

## **Written submission from Ascent (OEU0012)**

### **1. Foreword**

1.1 Ascent is a partnership of the London Violence against Women and Girls (VAWG) Consortium that delivers a range of front-line services for survivors of domestic and sexual violence. Ascent also provides support to voluntary and statutory organisations. It is funded by London Councils.

1.2 The Ascent partnership is built on a shared understanding that VAWG is both a cause and consequence of women's inequality. The United Nations Convention for the Elimination of all Forms of Violence Against Women defines gender-based violence as 'violence that is directed against a woman because she is a woman or that affects women disproportionately' and declares it to be 'a form of discrimination against women that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'. This recognition is important because VAWG does not occur in a vacuum separate to the social, economic and political climate of wider society. We are responding to this consultation because we recognise the importance of the protection of women's equality in the law and understand that any changes to existing UK law in this area post-withdrawal from the EU that diminish women's rights will impact on the likelihood of and risk to women and girls of facing violence and abuse including their ability to leave a violent or abusive situation with the help of the law.

1.3 Within this submission, we have focused on legislation that has significance to women's equality and an established relationship towards enabling women to live safely in society. This approach comes from our shared expertise on working directly with survivors of violence.

1.4 We write this at a time when the future after leaving the EU is uncertain. Our recommendations are made in the hope that we can impact positively on discussions and be part of further dialogue on this subject.

1.5 We are aware that the Fawcett Society is submitting a joint-response to this consultation on behalf of members of its Face Her Future campaign also addressing women's safety. Additionally, Maternity Action is making a submission. We support both of these submissions.

1.6 This response has been written by Rights of Women on behalf of ASCENT. A Rights of Women's mission is, in part, to make the law accessible to all women. We have therefore sought to avoid complicated legal language or jargon.

1.7 We acknowledge the support of Just Fair UK to us in making this submission, particularly in relation to their insight around the UK's compliance with international law, which has assisted in informing our approach.

### **2. Executive summary of recommendations**

2.1 Any new proposed legislation to convert provisions under EU law into UK law (currently being referred to as the "Great Repeal Bill") must include extensive protections in relation to equalities.

2.2 The issue of no protection within equality law for those facing intersectional discrimination and socioeconomic discrimination is put into an even sharper relief than previously by the proposed exit from the European Union and should be addressed as a priority.

2.3 A well-resourced working group is needed within Parliament to continue to investigate the impacts on women as a result of changes to the law that may occur as a result of leaving the EU, which is able to make detailed recommendations, in part through long term engagement with relevant stakeholders including women's specialist organisations.

2.4 The UK Government should ratify the Istanbul Convention on Violence against Women at the earliest opportunity.

### **3. Overview of relationship between EU and UK law**

To assist a layperson to understand our response we will begin with a brief overview of the relationship between UK and EU law to enable a full understanding of our response below.

3.2 In understanding the potential impact of Brexit on equalities and human rights, it is first important to understand the differing functions and roles of a number of key entities and their jurisdiction in relation to aspects of law (which we describe in more detail below), these are:

- European Union (EU)
- European Court of Justice (ECJ)
- EU Charter of Fundamental Rights (known as The Charter)
- Council of Europe (CoE)
- European Convention on Human Rights (ECHR)
- European Court of Human Rights (ECtHR)
- EU Law / EU Treaties / EU Directives
- UK primary and secondary law
- Equality Act 2010
- Human Rights Act 1998 (HRA)
- Equalities and Human Rights Commission (EHRC)

3.3 The referendum on 23<sup>rd</sup> June 2016 opted to leave (or 'Brexit') the European Union (EU), therefore no longer being a member state of the EU. The EU is a collective of 28 member states. Britain entered the EU on 1<sup>st</sup> January 1973 after passing The European Communities Act 1972. This Act is likely to be repealed as a result of leaving the EU.

3.4 The EU judicial system's main court is the European Court of Justice (ECJ). The ECJ's main role is to ensure EU member states comply with EU law. Leaving the EU carries a basic implication that the UK will no longer be required to be compliant with EU law or accountable to the ECJ.

3.5 The EU Charter of Fundamental Rights (known as 'The Charter') sets out a series of human rights that all EU members are bound to adhere to –it is enforced by the CJEU. The Charter is similar to the European Convention on Human Rights (ECHR) but contains additional rights particularly in relation to children. The UK never fully signed up to the Charter, choosing to opt-in for some parts and out for others. The UK's obligation to adhere to the Charter will end when it withdraws from the EU.

3.6 The Council of Europe (CoE) is an international organisation whose role is focused on promoting human rights worldwide. It has 47 member states, 28 of which are EU members. It is separate to the EU. The European Convention on Human Rights (ECHR) is an instrument of the CoE. The European Convention on Human Rights is enforced by the European Court of Human Rights (ECtHR). The UK withdrawing from the EU does not directly alter the UK's membership of the Council of Europe, remove its obligations under the ECHR or prevent UK cases being taken to the ECtHR.

3.7 EU law consists primarily of treaties but also secondary mechanisms, including regulations, directives and case law. EU members are expected to follow these when passing their own laws individually often by way of the EU law setting minimum standards. Examples of where these have been important to UK in recent years includes in relation to UK primary legislation around human trafficking and secondary legislation such as statutory guidance on the treatment of victims of crime within the criminal justice system.

3.8 The Equality Act 2010 and the Human Rights Act 1998 are both pieces of domestic (UK) legislation. The first protects individuals against discrimination and places a duty on public bodies to uphold equalities. The latter protects individuals against breaches of their human rights. They both enshrine many of the principles established through European and International laws and conventions. These will remain as law after the UK leaves the EU.

3.9 The Equalities and Human Rights Commission (EHRC) is a public body that has the UK's Parliament's mandate to challenge discrimination, protect and promote human rights on the UK.

3.10 The entities, laws and conventions outlined above are important to understand (for the purposes of this submission) for two main reasons: firstly to make sense of a confusing landscape by understanding their functionality in their own right but secondly in terms of their relationships to one another. The history and interactions between them has resulted not only in changes and advancements in law but a process of shared learning, dialogue and development of best practice that have been underscored and maintained through input from multiple perspectives. This submission notes the comments to this effect made by Professor Catherine Barnard and Professor Aileen McColgan to the Women and Equalities Committee [Oral evidence: Impact of Brexit on the Equality Agenda, HC 657 14<sup>th</sup> Sept. 2016] regarding the relationship of influence between the UK and EU on developing equality law and how it has not been a one-way process or unidirectional. Therefore the loss of certain of these interactions or isolation from forums for collective decision-making after leaving the EU may hold longer term impacts for UK law that cannot yet be envisaged but should not be underestimated. On this basis, we believe it is of high importance to put strong measures in place now to robustly protect equalities.

3.11 We also note the process that is anticipated to arise following the triggering of Article 50. It is currently our understanding that EU law will continue to apply for a minimum of two years post the triggering of Article 50.

#### **4. Consultation question and answers**

**A. Legislation: What aspects of equalities legislation could be affected when the UK leaves the EU? This could include implications for the Equality Act 2010 as well as other**

**regulations and legislation that have an impact on those with protected characteristics (Age, Disability, Gender reassignment, Marriage and civil partnership, Pregnancy and maternity, Race, Religion and belief, Sex, and Sexual orientation).**

#### **4.1 Equality Law**

4.1.1 The process of leaving the EU places the Equality Act 2010 under threat as it becomes vulnerable to repeal or change, potentially without any obligation to adhere to or be influenced by EU law and with it any regard to developments in standards being set at a European-wide level.

4.1.2 We highlight specific gaps within existing equalities legislation within Section 5 of this submission.

#### **4.2 Family Law: Divorce jurisdiction and Maintenance Regulations**

4.2.1 Agreements and legislation around the registration and enforcement of child maintenance orders have a disproportionate impact on women. Parents have a legal responsibility to provide financially for their children even if they no longer live with them. When child maintenance is paid it can make a significant difference to the lives of families. The impact of reciprocal agreements between states to enforce child maintenance orders has been to speed up the process, providing clarity. Without such provisions mothers and children who live in a different jurisdiction from the other parent are left to pursue lengthy, costly and often fruitless legal action, often in more than one jurisdiction at once. Any delay or confusion in the recognition and enforcement of child maintenance orders starkly and disproportionately disadvantages women due to the fact that they are more often than not the primary carers of the children, they are left to meet the costs of children and child care and they earn less. The removal of legal aid for private family law cases in this jurisdiction increases the barriers that women face in accessing the financial contributions that they and their children are entitled to from the non-resident parent. The difficulties of trying to navigate foreign legal systems in order to pursue or enforce maintenance orders are often insurmountable. It is essential that our withdrawal from the EU does not undo any reciprocal enforcement agreements in place. It is also essential that in spite of Brexit, the UK continues to work with countries across Europe to harmonise our family law legal systems to promote the welfare of children.

4.2.2 In a relationship where violence has occurred towards the woman, provisions that recognise and enforce decisions are fundamental in enabling the woman to leave a violent situation. The speed and effectiveness of this transition is important with regards to her ability to begin to recover from her experiences. The poverty and financial destitution, which so often arises when fleeing violence exacerbates the trauma. Protracted and complex litigation with one's abuser over child maintenance can further exacerbate trauma.

4.2.3 A Bar Council Report <sup>1</sup>[June 2016] on the potential impacts of leaving the EU in relation to family law noted the importance and benefits of "having uniform jurisdictional rules in all or most Member States for divorce proceedings and for maintenance proceedings; having a system of summary enforcement in the courts of all Member States of orders under the

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[http://www.barcouncil.org.uk/media/472103/exec\\_summary\\_bar\\_council\\_eu\\_referendum\\_final.pdf](http://www.barcouncil.org.uk/media/472103/exec_summary_bar_council_eu_referendum_final.pdf)

Maintenance Regulation; and likewise as regards orders for contact between parents and children made in the courts of each Member State.”

4.2.4 Current EU regulations that could be affected by a withdrawal from the EU include the Maintenance Regulation (EC) No 4/2009, which is an EU Regulation dealing with conflict of laws regarding maintenance (child and spousal).

4.2.5 It is therefore essential to ensure that jurisdictional agreements and uniformity are protected and maintained and able to reflect the often international composition (in terms of nationality) of families.

### **4.3 Immigration and Asylum law**

4.3.1 The issue of the status of EEA and Swiss nationals (hereafter ‘EEA nationals’) and their family members living in the UK after our withdrawal from the EU is of grave concern to the many millions who have established their lives in the UK in good faith relying on EU free movement law.

4.3.2. Whilst the government could seek to guarantee the rights of EEA nationals and their family members living in the UK now it has chosen instead to utilise their ongoing residence in the UK as leverage in the forthcoming withdrawal negotiations with the EU.

4.3.3 In the context of this uncertainty there has been a massive upsurge in the number of applications made to the Home Office for European residence documentation. Rights of residence under European law do not derive from such Home Office documents, which instead serve to recognise the rights already in existence. Nevertheless legal advice to EEA nationals and their family members is to seek to apply for such documentation to best protect themselves in this climate of uncertainty. Despite this move to become documented, there will remain a significant proportion of EEA nationals and their family members who will remain undocumented at the time of UK withdrawal from the EU.

4.3.4 The withdrawal agreement and consequential domestic arrangements will need to adequately protect the rights of all EEA nationals and their family members currently residing in the UK. Consideration must be given to the particular experiences of those with protected characteristics and how they are to be protected on withdrawal.

4.3.5 A major problem, which has affected countless women to date and will be brought into sharp focus on withdrawal unless satisfactorily pre-empted with protective measures, is the practical barriers women face asserting rights of residence that are derived from the activities of abusive partners.

4.3.6 An EEA or non-EEA national spouse of an EEA national exercising Treaty rights in the UK (e.g. through work or self-employment) has a right to reside in the UK by virtue of their spouse’s activity. If the family member needs to assert their existing right of residence as the spouse of an EEA national exercising Treaty rights they need to demonstrate not only the existence of the family relationship but also that their spouse is exercising Treaty rights in the UK, for example by producing payslips to evidence work.

4.3.7 Relationship breakdown *per se* does not affect rights of residence under European law – it is only the ending of the family relationship through divorce or ending of the EEA national’s activity that has an effect. Nevertheless, relationship breakdown can give rise to

practical difficulties for many seeking to realise their rights (e.g. when applying for residence documentation or applying for benefits) who must adduce evidence of their ex-partner's activities in the UK e.g. payslips to evidence work. These practical difficulties are exacerbated where there has been domestic violence in the relationship when it is often both impossible and unsafe for victims of domestic violence to obtain the cooperation of an abusive ex-partner in order to provide the necessary evidence demonstrating he has been exercising Treaty rights.

4.3.8 The measures put in place to protect EEA nationals and their family members on the UK's withdrawal from the EU must take these practical difficulties into account and ensure that women's rights of residence are secured notwithstanding their inability to adduce evidence to show their ex-partner's activities to date.

4.3.9 Another common problem, which will disproportionately affect EEA national women is those who have been residing in the UK for many years but unbeknownst to them have not been exercising Treaty rights. This problem arises for economically inactive EEA nationals who will have a right of residence in the UK as self-sufficient only if they have comprehensive sickness insurance. The requirement to have comprehensive sickness insurance applies to students and the self-sufficient. A common scenario is the EEA national wife of a British citizen who has herself not been working but has been financially supported by her husband whilst she cares for the children. Without comprehensive sickness insurance the EEA national wife would not have been exercising Treaty rights despite having a British husband, British children and having built a life in the UK. One simple way the Government could protect the rights of such persons would be to accept that access to the NHS is to be treated as comprehensive sickness insurance for the purposes of satisfying the requirements for a right of residence as a student or self-sufficient person.

4.3.10 Another category of women affected by the UK's withdrawal from the EU are those who have a so-called derivative right of residence as the primary carer of a child in the UK. The UK's Immigration (EEA) Regulations 2006 (as amended) prevent those with a derivative right of residence from acquiring permanent residence in the UK. On withdrawal from the EU, those with derivative rights of residence must be specifically protected to allow them to continue to reside post-exit.

#### **4.4 Human trafficking**

4.4.1 EU Directive 2011/36 sets out a victim centred approach to human trafficking alongside criminal offence definitions and protection of witnesses. The Equality and Human Rights Commission notes 'This has meant, for example, that civil legal aid is available for an individual who has been proven to be a victim of trafficking when applying for leave to enter or remain in the UK, or for a claim under employment law which is connected to the exploitation of someone who is a trafficking victim, which supports victims' rights to access to justice.'

4.4.2 The Modern Slavery Act 2015 (MSA) incorporates some but not all of the protections provided by the Directive. It concentrates on the prevention of trafficking and on the criminal law rather than victim centred approach.

4.4.3 Sections 13/14/15 of the Directive on the special protection of child victims of trafficking are well reflected in the MSA, but there is little protection available for adults. S 11 of the Directive spells out in some detail the level of support a victim of trafficking can

expect, once identified, and specifies that it must at least guarantee subsistence for a specified length of time. However, the equivalent clauses in the MSA (49/50) simply state that the Secretary of State 'must provide guidance and may make regulations'. So far, there has been guidance on identification, for example via the National Referral Mechanism, which has been the subject of concern from many (including the Anti Slavery Commissioner) mainly on the issue of the Competent Authority making the decisions on trafficking being the Home Office, with its brief of immigration control. There have been no regulations to date.

4.4.4. Legal aid is made available to victims of slavery (or trafficking) on the same narrow terms as offered in the Legal Aid Sentencing and Punishment of offenders Act 2012 (LASPO). Legal advice about their immigration status and options is not available to those considering presenting themselves to the authorities as victims of trafficking. Article 12 of the Directive, which states that there should be 'access without delay to legal counselling' is more comprehensive.

4.4.5 Article 17 of the Directive specifies that victims are entitled to compensation for trafficking under the existing schemes in each member state. An equivalent entitlement is lacking in the MSA. Compensation then depends on employment law rights which themselves may well be eroded by leaving the EU. Compensation for loss of the National Minimum Wage is limited by the MSA to 2 years (previously victims had won large awards in the Employment Tribunal because they could claim for losses over many years of domestic servitude). The Criminal Injuries Compensation Authority (CICA) does not accept claims from victims of trafficking unless prosecutions have been brought, and unless there is evidence of physical violence. There is no legal aid available for the submission of CICA claims, nor for enforcement of compensation awards in the Courts.

4.4.6 The conclusion of the Anti-Slavery Commissioner at the end of his first year after the enactment of the Modern Slavery Act was 'at the moment there are too many gaps in the system for victims to fall through'. The Directive has been a useful corrective to the MSA, in order to challenge its shortcomings. For example a successful challenge has been brought to CICA using the Directive, which CICA is now appealing.

4.4.7. Much depends on whether the UK, when leaving the EU, decides to leave the Council of Europe as well. If it does not, The Anti Trafficking Convention of the Council of Europe will remain as a source of protection, as well as the European Convention on Human Rights, Article 4 of which is a prohibition on slavery.

4.4.8. Before the UK leaves the EU, detailed work is needed to highlight the value of the protections in the Directive, which have not been incorporated into the Modern Slavery Act, to ensure they are included in an updated version of the Act. It should be noted that a large majority of victims of trafficking are women, so the issue of protection of victims of trafficking is central to women's rights.

#### **4.5 Maternity, pregnancy and employment**

4.5.1 Women's rights in relation to employment, particularly around pregnancy and maternity have come into force in the UK often through secondary legislation as a result of EU directives. The loss of any obligation to these directives coupled with an uncertain economic landscape creates an insecurity that could pave the way to these rights being overturned in the face of arguments that they place too high a burden on employers that

threaten their ability to survive. Pressure to view these entitlements, which particularly benefit women, as negotiable due to the external economic environment rather than established rights could be disastrous for women. It is therefore important to consider now whether it would be better to seek to have them reinforced through primary legislation.

4.5.2 On this topic, we refer to the expertise and support the submission made by the organisation Maternity Action to this consultation.

## **B) Courts, case law and appeals**

- **Which institutions, organisations and processes are best placed to ensure that the UK maintains and develops its legislation and policies designed to support those with protected characteristics?**
- **What impact will the European Court of Justice's decisions have in the UK post-Brexit?**
- **What is the ongoing role of the European Convention on Human Rights and the European Court of Human Rights in enforcing UK equality law/legal decision making processes?**
- **Will there be a legal gap post-Brexit that would disadvantage UK citizens who want to appeal decisions taken by the UK courts?**

## **C. Embedding equality principles**

### **5. Is it necessary to further embed equalities legislation into the UK law on leaving the EU?**

5.1 Existing areas of contention regarding the breadth of UK Equality law and where it could be developed, that are of particular significance to the advancement of women's rights and protection to women generally, relate to recognition of discrimination on intersectional and socioeconomic grounds.

5.2 The Ascent partnership shares a vision borne out of frontline work that intersectional discrimination exists and that clear and robust protection against this, currently not provided by the Equality Act 2010, is needed within Equality law. At a European level, the issue of addressing intersectional discrimination is an ongoing matter of debate often complicated by individual member state's domestic legislation. However, a European Commission report on intersectionality <sup>2</sup>[May 2016] notes that claims on multiple grounds are 'not precluded' in 'France, Malta, the Netherlands, Norway, Poland, Portugal, Sweden, and the UK' which suggests at a European level a *trajectory* towards addressing the issue of intersectional discrimination exists and could develop further in future years as a result of the interactions between member states that occur through EU membership. The loss of the UK's voice at this level and the influence of EU could have a notable impact on the UK's ability to advance in this area and therefore measures to address this should be put into place now. Additionally, the confusing landscape in relation to what remedies are possible in the UK are desperately in need of clarity. This point is of fundamental importance to the Ascent partnership because we recognise that women affected by intersectional discrimination face some of the greatest disadvantage and barriers in society in relation to the risk and prevalence of violence.

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<sup>2</sup> <http://ec.europa.eu/justice/gender-equality/document/files/intersectionality.pdf>



5.3 The urgency of needing to address the issue of intersectionality and socioeconomic disadvantage in the UK has been frequently highlighted at an international level, including in relation to the Public Sector Equality Duty, which is an aspect of the Equality Act 2010 that places a positive duty on public sector bodies to consider impacts on equality in their actions. The Committee on the Elimination of Discrimination against Women (CEDAW) report <sup>3</sup> [2013] concluded that this was a critical issue of concern that needed redress. This has been echoed again recently in a report from the United Nations Committee on Economic, Social and Cultural Rights <sup>4</sup> [July 2016] which concludes in its observations and recommendations on the Equality Act that the UK Government should ‘bring into force the relevant provisions of the Equality Act that refer to the public authorities’ duty with respect to socioeconomic disadvantage, as well as with respect to the prohibition of intersectional discrimination, in order to enhance and guarantee full and effective protection against discrimination’.

To illustrate some of the points addressed above we have included links to the Women’s Speak Out project led by Women’s Resource Centre:

- [Ellen – Modern Slavery Bill, domestic workers rights.](#)
- [Goranka – Legal Aid](#)

• **What role will the European Convention on Human Rights play? How do other countries ensure strong protection for equalities legislation and rights?**

• **What is the role of the EHRC?**

• **What role could the Office for Disability Issues and the Government Equalities Office play in promoting and strengthening equalities post Brexit?**

• **What policy and/or legislative changes should be made to ensure that the UK is well placed to support strong equalities legislation and processes outside the EU?**

## 6. Disclaimer

Whilst every effort has been taken to ensure the content of this document is legally accurate, it is for information only and is not legal advice. Ascent cannot accept responsibility for any reliance placed on legal information presented in this submission.

November 2016

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