



# Joint Committee on Human Rights Submission: European Union (Withdrawal) Bill and Children's Rights

**Summary:** As an alliance of Scottish children's charities and organisations, we welcome the opportunity to submit evidence to the Joint Committee on Human Rights. We are particularly concerned about the impact of the European Union (Withdrawal) Bill ('Withdrawal Bill') on children's rights. This submission outlines our concerns regarding the loss of the Charter of Fundamental Rights and the Bill's approach to the role of devolved administrations.

## Impact of removing the Charter on children's rights protection

We are deeply concerned by the Withdrawal Bill's exclusion of the EU Charter of Fundamental Rights. This is a very significant step from a children's rights perspective. The Charter enhances rights for children which exist in the ECHR, such as the right to education.<sup>i</sup> It also condenses the rights enshrined in the UN Convention on the Rights of the Child ('UNCRC') into one article.<sup>ii</sup> These UNCRC rights include the right to care and protection, the right to express views freely, the best interests principle and the right to know both parents.<sup>iii</sup> Children's rights enshrined in the Charter have been translated into practice through EU legislation, policy and case law.

The UK Government's position is that abandoning the Charter shall not adversely affect individuals' rights as the rights contained in the Charter can be found in other international treaties which the UK has ratified. There are three crucial problems with this position:

### The Charter has broader scope than other international human rights treaties

The Charter goes beyond the rights in other treaties by including updated and often broader protections.<sup>iv</sup> Furthermore, the Charter includes certain 'novel' rights not found in other treaties.<sup>v</sup>

### The UK has not fully incorporated certain UN human rights treaties

Whilst the UK Government is correct to state that certain Charter rights find expression in other international treaties that the UK has ratified, the fact that no action has been taken to incorporate these treaties (including the UNCRC) means they do not have direct effect at domestic level.

### No commitment to preserve sources of rights in the future

The UK Government has made no attempts to identify exactly which rights are protected by other treaties nor has it committed to protect the sources of these rights after Brexit. This latter point is particularly relevant given the potential for post-Brexit reform of the UK human rights framework.<sup>vi</sup>

We are further concerned by the Withdrawal Bill's attempt to block challenges to retained EU law on the basis of incompatibility with the general principles of EU law (including fundamental rights). This approach drains retained "underlying rights" of their practical effect.

As such, we believe the Withdrawal Bill must be amended so that the Charter is preserved, as is the right to challenge retained EU law on the basis of incompatibility with the general principles of EU law. This would ensure that the Bill is brought into line with the UK Government's stated intention that the rights of individuals are not adversely affected.

Our full briefing on this issue can be accessed [here](#).

## Role of devolved administrations and children's rights protection

We are concerned by the Withdrawal Bill's approach to the role of the devolved administrations and how these arrangements may impact upon children's rights after Brexit. Under the current Bill, all

powers returning from Brussels shall be centralised at Westminster/Whitehall unless and until they are further transferred to the devolved administrations. Our concern is that decisions taken in Scotland are subject to a higher standard of review from a children's rights perspective than their equivalents made at UK level. There are four main factors here:

#### Children and Young People (Scotland) Act 2014

The 2014 Act places a duty on Scottish Ministers regarding the rights of children. It requires that they consider whether further steps are required to secure children's rights under the UNCRC and, where appropriate, implement these steps. The Part 1 duty under the 2014 Act seeks to embed child rights-based considerations into law and policy making in Scotland. There is no direct equivalent for decisions taken at UK level. Accordingly, this is an area of concern given the Withdrawal Bill's approach of centralising repatriated powers at Westminster/Whitehall, even if this is only to be transitional.

#### Children's Rights and Wellbeing Impact Assessments (CRWIAs)

CRWIAs have been used by Scottish Ministers since June 2015 as part of the implementation of the 2014 Act. The aim of CRWIAs is to assess whether proposed Scottish Government policies, measures and legislation will protect children's rights and promote their wellbeing. CRWIAs have been used to scrutinise new primary and secondary legislation in Scotland as well as policy developments.<sup>vii</sup> By contrast, general impact assessments conducted for UK legislative and policy decisions have been found to be insufficiently child-focused.<sup>viii</sup>

#### Scotland Act 1998 and incompatibility with human rights

Under the current devolution arrangements, acts of the Scottish Parliament or Scottish Ministers which are incompatible with the Human Rights Act are invalid and can be struck down. By contrast, UK Acts of Parliament which are incompatible with the Human Rights Act remain on the statute book but subject to a "declaration of incompatibility".<sup>ix</sup> Arguably, the Scotland Act therefore provides for a stronger procedural protection of human rights. Post-Brexit decisions taken at UK level which are incompatible with human rights shall therefore remain on the statute book. However, had the powers been transferred to Scotland and legislated upon there, any human rights incompatibility would have caused the legislation to fall. Arguably, this threat of invalidity improves the human rights-based scrutiny of Scottish Bills and policies.

#### Future Developments

In its Programme for Government 2017-18, the Scottish Government sets out further steps that it intends to take to progress children's rights in Scotland. This includes an audit of effective ways to further embed the principles of the UNCRC into policymaking and legislation, with consideration to be given to the option of full incorporation of the Convention. The Programme also includes a commitment to oppose any attempts to undermine the Human Rights Act or withdraw from the ECHR, as well as to keep up with relevant developments at EU level. It is clear that the Scottish Government is taking a progressive approach to strengthening children's rights (and human rights more generally) in areas of devolved competence. This can be contrasted with the UK Government's exploration of potential repeal of the Human Rights Act.<sup>x</sup>

To summarise, there are valid concerns that in retaining control over specific legislative areas at UK-level, decisions impacting children will undergo weaker rights-based scrutiny than would have been available at Scottish level as a result of the above factors. As such, we would advocate that, insofar as possible, repatriated powers which fall within devolved areas should be quickly transferred onwards to Scotland. This will allow any future decisions to benefit from the higher standard of child rights-based review available in Scotland, as outlined above.

Our full briefing on this issue can be accessed [here](#).

## Case study: cross-border family law and Brexit

Together has particular concerns regarding the approach of the Withdrawal Bill to areas of EU law dependent on reciprocity between Member States. In examining the impact of the Withdrawal Bill and Brexit more generally on children, Together has conducted a case study on cross-border family law.

Currently, intra-EU disputes relating to children are governed by the Brussels II *bis* Regulation<sup>xi</sup> and the Maintenance Regulation.<sup>xii</sup> These set out the rules on jurisdiction, recognition and enforcement of orders from other EU Member States. Under the Withdrawal Bill, EU family law shall (at least initially) be converted into UK law. However, once domesticated this EU family law framework shall lose much of its effectiveness. This is because the instruments are dependent on reciprocity, something which shall be lost upon conversion into UK law under the Withdrawal Bill. Accordingly, UK courts shall therefore be under a unilateral obligation to continue to respect and enforce incoming orders from remaining EU Member States but these states will no longer be bound to treat UK orders in the same way. This position is undesirable. Accordingly, UK Ministers may seek to repeal retained EU family law, something which the Bill seems to foresee<sup>xiii</sup>, and fall back on existing international law agreements such as the relevant Hague Conventions.<sup>xiv</sup> Our concern, however, is that these alternative instruments do not provide the same degree of children's rights protection as EU family law. This is particularly relevant given the current plans to reform the Brussels II *bis* Regulation in an even more UNCRC-focused manner.<sup>xv</sup> Accordingly, this case study is illustrative of the risk that Brexit may result in the UK being left behind positive developments at EU level.

Our full report on this issue can be accessed [here](#).

## Conclusion

Ultimately, leaving the EU should not result in a reduction in children's rights protection or a lowering in human rights protection more generally. The current level of protection must be maintained and, where possible, steps should be taken to advance children's rights protection in Scotland and across the rest of the UK.

## Submitted by Together (Scotland Alliance for Children's Rights)

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<sup>i</sup> CFR Article 14: Right to Education

<sup>ii</sup> CFR Article 24: Rights of the Child

<sup>iii</sup> 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).

<sup>iv</sup> 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, see AZ [2017] EWCA Civ 35.

<sup>v</sup> For example, the Charter contains a stand-alone prohibition on discrimination. 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)

<sup>vi</sup> Whilst the [2017 Conservative Manifesto](#) states that there will be no repeal or replacement of the Human Rights Act whilst the process of Brexit is underway, it states that plans to reform the UK's human rights frameworks shall be reconsidered after Brexit has concluded, see p.37

<sup>vii</sup> See for example CRWIAs in relation to the [Carers \(Scotland\) Act 2016](#) and the [Secure Accommodation Regulations](#)

<sup>viii</sup> See for example EHRC criticisms regarding UK Government's seven impact assessments on the Welfare Reform and Work Act 2016 which it deemed had not sufficiently taken children's rights into consideration: EHRC, [Children's Rights in the UK \(April 2016\)](#), section 4.2.1

<sup>ix</sup> Human Rights Act 1998: Section 4

<sup>x</sup> See 2017 Conservative Manifesto p.37 (above)

<sup>xi</sup> Brussels II *bis* Regulation 2201/2003

<sup>xii</sup> Maintenance Regulation 4/2009

<sup>xiii</sup> European Union (Withdrawal) Bill clause 7(2)(c)

<sup>xiv</sup> Namely The Hague Convention on the Civil Aspects of International Child Abduction, 25 October; The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 19 October 1996; The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 23 November 2007.

<sup>xv</sup> European Commission, 'Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)' COM(2016) 411 final