



## Family and Civil Law and Brexit Consultation Response – August 2018

### About Together (Scottish Alliance for Children's Rights)

Together (Scottish Alliance for Children's Rights) is an alliance that works to improve the awareness, understanding and implementation of the UN Convention on the Rights of the Child (UNCRC) and other international human rights treaties across Scotland. We have over 380 members ranging from large international and national non-governmental organisations (NGOs) through to small volunteer-led after school clubs. Our activities include collating an annual State of Children's Rights report to set out the progress made to implement the UNCRC in Scotland. This submission follows ongoing consultation with our membership but may not necessarily reflect the specific views of every one of our member organisations.

### Introduction

Together welcomes the opportunity to contribute to the Scottish Government's consultation on Brexit and Family Law. This is an important issue affecting many children and their families. Our [2017 report](#) found that approximately 10% (5604) of babies born in Scotland in 2016 had at least one parent born in another EU country. This is the result of years of free movement between EU countries. Contentious breakdowns of such 'international families' are more likely to span two countries and may result in parental child abduction to another EU country. If this happens, it is essential that children and their families have access to clear and simple procedures determining which country's courts shall have jurisdiction, and under what conditions judgements may be recognised and enforced in another country. EU family law regulates these procedural issues where two EU member states are involved. Alternative instruments, such as the Hague Conventions, exist for disputes involving other countries.

EU family law relies on reciprocity between member states. This reciprocity will be lost if the UK leaves the EU without an agreement on family law. Alternative instruments, such as the Hague Conventions, could be relied upon as backstop. However, Together considers that close cooperation between the UK and EU in family law matters is in the best interests of the many children born in Scotland to UK-EU families.

The following response relates to EU family law in relation to disputes around contact, residence, child abduction and maintenance payments. It does not cover other family law issues, for example divorce.

## Q1. Should EU provisions on family law continue to apply after the proposed transition period?

Together welcomes the proposed application of EU family law during a transition period until 31<sup>st</sup> December 2020. Additionally, Together supports the UK seeking agreement for continued participation in the EU family law system beyond the transition period, with full reciprocity.

EU family law makes more express provision for children's rights than the alternative instruments such as the 1980 and 1996 Hague Conventions. Children's rights are set out in the UN Convention on the Rights of the Child and include the right of a child to express their views and have these taken into account in matters affecting them,<sup>1</sup> the right to have their best interests taken into account as a primary consideration,<sup>2</sup> and the right to maintain regular and direct contact with their parents.<sup>3</sup>

The EU framework ensures that children have the opportunity to have their views heard during abduction return proceedings<sup>4</sup> and will soon allow children's opinions to be heard in all proceedings falling within the scope of the recast Brussels II *bis* regulation.<sup>5</sup> EU family law also ensures that the best interests of the child is used as a mediating principle,<sup>6</sup> establishes time limits for certain proceedings<sup>7</sup> and provides for fast track enforcement of access rights.<sup>8</sup> New proposals also allow for fast track enforcement of other judgements relating to children and additional safeguards to speed up proceedings – saving time and costs for families.<sup>9</sup>

The European Union (Withdrawal) Act means that EU family law instruments will lose much of their effectiveness due to the loss of reciprocity. The UK may seek to fall back on alternative international agreements such as the Hague Conventions. This, however, raises several concerns:

- The EU has positively influenced family law in furthering children's human rights protections, particularly in the context of the right of the child to have an opportunity to express their views, the requirement for a balance between the depth of an individualised assessment into the child's best interests and the speed of proceedings and the right of the child to maintain regular and direct contact with their parents. Reliance on the Hague Conventions may result in a watering down of protection for children.

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<sup>1</sup> Article 12 UINCR, see also General Comment No. 12 (2009) 'The right of the child to be heard' (1 July 2009) CRC/C/GC/12

<sup>2</sup> Article 3 UNCRC, see also General comment No. 14 (2013) 'The right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)'.

<sup>3</sup> Article 9(3) UNCRC

<sup>4</sup> BIIR Article 11(2). In abduction return proceedings, BIIR provides "it shall be ensured that the child is given an opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity".

<sup>5</sup> Recast Proposal, Article 20

<sup>6</sup> Additionally, the proposed Recast recognises a greater linkage between the best interests of the child and ensuring the child has an opportunity to be heard (Recital 13)

<sup>7</sup> Whilst BIIR Article 11(3) states 'six weeks', the proposed Recast clarifies that this limit pertains to each stage of proceedings (maximum of 6+6+6 weeks) Explanatory Memorandum to Recast Proposal, 13 (the three stages being: first instance, appeal, enforcement).

<sup>8</sup> BIIR Article 41 abolishes the requirement of exequatur so access orders are directly enforceable in another Member State provided they are accompanied by the appropriate certificate

<sup>9</sup> Recast Proposal, Article 25(4)

- The UK may miss out on future developments at EU level which are positive from a children's rights-based perspective. An example is the current recasting of the Brussels II *bis* Regulation which links more closely to the UNCRC. Whilst the UK has opted into the recast, it is not clear whether it shall enter into force before or after Brexit. If there was a UK-EU agreement on continuing the application of EU family law in the UK after Brexit, then this would allow the UK and Scotland to benefit from positive future developments for children.
- There may be technical issues regarding the UK's participation in some of the Hague Conventions, in particular the 2007 Hague Maintenance Convention. These issues may take some time to resolve, therefore, if the UK Government intends to fall back on these conventions, there is a risk of a gap between the end of the transition period and these alternative instruments becoming applicable.
- The Hague Maintenance Convention 2007 lacks rules on jurisdiction.

In summary, children's human rights are being increasingly embedded into EU family law. This is helping to ensure that their rights are protected, respected and fulfilled. Together would welcome EU family law continuing to apply after the transition period, with an agreement with the EU to ensure full reciprocity, so that children can continue to benefit from these protections.

## **Q2. Should Scotland recognise family law judgements from EU member states, even if the UK leaves the EU without a negotiated settlement?**

Together notes that both recognition and *enforcement* are key issues for judgements relating to children. The question relates only to recognition but this must not prevent debate on the key matter of enforcement.

Brussels II *bis* Regulation provides for the fast-track enforcement of access rights. The recast extends this to all decisions falling under the new regulation. The aim is to reduce costs and delays for families.<sup>10</sup> By contrast, neither the 1996 nor 1980 Hague Conventions provide an accelerated procedure for enforcing orders.<sup>11</sup> The procedure for enforcement under the Hauge Conventions is more complex, slower and expensive.

However, if no deal is reached with the EU then this would mean a loss of reciprocity. Accordingly, if the UK continued to apply EU family law it would be doing so unilaterally. In this context, it would mean UK courts automatically recognising and enforcing incoming orders from EU countries, but there being no guarantee that UK orders would be given the same treatment in remaining EU countries' courts. This lopsided situation is undesirable as it would lead to children's cases being dealt with differently depending on where the order originated.

Whilst more time consuming and costly, falling back on the Hague Conventions in this situation seems more logical than continuing to apply EU family law unilaterally without the reciprocity that makes it effective.

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<sup>10</sup> [Explanatory Memorandum to Recast Proposal](#), 14

<sup>11</sup> Nigel Lowe, 'EU Family Law and Children's Rights: A better alternative to the Hague conference or Council of Europe?' (The Children and the European Union: Legal, Political and Research Prospectives Conference, University of Liverpool, 21 April 2009), at 4-5.

**Q3. If the UK leaves the EU without a negotiated settlement, should jurisdiction of the courts in family cases revert to the position before EU provision was introduced in this area?**

Together has not taken a specific position on this issue. However, it is crucial that whichever approach is adopted, there must be clear rules to deal with cases where proceedings are raised in more than one country. Parallel proceedings can cause lengthy delays, expense and increase animosity between parents, all of which are contrary to the best interests of the child under Article 3 UNCRC.

**Q4. Would the Hague Conventions and the Lugano Convention adequately replace the European instruments discussed in paragraphs 27-28 for family and civil international law?**

We refer to our earlier answer to Question 1. Together's view is that Brussels II *bis* and the EU Maintenance Regulation provide more expressly for the rights of the child during cross-border family proceedings. Whilst alternative instruments do provide a "backstop" to some extent, reliance on these could result in a dilution of existing protections for children's rights. Additionally, the 2007 Hague Convention contains no rules on jurisdiction. This 'gap' could lead to parallel proceedings in maintenance disputes leading to associated delays and expense.

We cannot comment on the other European instruments mentioned in paragraphs 27-28.

**Q5. If there was a time lag between the Maintenance Regulation and Brussels IA ceasing to apply and the UK re-joining the 2007 and 2005 Hague Conventions and the Lugano Convention, what would the impact of this time lag be for families?**

The following answer relates only to the EU Maintenance Regulation and the 2007 Hague Convention. We are unable to comment on the other instruments mentioned.

If the UK Government intends to fall back on the Hague Conventions, it is critical that there is no "gap" in their application. The UK acceded to the 2007 Hague Convention on behalf of its Member States, including the UK. Accordingly, the UK shall cease to be bound by the 2007 Convention when it leaves the EU unless prior action is taken by the UK Government to accede in its own right. There are rules about when the UK Government can take this action and rules specifying when the Convention shall enter into force following accession.<sup>12</sup>

If there is a time lag between the application of EU measures and the application of the Hague Conventions then this would result in uncertainty for children and their families. This could lead to delays in proceedings, additional expense and frustration. This situation would be contrary to the best interests of the child under Article 3 UNCRC. Furthermore, any difficulties or delays in obtaining maintenance payments from a parent living abroad may also raise issues under Article 27(4) UNCRC on the child's right to a satisfactory standard of living. This is particularly important for children from lower income families who might struggle in the absence of maintenance payments from a parent living abroad.

If the UK Government intends to rely on the 2007 Hague Convention, then the transition period should be used as an opportunity to ensure the necessary ratification process has been completed so that no "gap" in application occurs once the transition period is over.

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<sup>12</sup> The 2007 Convention comes into force three months after ratification. Therefore the UK must accede three months prior to the end of the transition period to ensure no "gap" in application. However, as issues relating to the 2007 Convention are within the EU's exclusive competence, complications arise. For more details see our [2017 Report](#) at Section 5.1.

**Q6. Are there any other points about the impact on Scots family law of Brexit which you wish to make?**

Some solicitors have expressed concerns that whilst they are familiar with the EU instruments, they are less familiar with the Hague Conventions which they have not had to use as frequently. Accordingly, if the UK Government intends to fall back on the Hague Conventions, then this will require extensive training for practitioners and judges.<sup>13</sup> Under the Council of Europe Guidelines, such training should incorporate child rights-focused approaches.<sup>14</sup>

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<sup>13</sup> Lowe N, 'Some reflections on the options for dealing with international family law following Brexit' (2017) Family Law 399 Lowe, 404

<sup>14</sup> [Council of Europe Guidelines on Child-Friendly Justice](#) (2010), paras 15 and 49.