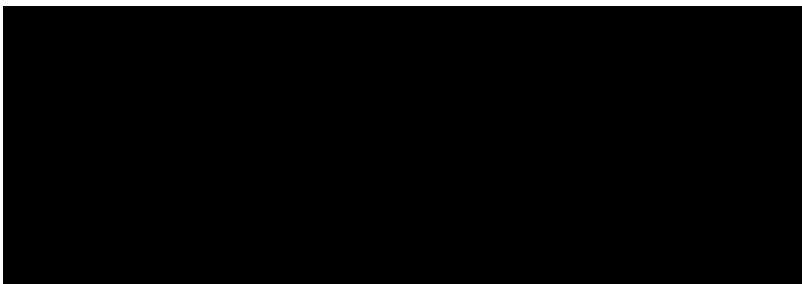




A Report on Equality and Human Rights legislation in Scotland

**Prepared by Anja Lansbergen in conjunction with Jo Shaw,
University of Edinburgh**



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Executive Summary

i. Introduction

The following report has been prepared as part of a Knowledge Exchange Project, funded by the Scottish Funding Council, intended to promote best practice on equality and human rights in Scotland. It will provide map out the legislative framework in this area within the context of UK-wide and EU level action and provide an overview of the trajectory of equality protection. The remainder of the report will then proceed to detail the key equality legislation operating in the UK.

As with the area of immigration and asylum law under consideration in the December 2008 KEP seminar, the principal competences lie above the level of the Scottish Parliament and there are limited competences under the Scotland Act. Thus so far as there are only limited policy levers which the Government can pull in relation to questions of asylum and immigration, this position cannot be fundamentally altered by developing an argument that equality and human rights policy objectives could be pursued in such a way as to create a distinctive Scottish agenda for asylum and immigration. Even so, it remains important to understand both the limited competences given under the Scotland Act and also the overall trajectory of legislative change at the UK and EU levels in relation to equality and human rights protection in order to see whether there are any additional spaces within the UK set up which could be exploited further by policy-makers in Scotland.

ii. Legislative Framework

The protection of equal rights in Scotland is dictated primarily by the UK agenda at Westminster and – to an increasing extent even in areas hitherto outwith the scope of EU law – by the EU agenda. This is because equal opportunities remain an area of legislative competence reserved to Westminster under the Scotland Act 1998,¹ with the result that the Scottish Parliament cannot pass legislation concerning equality or human rights. The exception to this reservation is the conferral of competence to pursue policies that encourage the observance of equal opportunities, other than by prohibition or regulation.² The Scottish Government therefore has a statutory power to pursue an equal opportunities agenda, as has been exercised in the shape of the Scottish Government equality strategy, most recently that established by the current SNP Ministers (see below).

Although the Scottish Parliament lacks competence to legislate directly in the area of equal opportunities, it is required to conform to a particular standard of human rights protection when passing legislation in other areas. By virtue of the Scotland

¹ Scotland Act 1998, Schedule 5, Part II, para L2.

² As above.

Act,³ all legislation passing through the Scottish parliament must be in conformity with the European Convention on Human Rights. Any piece of legislation not conforming to the rights set out in the Convention will be outwith the legislative competence of the Scottish parliament and will consequently not be law.⁴

As equal opportunities remain a reserved issue, the legislation protecting equality and human rights in Scotland emanates primarily from UK-wide legislation passed at Westminster, much of which is in turn determined by EU legislation and EU-level general principles of non-discrimination. The UK parliament has consequently legislated in specific areas to prevent discrimination on several grounds. For a detailed analysis of the protection conferred by UK legislation, see part two of the report below.

The UK has a constitutional tradition of parliamentary sovereignty, meaning that the legislative competence of Parliament is unfettered and Acts of Parliament are supreme. The UK Parliament has therefore been historically free to legislate as it saw fit in the area of equality and human rights, and legislation could not as such be declared invalid for failing to comply with a certain standard of human rights protection.

The sovereignty of Parliament in the area of equality and human rights is however subject to certain limitations.

The UK is a signatory of the European Convention of Human Rights (ECHR). The ECHR is an international treaty signed by 47 countries, in which countries agree to secure the stipulated rights and freedoms for everyone within their jurisdiction. The UK has transposed this obligation into national law through the Human Rights Act 1998 (HRA). The HRA makes it illegal for any public body (with the exception of parliament) to act in contravention of ECHR rights.⁵ The Act also stipulates that UK courts must interpret primary and secondary legislation, so far as it is possible to do so, in line with convention rights.⁶ ECHR rights are therefore also protected against private individuals in UK law by the interpretive obligation placed on the courts. However, if a court considers a piece of legislation to be incompatible with a convention right, it may issue a 'declaration of incompatibility'.⁷ The issuing of such a declaration does not affect the validity of the legislation in question,⁸ thereby retaining the sovereignty of parliament and its ability to legislate expressly in contravention to ECHR rights. In addition, there is a right of individual petition under the ECHR to the European Court of Human Rights which sits in Strasbourg. This right of individual petition has existed substantially longer than the specific arrangements under the HRA, which date from the period of constitutional reform which occurred after the election of the Labour Government in 1997.

³ Scotland Act 1998 s29(2)(d).

⁴ Scotland Act 1998 s29(1).

⁵ HRA 1998 s6(1)

⁶ HRA 1998, s3(1)

⁷ HRA 1998 s4(2)

⁸ HRA 1998 s4(6)(a)

The UK also has certain obligations in respect of human rights standards that result from its membership of the European Union. The European Union has not currently acceded to the ECHR,⁹ but ECHR rights are protected at the Union level as ‘general principles of Community Law’.¹⁰ This has the implication that certain sanctions could potentially be adopted at the EU level if any UK public body acted in persistent disregard of the ECHR.¹¹ In addition, the European institutions may also take enforcement action against the UK to combat discrimination by public authorities on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation,¹² or if the UK fails to ensure that men and women are paid equally for equal work,¹³ as the UK must comply with both Treaty provisions and secondary legislation which has been adopted in this field. The EU has also developed a Charter of Fundamental Rights detailing certain standards in human rights and equality. Although the Charter has been ‘solemnly proclaimed’ by the European institutions, its precise legal effects are currently rather unclear.¹⁴

The UK may be required to pass legislation in the area of equality in order to fulfil its obligation to transpose Community Directives. A Directive is a piece of secondary EU legislation that is binding on the UK as to the ends to be achieved, but leaves discretion as to the method of implementation. When a Directive is issued, the UK must pass national legislation to implement those ends within the proscribed time period. An example of such a directive is Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, which was implemented by the Employment Regulations in 2003 (see below).

iii. Trajectory of equality protection

The direction of equality protection in the UK is a move towards a more generalised right to equality, which is broader and with more general applicability than the traditional rights of non-discrimination based on the grounds of gender, race and disability. It therefore has the capacity to offer a more sensitive response to issues of intersectionality between different equality ‘grounds’ and to issues raised by multiple discrimination, where the status of an individual as – for example – a person who has a vulnerable legal status under immigration and asylum legislation becomes a further basis on which they may be suffering prejudice. Even so, the formal list of equality grounds which can be articulated in rights terms will be exhaustive.

The overhaul of the three former Commissions dealing with issues of discrimination is indicative of this move towards a more generalised protection of equality. The Equal Opportunities Commission, the Commission for Racial Equality and the

⁹ The re-modelled EU would accede to the Convention under the Lisbon Treaty

¹⁰ Art 6.2 TEU

¹¹ Art 7 TEU

¹² Art 13 EC (Nice consolidated version)

¹³ Art 141 EC

¹⁴ Under the Lisbon Treaty, the Charter would gain full binding force.

Disability Rights Commission were replaced as of 1 October 2007 by a single Equality and Human Rights Commission.¹⁵ In addition to assuming the functions of the former three Commissions, the Equality and Human Rights Commission gained new responsibilities for sexual orientation, age, religion and belief, and human rights. The Commission is a non-departmental public body that advises the government in its move towards a single equality legislation, organises campaigns and events and promotes best practice in preventing discrimination.¹⁶ It also has extensive legal powers and is able to take legal action on behalf of individuals.

The move towards a more generalised approach right of equality is more explicitly stated in the Equality Bill 2008 which is expected to be introduced in Parliament during the current session after an extended consultation process.¹⁷ This Bill, if passed, would impose a single equality duty on public officials that embraces grounds such as sexual orientation and religious belief as well as race, disability and gender. It will, moreover, preserve space for Scottish Ministers to impose specific duties on Scottish public bodies, and in relation to the Scottish functions of cross-border bodies.

In addition to the UK Equality and Human Rights Commission, Scotland has its own Commission for Human Rights which co-operates closely with the UK-wide Equality and Human Rights Commission. This Scottish Commission was established by the Scottish Commission for Human Rights Act 2006, under the broader scope of the Scottish Government's Equality Strategy. The functions of the Commission include publishing information about human rights, providing education and training and conducting research. The Commission also has the power to conduct enquiries into Scottish public authorities in relation to general human rights matters.¹⁸

Legal Protection of Rights

i. General provisions

There is currently no general right to equality within UK law, and although the Equality Bill 2008 (see above) would reinforce a trend towards a more generalised approach, it would not as such introduce a general right to equality. Moreover, its focus will be more on the duties of public authorities than on the rights of individuals.

¹⁵ Equality Act 2006

¹⁶ See Equality and Human Rights Commission website

¹⁷ See http://www.equalities.gov.uk/publications/Government_Response_to_the_consultation.pdf.

¹⁸ See Scottish government website

General non-discrimination provisions can be found both in the European Convention on Human Rights and in the EC Treaty. Art 14 of the European Convention on Human Rights provides that all of the enjoyment of rights and freedoms set out in the Convention are to be secured without discrimination on any ground, an obligation that has been transposed into UK law by the Human Rights Act 1998 (see above). However, Article 14 ECHR is not a self-standing right and it cannot be invoked without reference to other ECHR rights.

EU law also contains a general clause enabling the adoption of legislation prohibiting discrimination on certain specified grounds: Directives have been adopted by the Council of Ministers on the basis of Art 13 EC and Article 141 EC which prohibit discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. In the case of discrimination on grounds of sex and race/ethnic origin this extends beyond the workplace (including in relation to training) to the area of the provision of goods and services. Directives as such do not impose obligations on individuals, but the UK implementing legislation must extend to both the public and the private sectors.

ii. Race

UK Race Relations Act 1976 (as amended by the 2000 Regulations) prohibits discrimination by public authorities on the grounds of race. The Act also makes it unlawful for private employers, educational bodies and goods or service providers to discriminate on the grounds of race, subject to the limitation of genuine occupational requirement.

The Act also prohibits harassment on grounds of race. Expressions of racial intolerance that fall short of harassment, incitement of racial hatred¹⁹ or discrimination are protected by the right to freedom of speech and are not therefore unlawful.

iii. Gender

The Sex Discrimination Act 1975 makes it unlawful for private employers, educational bodies and those providing goods or services to discriminate, harass or victimise on the grounds of gender, gender reassignment or marital status. Discrimination for these purposes includes indirect discrimination, where the provision would apply equally to a man but will detriment a significantly larger proportion of men than women.

In addition to these provisions, the Equal Pay Act 1970 implies an equality clause into all employment contracts, and provides that if any term of a woman's contract is less

¹⁹ See Racial and Religious Hatred Act 2006

favourable than a similar term of a man's contract, that term shall be treated as modified so as not to be less favourable.

While these provisions appear to precede the relevant EU legislation, it is important to note that there have been significant amendments over the years in order to adapt UK legislation to the requirements of EU law, including a reversal of the burden of proof.

iv. Disability

The Disability Discrimination Act 1995 makes it unlawful for private employers, educational bodies and goods or service providers to discriminate on the grounds of disability. Small businesses with fewer than 20 employees are exempt from this prohibition. In addition, the Disability Discrimination Act 2005 makes it unlawful for a public authority to discriminate against a disabled person in carrying out its activities.

Under the Special Educational Needs and Disability Act 2001 it is unlawful for a school or higher education institution to discriminate on the grounds of disability in determining the admission of students, or in stipulating the terms of admission.

The UK Government is considering, in the context of the Equality Bill 2008, how – if at all – it will implement the ruling of the European Court of Justice on discrimination 'by association' in the *Coleman* case, as the ECJ has made it clear that where a carer is treated less favourably because s/he cares for a disabled person, this is covered by the prohibition on discrimination on grounds of disability.²⁰

v. Other

Further Employment Equality Regulations prohibit discrimination by employers on the grounds of age, religion or belief and sexual orientation respectively.

Looking forwards

The protection of equality and human rights increasingly involves a multiplicity of public bodies exercising different functions. Those complexities map across, in sometimes quite problematic ways, onto the roles of public bodies in relation to immigration and asylum law. In both cases, we are looking at the increased diffusion of powers, functions and duties in relation to the determination of rights and duties and, in particular, the protection of vulnerable groups. Those subject to asylum and immigration legislation have been protected in very significant ways by human rights law generally, and by protections against arbitrary state actions in particular. There is

²⁰ Case C-303/06 *Coleman v. Attridge Law*, judgment of 17 July 2008.

an important tradition of judicial activism in this field, which has been continued in the UK in recent years by the approach which the higher courts have taken to questions such as detention of terrorist suspects, as well as the imposition of asset freezing orders, as well as the more traditional questions of asylum and immigration law such as deportation, the right to reside and the scope of access to public services and welfare benefits. The role of equality legislation as such has been much more attenuated. However, the important shift towards a greater focus on public duties rather than individual rights highlighted in this short paper, combined with the trend towards a more generalised rather than particularised approach may have the capacity, in the future, to bring about an increase impact of equality legislation upon those who are at the sharp end of asylum and immigration law enforcement.

List of Relevant Legislation

Disability Discrimination Act 1995

Disability Discrimination Act 2005

Employment Equality (Age) Regulations 2006

Employment Equality (Religion or Belief) Regulations 2003

Employment Equality (Sexual Orientation) Regulations 2003

Equality Act 2006

Equal Pay Act 1970

Human Rights Act 1998

Race Relations Act 1976 (amended 2000)

Racial and Religious Hatred Act 2006

Sex Discrimination Act 1975

Special Educational Needs and Disability Act 2001

Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11

Equality Bill and White Paper 2008

Abbreviations Used

EC	European Community / Treaty Establishing the European Community
ECHR	European Convention on Human Rights
EU	European Union
HRA	Human Rights Act 1998
TEU	Treaty on European Union

Further Information

The Equality bill - Government Response to Consultation

http://www.equalities.gov.uk/publications/Government_Response_to_the_consultation.pdf

The Equality and Human Rights Commission

<http://www.equalityhumanrights.com/en/Pages/default.aspx>

Pages specifically on Scotland

<http://www.equalityhumanrights.com/en/scotland/aboutus/pages/default.aspx>

The Scottish Commission for Human rights

<http://www.scotland.gov.uk/Topics/Justice/Civil/17838/10235>

The European Convention on Human Rights

<http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>

Scottish Government Equalities Strategy

<http://www.scotland.gov.uk/library3/social/wtem-00.asp>