

Losing the Charter of Fundamental Rights – a children's rights perspective

Submission from Children's Rights Alliance for England (CRAE) and
Together, the Scottish Alliance for Children's Rights
to House of Lords EU Justice Sub-committee inquiry on rights after Brexit
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Introduction

The Children's Rights Alliance for England (CRAE), part of Just for Kids Law, works with over 100 members to promote children's rights and monitor government implementation of the UN Convention on the Rights of the Child (UNCRC). Together is an alliance of over 380 charities and interested professionals that works across Scotland to improve the awareness, understanding and implementation of the UNCRC. Together Scotland and CRAE have worked with a number of children's organisations to call for efforts to ensure that children's rights protections are not lost as a result of Brexit.

Impacts of the loss of the Charter on Fundamental Rights on children's rights

The exclusion of the EU Charter of Fundamental Rights (the Charter) from the EU (Withdrawal) Act 2018 is of significant concern, particularly in relation to children. The Charter includes critical rights for children, including the right to have their views taken into account in decisions which affect them and the need for public authorities to take into account the best interests of the child in all actions concerning children. The Charter enhances rights for children that already exist in the European Convention on Human Rights (ECHR) such as the right to education.¹ It includes key rights enshrined in the UN Convention on the Rights of the Child (UNCRC)² such as the right to care and protection, to express views freely in accordance with their age and maturity, the principle of best interests being a primary consideration and the right to know both parents.³

The UK Government has stated that abandoning the Charter *"will not affect the substantive rights from which individuals already benefit in the UK"*.⁴ This is not the case. A Legal Opinion sought by the Equalities and Human Rights Commission (EHRC), concludes that *"a failure to preserve relevant parts of the Charter in domestic law after Brexit will lead to a significant weakening of the current system of human rights protection in the UK"*.⁵

Children's rights enshrined into the Charter have been translated into practice through EU legislation, policy and case law.⁶ This has included areas as diverse as legislation on child-friendly justice systems⁷ and ensuring the best interests of unaccompanied asylum seeking children⁸, through to policies designed to tackle high youth unemployment rates⁹ and child obesity.¹⁰ In addition, the impact of the Charter in informing the development of child-rights focussed cross-border family law regulations cannot be underestimated and is one of many examples that show the value of the Charter. EU cross-border family

¹ CFR Article 14: Right to Education

² CFR Article 24: Rights of the Child.

³ These can be aligned with UNCRC Article 3 (best interests), Article 5 (the evolving capacities of the child), Article 6 (survival and development), Article 7 (to know and be cared for by both parents), Article 12 (to express views freely and have them taken into account).

⁴ UK Government, Department for Exiting the European Union, [Charter Factsheet](#)

⁵ Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), para 2; see also para 44.

⁶ Eurochild (2014) [Applying the EU Charter of Fundamental Rights to children's rights in the EU](#)

⁷ [Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings](#), 2013/0408 (COD). [Directive establishing minimum standards on the rights, support and protection of victims of crime, and on-going FRA research on forms of child participation in criminal and civil judicial proceedings](#), 2012/29/EU

⁸ COM (2014) 382 final

⁹ [EU Work Plan for Youth \(2014 –2015\)](#)

¹⁰ [EU Action Plan on Childhood Obesity 2014-2020](#), 24 February 2014.

law regulations (covering issues such as child custody, contact, child abduction and child maintenance¹¹) provide these families with certainty about their legal rights in difficult situations. The Charter's strength goes beyond solely creating enforceable rights for children: it acts as a guiding light from which legislation and policy can be developed that protects, respects and fulfils children's human rights.

Effect of removing the Charter on individual's rights

The Charter contains certain provisions of great importance to children and young people which are not protected in domestic law at constitutional level.¹² Additional rights under the Charter include a specific provision on the rights of the child¹³ and a freestanding right not to be discriminated against.¹⁴ In relation to both of these examples, the legal Opinion obtained by EHRC concludes that these rights will not be fully reflected in domestic law upon the loss of the Charter.¹⁵

In cases where certain rights are expressed in both the Charter and other international instruments, the scope of the Charter-based right is often broader. For example, whilst the right to a fair trial under Article 6 ECHR is limited to civil and criminal proceedings, Article 47 of the Charter is not. Accordingly, the Charter's protection is also available in administrative cases, such as immigration decisions.¹⁶ Other examples of the broader scope of particular rights can be found in the areas of data protection and migration law.

Concerns on the future framework of rights after Brexit

There is great uncertainty about the future framework of human rights after Brexit. The UK Government has argued that removing the Charter will not result in a reduction in rights as Charter rights are already sufficiently protected elsewhere, for example in domestic law and international treaties. However, its right-by-right analysis published on 5th December 2017 failed to address gaps in protection which will arise if relevant Charter rights are not preserved.

Importantly, while certain Charter rights are also contained in UN treaties which the UK has ratified, including the UN Convention on the Rights of the Child, these have not yet been incorporated into domestic law and therefore are not directly enforceable here. While it is hoped that the current human rights protections, including the Human Rights Act 1998 and the European Convention on Human Rights, will be maintained after Brexit, there is no certainty that this will be so. The Human Rights Act remains under threat. The Conservative 2017 General Election Manifesto states that it will: 'consider our human rights framework when the process of leaving the EU concludes'.¹⁷ The UK received strong calls to safeguard the Human Rights Act when it was reviewed under the Universal Periodic Review process. The possible loss of the Charter only increases the importance of both maintaining the Human Rights Act, and also directly incorporating the UNCRC into UK and Scots law, in the interest of ensuring domestic legal protection of human rights after Brexit.

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¹¹ Procedural matters in relation to cross-border disputes across EU member states are dealt with under the Brussels II *bis* Regulation ("BIIR").

¹² Contrast those rights which are included in the ECHR, which are given constitutional protection at UK domestic level through the Human Rights Act 1998.

¹³ Article 24

¹⁴ Contrast the right to non-discrimination under the Article 14 ECHR which is "parasitic" upon another ECHR right being engaged. Whilst the ECHR does have a stand-alone right to non-discrimination under Protocol 12, the UK has not ratified this, the UK Government having considered that to ratify it would make its "potential application...too wide" see UK Parliament, "[Joint Committee on Human Rights: Seventeenth Report](#)" (23 March 2005)

¹⁵ Jason Coppel QC, [Opinion for Equality and Human Rights Commission](#) (5 January 2018), para 38.

¹⁶ AZ [2017] EWCA Civ 35

¹⁷ The Conservative Party (2017) *Forward together: The Conservative party manifesto*