

Coram Children's Legal Centre submission to the Joint Committee on Human Rights on the human rights implications of the European Union (Withdrawal) Bill, November 2017

Coram Children's Legal Centre (CCLC), part of the Coram group of charities, works in the UK and around the world to protect and promote the rights of children, through the provision of direct legal services; the publication of free legal information; research and policy work; law reform; training; and international consultancy. CCLC has undertaken amicus curiae interventions in a number of significant cases, including in the European Court of Human Rights, the Supreme Court and the Court of Appeal, providing assistance to the court on matters of children's rights and best interests.

Summary

1. Withdrawal from the EU is the most fundamental constitutional change to the UK for a generation. The EU (Withdrawal) Bill ('Withdrawal Bill') purports to convert all EU law as it stands into national law on exit day (clause 4) However, this conversion is inadequate from a children's rights standpoint for the following reasons:
 - It does so without the constitutional commitment to protecting the rights of the child in all areas of law and policy affecting children.¹
 - The Charter offers a broader array of rights, particularly for children, than those found in existing incorporated rights, and is specifically excluded from incorporation.
 - The converted law will in some cases references children's best interests and the fundamental rights of the child, but will lose the context of broader rights commitments and interpretation provided by the Charter and the European Court of Justice (ECJ).

Protecting children's rights during the transposition of EU law

2. The EU has committed to the fundamental rights of children through the Treaty of Lisbon, as well as the Charter of Fundamental Rights ('the Charter'). Article 24 of the Charter contains provisions inspired by the UN Convention on the Rights of the Child (UNCRC), including adopting the best interests principle, and the child's right to be heard. Additional provisions directly addressing children's rights and interests include: the right to receive free compulsory education (Art 14(2)); the prohibition of discrimination on grounds of *inter alia* age (Art 21); and the prohibition of exploitative child labour (Article 32). The ECJ now routinely refers to the Charter when adjudicating on cases involving children,² for example in cases relating to cross-border

¹ Article 3(3) TEU

² Article 24. See further Stalford, H. *Children and the European Union: Rights, Welfare and Accountability*, 2012, Oxford Hart; and Stalford, H. (2014). 'The CRC in litigation under EU law'. In T. Liefwaard, & J. Doek (Eds.), *Litigating the Rights of the Child* (pp. Chapter 12). London: Springer.

family disputes, and the principles of free movement for people and goods.³

3. As drafted, the Withdrawal Bill removes the Charter from UK law and proposes that ‘fundamental rights and principles’ are considered in place of the Charter when implementing case-law or legislation that refers directly to it after exit day.⁴ However, there is no further information on what these fundamental rights would be, nor any clarity as to whether the development of children’s rights envisioned in EU law would be considered to be fundamental rights and principles. The Government’s White Paper notes that many of the rights protected in the Charter are also found other international treaties which the UK has ratified – including the UNCRC.⁵ However, in a centralised context, there is no specific statutory provision requiring respect for children’s rights in law-making, nor a general requirement to safeguard and promote the welfare of children in the UK.⁶
4. The UNCRC is a broad treaty of rights, which provides comprehensive protection for children’s social, economic, cultural and civil rights. Whilst the UK is a signatory of the UNCRC, it is not enshrined in domestic law. EU legislation, policy and case-law developments have substantially improved the landscape for children across a diverse range of areas, including: criminal and family justice, non-discrimination, child trafficking, sexual exploitation and health and safety. The UNCRC is the touchstone for the development of European children’s law,⁷ and the Commission has adopted the language of the UNCRC in all legislation and policy relating to children.
5. Currently, Wales, Scotland, and Northern Ireland have strengthened their laws on children’s rights and protection. Since 2012, public authorities in Wales have had a duty to give due regard to the UNCRC and routinely undertake Child Rights Impact Assessments in proposing legal and policy change.⁸ In Scotland, Ministers must consider steps to secure further or better implementation of the UNCRC,⁹ and in Northern Ireland, the best interests of children must be determined in accordance with the UNCRC.¹⁰
6. However, the Withdrawal Bill will limit the scope of the devolved nations to alter law that is within the current devolution settlement and brings competence on matters that have been arranged under EU law back to Westminster. This would prevent devolved nations from

³ See for example [C-92/12 PPU Judgment 26/04/2012 Health Service Executive](#); and [C-648/11 MA and Others](#) v. Secretary of State for the Home Department, ECLI:EU:C:2013:367.

⁴ House of Commons, European Union (Withdrawal) Bill briefing paper, 1 September 2017

⁵ Legislating for the United Kingdom’s withdrawal from the European Union, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf

⁶ The current statutory provisions to safeguard and promote the welfare of children in England and Wales are found in the Children Act 1989 in relation to family proceedings and in the 2004 Children Act which places a duty on specific public authorities. The Borders Citizenship and Immigration Act 2009 places a similar duty on public authorities in respect of children subject to immigration control across the UK

⁷ See the Fundamental Rights Agency, Handbook on European Law on the Rights of the Child, 2015

⁸ The Rights of Children and Young Persons (Wales) Measure 2011

⁹ Children and Young People (Scotland) Act 2014

¹⁰ Children’s Services Co-operation Act 2015

exercising their powers to prevent, or amend legislation from Westminster, even where this contradicts their own commitments to children's rights.

Maintaining children's rights protection following Brexit

7. The Withdrawal Bill leaves unclear the nature and scope of EU legislation which the Minister may deem appropriate to amend when it is transposed into UK law. The limited parliamentary oversight or assessment of the amendments will make scrutiny of these measures very difficult. Even where amended EU legislation may seem benign, the amendments may have significant consequences for children.

8. An example of amended EU legislation where children's rights could be eroded is the 2011 EU Anti Trafficking Directive, which has in part been transposed into domestic law through the Modern Slavery Act 2015, the 2015 Human Trafficking and Exploitation (Scotland) Act, and the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015. Not all nations have transposed the full scope of provisions in the directive which includes explicit reference to unaccompanied minors¹¹ and outlines that member states should take necessary measures to ensure specific, durable, actions to assist and support child victims of trafficking taking into account special circumstances of the child victim.¹² Currently where national law is silent on the implementation of specific, positive obligations, then the provisions of the directive may become directly applicable. The absence of comprehensive protection provisions across domestic legislation and the failure to implement guardians for trafficked children highlights the half-hearted nature of children's rights protections to date. Without the full transposition and protection of the rights contained in the EU Trafficking Directive, child victims of modern slavery in the United Kingdom will be unable to rely on domestic legislation for full protection post Brexit. Even if the transposition is complete, the terms of the Withdrawal Bill allow the Government to modify parts of the directive which do not conform with domestic legislation without further scrutiny.

9. Even once the sunset clause expires, the protections contained in EU law, and the co-ordinated approach towards greater accountability for children's rights, safeguarding and well-being will be lost. Without further measures of accountability, a children's rights perspective or even an assessment of the impact of any new legislation is not required. This will include the legislation required to complete the UK's exit, such as the proposed Immigration Bill, and any further domestic primary and secondary legislation, whether or not related to Brexit.

10. Examples of children's specific rights, or examples where we feel children's rights should be appropriately considered as the UK leaves the EU, include:

- Where alterations to public procurement regulations are made and impact on the provision of residential and foster care for children looked after by the State;
- The effect on children's present and future health and wellbeing of changes to environmental standards and protections;

¹¹ Preamble 23 (particular assistance, support, guardianship, durable solutions)

¹² Article 16

- Decisions related to the provision of benefits, and the impact on families (such as legal aid, the restriction of child benefit and the decision to freeze benefits).

11. In September 2017, UNICEF published a report setting out the progress made on children’s rights in the UK.¹³ This established that while much has been achieved, there are still considerable weaknesses in the assessment of the impact of children’s rights on law and policy, with no Bill having undergone a child rights impact assessment.

12. New Trade Agreements: will they uphold children’s rights?

Under current EU law, the free circulation of goods and services between the Member States have to be balanced against the need to subject such goods and services to sufficient scrutiny with a view to protecting the welfare of children who may be exposed to them. This balancing of priorities has been achieved in the context of DVD and other media exports, for instance, by reference to children’s rights to be protected against harmful media content under Article 17 UNCRC (*Dynamic Median Vertriebs GmbH v Avides Media AG* (Case C-244/06) [2008] ECR I-505). As the UK embarks upon new trade deals, particularly if it withdraws from the Customs Union, there needs to be a comparable mechanism in place to ensure that any new trade deal includes sufficient safeguards for children who will be exposed to foreign products and services.

Recommendations

13. The Government should ensure that all existing EU law protections for children’s rights are incorporated into UK law following Brexit. These include rights in EU Directives; rights in CJEU case law; and directly applicable EU regulations. The Charter should be brought fully into the domestic law of all UK nations, to ensure adequate protection for issues of centralised and devolved concern.
14. The Government must expressly in primary legislation protect children’s rights in the context of Brexit. This could be achieved through requiring all regulations that are introduced as a result of Brexit to give due regard to the UNCRC, or by the full incorporation of the UNCRC into UK law. To allow for adequate transparency and accountability, the Government should introduce a requirement to carry out a child rights impact assessment (CRIA) prior to the decision to introduce a statutory instrument.

¹³ Unicef UK Briefing. ‘The case for a child rights impact assessment in England’, 2017