



## REPORT

# Conditioning Power: Devolved Law-Making after the Supreme Court's s.28(7) Rulings

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# Executive Summary

1. This report analyses the implications of the UK Supreme Court's interpretation of section 28(7) of the Scotland Act 1998, delivered through two landmark cases - the Continuity Bill Reference (2018) and the UNCRC/ECLSG Treaty Incorporation Bill References (2021). These judgments have reshaped the constitutional understanding of devolved lawmaking and introduced new complexity, uncertainty and constraints on the law-making powers of the Scottish Parliament.
2. Section 28(7) of the Scotland Act 1998 makes clear that the UK Parliament can continue to make laws for Scotland, including in devolved areas. Similar sections appear in the devolution statutes for Wales and Northern Ireland. Prior to the Supreme Court reference cases, this was widely regarded as a symbolic reaffirmation of Westminster parliamentary sovereignty. However, the Supreme Court interpreted this section more broadly: the Scottish Parliament (and by extension the other devolved legislatures) cannot make laws that are inconsistent with the maintenance of the UK Parliament's 'unqualified' legislative power. The Scottish Parliament can amend or repeal UK laws in devolved areas or make new free-standing laws. But it cannot legislate to *condition* the meaning or effect of UK laws in devolved areas or make the UK Parliament's rules *conditional* on decisions made by other bodies, such as the Scottish Ministers or the courts.
3. The Supreme Court rulings have generated new and unexpected barriers to devolved law-making. In the wake of the ruling, the United Nations Convention on the Rights of the Child (UNCRC) (Incorporation) (Scotland) Act 2024 was substantially narrowed so that the rights protected and duties imposed by the Act only extend to free-standing laws passed by the Scottish Parliament. This excludes major pieces of legislation in devolved areas that were enacted prior to devolution, including the Children (Scotland) Act 1995. The limitations of this approach are affecting new Bills, including the Children (Care, Care Experience and Services Planning) (Scotland) Bill - the Bill intended to help meet 'the Promise'.
4. A Bill to incorporate the European Charter of Local Self Government (ECLSG) into Scots law has been stalled for five years in the wake of the judgment. New amendments suggest that the ECLSG Bill will be similarly narrowed to apply only to free-standing laws enacted by the Scottish Parliament. As much of the legislation that applies to local government pre-dates

devolution or originates in Acts of the UK Parliament, the ECLSG Bill may do relatively little to protect and strengthen the position and powers of local government in Scotland.

5. The new limitations on devolved law-making have increased legal and administrative uncertainty and has made the implementation of new rights and duties more complex and dependent on which parliament enacted the associated laws. This has practical challenges in the administration of public services, where UK and Scottish Acts on devolved matters commonly operate within the same service area. In the case of the UNCRC Act, young people and their families face a complex landscape that fogs the extent of their legal rights and when remedies can be sought.
6. There are some workarounds available to devolved lawmakers. These include adopting a new approach to drafting legislation to create standalone devolved statutes, consolidating pre-devolution UK Acts, or amending UK legislation on a case-by-case basis. But these are slow, resource intensive, and would crowd out other legislative priorities. In addition, such measures may not be legally straightforward, could generate further unintended consequences, and risk creating a fragmented and less coherent statute book.
7. Better intergovernmental cooperation over the development of devolved legislation, as well as UK legislation that includes or connects to devolved matters, may help to ensure complementarity between the statute books and might help to avoid legal disputes. By itself, however, this is insufficient to alleviate the uncertainty and complexity generated by laws that have had to narrow their scope to conform to the Supreme Court's s.28(7) jurisprudence.
8. We recommend two practical solutions that can restore the clarity and scope of the law-making competences of the Scottish Parliament and other devolved legislatures when legislating on devolved matters. Neither of these would compromise the continued sovereignty of the Westminster parliament to make laws for Scotland:
  - Amend s.28(7) of the Scotland Act 1998 (and its equivalents in Wales and Northern Ireland), either through primary or secondary legislation, to expressly permit the devolved legislatures to condition UK legislation on matters that are now devolved. This is our preferred option as it would provide clarity, certainty and flexibility, and reduce

the likelihood of future disputes.

- Make a commitment to authorise conditioning of UK legislation on devolved matters on a Bill-by-Bill basis. This could similarly reduce the impracticalities and complexity uncovered in this report, but would be slower, less transparent, administratively heavy, and still retain some legal uncertainty. This approach may also be vulnerable to political disagreement and delay.

9. Without a legal intervention, devolved governance in Scotland, Wales and Northern Ireland will continue to face unnecessary complexity, constraints, and operational difficulties that undermine both policy aims and public service delivery, and risk creating tensions than inhibit cooperative intergovernmental relations.

# 1. Introduction

In the *Continuity Bill* and *Treaty Incorporation Bill References*,<sup>1</sup> the UK Supreme Court gave an interpretation of section 28(7) of the Scotland Act 1998 that departed from previous understanding of the significance of the provision. S.28 of the Scotland Act sets out the law-making powers of the Scottish Parliament in devolved policy areas. S.28(7) – the 7<sup>th</sup> paragraph in that section – states that:

*This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.*

Prior to the Supreme Court's decisions in these two cases, s.28(7) was generally understood to be a purely symbolic statement of the continuing sovereignty of the UK (Westminster) Parliament – i.e., its position as the supreme, and unlimited, law-making authority within the UK constitution.<sup>2</sup> According to the Supreme Court, however, in order to uphold Westminster's unlimited law-making power, s.28(7) restricts the ability of the Scottish Parliament to place general conditions on the operation of laws made by the UK Parliament in devolved areas. Such legislation can in general be amended, or even repealed, by the Scottish Parliament, as part of its power to make laws for Scotland in devolved areas. But the Court concluded that the Scottish Parliament did not have the power to pass laws that 'condition' the interpretation or scope of UK laws in devolved areas, because to do so would 'affect the power' of the UK Parliament to legislate for Scotland.

The impact of these decisions has been most keenly felt in relation to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, which had to be amended – and significantly narrowed in scope – before it could be enacted.<sup>3</sup> However, the Supreme Court's reasoning has potentially important restrictive effects on devolved law-making in general, not least because of considerable uncertainty about the scope of the judgments. It is, for example, one reason why the Scottish Government paused the introduction of its planned Scottish Human Rights Bill. It also stalled the enactment of a Member's Bill to embed the European Charter of Local Self-Government in Scots law. And issues arising from the Supreme Court's decisions are emerging in the context of ongoing legislation in relation to children's care and care experience and services and religious education.

In addition, these decisions have raised questions over the validity of legislation

already on the statute book – Acts which, in various ways, have sought to ‘condition’ the exercise of public functions or the interpretation of statutory provisions. And it has also created operational uncertainty for public bodies working in devolved areas where Scottish Parliament and UK Parliament legislation is intertwined. Nor is this a problem likely to be limited to Scotland: similar reasoning, with similar restrictive effects, is likely to be applied to devolved legislative powers in Wales and – despite differences in how the equivalent provision is framed and protected there – in Northern Ireland too.<sup>4</sup>

In this Report, we explain the background to the two Supreme Court decisions, the Court’s reasoning, and the challenges that the judgment is posing for devolved law-making. In our view, some of these challenges are unintended consequences that complicate and potentially constrain devolved law-making in ways that were not envisaged by the architects of devolution. Moreover, the decisions have generated confusion in the interpretation and application of some legislation governing devolved public functions in Scotland among those with a duty to implement it.

In the final section of the Report, we set out some steps that could help to address these issues. We are indebted to participants in the workshop *Devolved law-making after the UNCRC (Incorporation) (Scotland) Bill Reference*, held at the University of Glasgow in March 2025, whose contributions informed our thinking. Further discussions with Scottish Government officials, other public servants and third sector bodies reinforced our view that there are issues, uncertainties and new challenges that are hampering the ability of the Scottish Parliament to enact legislation that best meets the needs of those they serve. The analysis and potential resolutions offered in this Report are entirely those of the authors and are intended to offer pragmatic steps towards resolving some of these issues.

## 2. The Context: Devolution and Law-Making Powers

Devolution to Scotland, Wales and Northern Ireland rests on three Acts of the UK Parliament: the Scotland Act 1998; the Government of Wales Act 2006; and the Northern Ireland Act 1998. These Acts set out the law-making powers of each of the devolved legislatures, with each having been amended periodically to alter the scope of those powers.

Although the precise scope of devolved legislative competence differs in Scotland, Wales and Northern Ireland, each now conforms to a ‘reserved powers’ model of devolution.<sup>5</sup> This means that the Scottish Parliament, the Senedd (the Welsh Parliament) and the Northern Ireland Assembly have been given general (or plenary) powers to legislate on all matters that have not expressly been ‘reserved’ to the UK Parliament.

Within the limits of devolved competence, the laws passed by the devolved legislatures do the same sorts of things, and with the same force, as laws passed by the UK Parliament, reflecting the policy choices of devolved governments and parliamentarians. This may include, for example, altering individual rights and duties, creating new criminal offences, levying taxes, empowering public authorities to do things they would not otherwise have power to do, imposing duties on public authorities, giving effect to international obligations, and so on. Again, within the limits of their respective devolved competence, these legislatures may introduce new laws or amend or repeal existing laws, including laws that were enacted by the UK Parliament. There are very few laws that are wholly new; most involve amending existing law.

Devolved legislation that relates to a reserved matter ‘is not law’.<sup>6</sup> Those matters that are ‘reserved’ to the UK Parliament are set out in Schedule 5 to the Scotland Act 1998, Schedule 7A to the Government of Wales Act 2006, and Schedules 2 and 3 to the Northern Ireland Act 1998.<sup>7</sup>

In addition, there are cross-cutting constraints that affect the ability of the devolved legislatures to make law even in policy areas that would otherwise relate only to devolved matters. For example, the devolved legislatures cannot make legislation that would be incompatible with the rights contained in the European Convention on Human Rights (ECHR) or that would ‘modify’ certain ‘protected’ (in Northern Ireland, ‘entrenched’) enactments passed by the UK

Parliament. These protected enactments are listed in the devolution statutes (Scotland Act Schedule 4, Government of Wales Act Schedule 7B, Northern Ireland Act Section 7). The protected enactments include the Human Rights Act 1998, the European Union (Withdrawal) Act 2018 and the United Kingdom Internal Market Act 2020. Crucially for present purposes, they also include (aspects of) the devolution statutes themselves.

Devolved legislation that is outwith the devolved legislatures' limited law-making powers is vulnerable to being struck down by the courts. To avoid this outcome, various checks have been built into the respective legislative processes. When a Bill is introduced, both the person responsible for the Bill (usually a government minister with the clearance of their law officers) and the Presiding Officer/Speaker must make statements about whether the Bill would be within legislative competence. And, as was the case with both the *Continuity Bill* and *Treaty Incorporation References*, when a Bill has been passed by one of the devolved legislatures it may be referred to the Supreme Court by the devolved or UK law officers for a definitive ruling on its validity before it receives Royal Assent. Once a Bill has become an Act, it may also be challenged by any individual or group affected by or with an interest in it.

As well as setting out the boundaries of devolved law-making powers, the devolution statutes reaffirmed the sovereignty – that is, the supreme legal authority – of the UK Parliament over *all* matters of law.<sup>8</sup> This means that, while there are hard legal limits, enforceable by the courts, on the ability of the devolved legislatures to pass laws on matters reserved to the UK Parliament, there are no such limits on the ability of the UK Parliament to legislate in relation to devolved matters.

Nevertheless, the UK Parliament's continuing legal power to legislate in devolved areas is tempered by a political rule, known commonly as the Sewel Convention. Accordingly, the UK Parliament will not normally pass law in devolved areas without the consent of the relevant devolved legislature(s). Since their establishment in 1999, it has been commonplace and convenient for the devolved legislatures to give 'legislative consent', after consideration and deliberation, to provisions within UK laws that fall within devolved areas.<sup>9</sup>

Conventions are generally understood to be non-legally enforceable constitutional rules. This particular convention was written into the devolution statutes for Scotland and Wales in 2016 and 2017 respectively, appearing in the Scotland Act as s.28(8) and in the Government of Wales Act as s.107(6):

*But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the [Scottish Parliament/Senedd].*

However, the Supreme Court confirmed that this statutory recognition of the Sewel Convention has not given rise to any enforceable legal obligations to seek or obtain the consent of the devolved legislatures.<sup>10</sup>

From time to time, the courts, including the Supreme Court, have been called upon to judge whether a devolved legislature had the power to enact certain legislation. In Scotland, in particular, the frequency of challenges to devolved legislation has increased over time - brought both in the form of post-enactment challenges by groups or individuals affected by legislation, and in the form of pre-enactment references to the Supreme Court by devolved and UK law officers. And over time, those challenges, particularly those that have reached the Supreme Court, have been more likely to be successful.<sup>11</sup> The reasons for increasing litigation are complex but they have emerged in a context of heightened constitutional politics (particularly post-Brexit); by governments in Scotland and Wales willing to test the boundaries of the devolution settlements; and, by Conservative governments acting to enforce, or create new, limits on devolved law-making powers.

The majority of challenges to devolved legislation have involved arguments that it is in breach of the ECHR; others have concerned whether Bills were beyond devolved competence because they affected matters that remain reserved to the UK Parliament (such as the Scottish Government's proposed Independence Referendum Bill).<sup>12</sup> In the *Continuity Bill and Treaty Incorporation Bill References*, as will be explained in the next section, the key issues were **not about reserved matters**. Rather, what was in issue was the effect of the Bills on protected enactments, and in particular whether the Scottish Parliament - and by extension the other devolved legislatures - could pass laws in devolved areas that would condition the effect of laws enacted by the UK Parliament that relate to devolved matters.

### 3. The Judgments: The Continuity Bill and Treaty Incorporation Bill References

The *Continuity Bill* and *Treaty Incorporation Bill References* were the first – and so far only – cases to consider the effect of protected enactments on devolved legislative competence. The significance of the Supreme Court’s rulings in these cases is two-fold.

First, the court adopted a wide definition of what it means to ‘modify’ a protected enactment. This includes not only express amendment or repeal, but also the adoption of a later rule which is:

*‘in conflict with its unqualified continuation in force as before, so that the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one.’<sup>13</sup>*

Second, the court gave an unexpected meaning to s.28(7) of the Scotland Act – itself a protected enactment that cannot be modified by the Scottish Parliament. This provision means, it said, not only that the UK Parliament continues to have the right to legislate in relation to devolved matters in Scotland, but that its power to do so is also ‘unqualified’ (a term that does not appear in s.28(7) itself).

The combined effect of these two definitions, according to the court, is that **the Scottish Parliament cannot make legislation that is inconsistent with the maintenance of the UK Parliament’s unqualified legislative power. In particular, it cannot make the exercise or continued operation in force of rules enacted by the UK Parliament conditional on decisions made by other bodies, such as the Scottish Ministers or the courts**, because this would amount to a modification of s.28(7).

We set out in more detail below the Court’s reasoning in each case, before examining its impact on devolved law-making.

# Continuity Bill Reference

In the wake of the UK's decision to leave the European Union, the UK Government introduced legislation in the UK Parliament to regulate the continuing effects of EU law in the UK after withdrawal. What became the European Union (Withdrawal) Act 2018 removed from the devolution statutes the obligation to continue to abide by EU law. But, to preserve legal continuity, it created a new category of domestic law (so-called 'retained EU law' – now renamed 'assimilated law') so that existing EU law would remain in effect until such time as a decision was made to change or repeal it.

What proved controversial from the devolved perspective, however, was the question of who would be able to change or repeal retained EU law. Although much retained EU law fell within devolved policy areas, the EU (Withdrawal) Bill, as introduced, contained provisions restricting the authority to make these decisions to the UK Government and Parliament: the devolved legislatures were to be temporarily prohibited from modifying retained EU law in devolved areas, while UK Ministers were given powers to do so via regulations. This provoked an intergovernmental dispute and a decision by the Scottish Parliament to refuse consent for the Bill under the Sewel Convention.

Having withheld legislative consent to the UK Bill, the Scottish Parliament and National Assembly for Wales (as it was then) passed their own Continuity Bills, preserving legal continuity without limiting the devolved legislatures' authority to make modifications thereafter. These Bills were referred to the Supreme Court by the UK Government. However, the Welsh Continuity Bill reference was withdrawn when the National Assembly for Wales gave its consent to an amended version of the UK Bill, following an intergovernmental agreement.<sup>14</sup>

The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (henceforth, the Scottish Continuity Bill) was challenged by the UK Government on multiple grounds, most of which were rejected by the Supreme Court. However, two challenges, based on arguments that the Bill had unlawfully modified protected enactments, succeeded.

First, the Court accepted that, at the time the Bill had been passed by the Scottish Parliament, most of its provisions were within its law-making powers. However, by the time the case was decided, the Scotland Act had been amended – without the Scottish Parliament's consent – to make the EU (Withdrawal) Act a protected enactment. Thus, any provisions in devolved

legislation that were incompatible with provisions contained in the EU (Withdrawal) Act would amount to a modification of a protected enactment. As such, they would be outwith the law-making competence of the Scottish Parliament.

Second – and more importantly for our purposes – the Court held that s.17 of the Bill was beyond devolved competence because it unlawfully modified s.28(7) of the Scotland Act. S.17 sought to make regulations made by UK Ministers amending retained EU law subject to the consent of Scottish Ministers where they applied to devolved matters. The lack of such a consent provision had been one of the reasons why the Scottish Parliament had earlier refused to consent to the EU (Withdrawal) Bill. The Court decided that an Act of the Scottish Parliament that prevented UK subordinate legislation from having legal effect unless the Scottish Ministers gave their consent would undermine the authority of the UK Parliament to make laws for Scotland. The Court concluded that, although s.17 did not affect the sovereignty of the UK Parliament (because the UK Parliament retained the power to repeal or amend it), it nevertheless made the exercise of that sovereignty conditional on Scottish Ministers' consent. Hence, according to the Court:

*The imposition of such a condition on the UK Parliament's law-making power would be inconsistent with the continued recognition, by section 28(7) of the Scotland Act, of its unqualified legislative power.*

The Continuity Bill was withdrawn by the Scottish Government, although some of its provisions which had been found to be within devolved competence were later enacted in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

## Treaty Incorporation Bill References

The *Treaty Incorporation Bills References* concerned the validity of provisions in the United Nations Convention of the Rights of the Child (Incorporation) (Scotland) Bill (UNCRC Bill) and the European Charter of Local Self Government (Incorporation) (Scotland) Bill (ECLSG Bill).

- The UNCRC Bill, introduced by the Scottish Government, sought to ensure that children's rights would be respected and protected in Scotland and that public authorities would be legally required to respect and protect children's

rights in all that they do. The Bill emerged after years of collaborative working with, and campaigning by, human rights advocacy groups within Scotland.

- The ECLSG was introduced as a Member's Bill by then MSP Andy Wightman. It sought to ensure that actions undertaken by Scottish Ministers and laws on devolved matters would protect and strengthen the position and powers of local government in Scotland.

In each case, these Bills would have given effect in Scots law to treaties to which the UK is already a signatory and where obligations are binding in international law.

Although they would have had effect only in relation to devolved matters, both Bills sought a 'maximalist' approach to incorporation of the Treaties. In other words, they required that all legislation in devolved policy areas, whether enacted by the UK or Scottish Parliament, and relevant functions deriving from such legislation, would be subject to the provisions of the Treaties.

Under both statutes, the courts would have been obliged to interpret all legislation in devolved areas compatibly with the Treaties if possible. If not possible, the courts would have been given powers to declare legislation incompatible or, under the UNCRC Bill, to strike down incompatible legislation in some cases. In addition, public authorities, under the UNCRC Bill, and the Scottish Ministers, under the ECLSG Bill, would not have been permitted to exercise any of their functions incompatibly with the relevant Treaties.

UK Law Officers did not dispute the authority of the Scottish Parliament to incorporate the UNCRC and the ECLSG into (devolved) Scots law. However, they did challenge the inclusion of UK legislation within the scope of the duties imposed by the Bills, arguing that this would amount to an unlawful modification of s.28(7) of the Scotland Act. The Supreme Court agreed. The provisions, it said, had the potential to change the meaning or effect of legislation enacted by the UK Parliament in ways that had not been explicitly authorised by the Scotland Act. This would dilute the UK Parliament's unqualified law-making power by making UK legislation conditional on decisions by the courts as to its compatibility with the UNCRC or the ECLSG. And even in cases where judges would not be able to change the meaning of, or strike down, provisions in UK legislation, but could only declare them to be incompatible with the Treaties, the Supreme Court argued that the Bills could place political pressure on the UK Parliament to change legislation, and that this too would amount to an unlawful

conditioning of Westminster's unqualified power to legislate for Scotland.

As a consequence of this ruling, the UNCRC Bill was amended to limit the scope of the duties to exclude the following categories of legislation and public functions deriving from them:

- UK legislation on devolved matters;
- provisions inserted into UK Acts by Scottish Parliament legislation;
- provisions inserted into Scottish Parliament Acts by UK legislation; and
- subordinate legislation made by Scottish Ministers using powers conferred by UK Acts.

As a consequence, when the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 was passed by the Scottish Parliament, the scope of the duties placed on public bodies to act compatibly with the UNCRC had been significantly narrowed. This not only limited the ability to enforce the rights deriving from the UNCRC through the courts, but also introduced complexity and arbitrariness in determining the scope of the compatibility duties. This is because the scope of duties imposed by the UNCRC Act does not depend merely on the *subject matter* in question – i.e., whether particular public functions relate to reserved or devolved matters, but also on the *legal source* of those functions – i.e., whether they derive from UK Acts or Scottish Acts. This complexity and resulting confusion risks giving rise to inconsistent application of the Act and inconsistent recognition of the rights it is intended to protect, as well as potentially leading to litigation.

So far, the ECLSG Bill has not been amended and therefore cannot receive Royal Assent. However, draft amendments have very recently been published, and a motion for reconsideration lodged,<sup>15</sup> that would enable the Bill to be amended and enacted before the next Scottish election – some five years after it was initially passed by the Scottish Parliament. The amendments proposed by the Scottish Government largely mirror those made to the UNCRC Act, with similar effects in terms of restricting the scope of the duties imposed by the Bill. **Much of the legislation that applies to local government in Scotland predates the establishment of the Scottish Parliament and thus was enacted by the UK Parliament. Although the Scottish Parliament has enacted local government legislation, this has often simply amended the pre-existing UK Acts. As a result, an ECLSG Act limited to apply only to free-standing laws enacted by the Scottish Parliament would do relatively little to protect and strengthen the position and powers of local government in Scotland.**

In relation to both bills, the proposed amendments came after lengthy negotiations with UK Government lawyers, and go beyond the letter of the Supreme Court's ruling.<sup>16</sup> Indeed, amendments are being proposed to s.2 of the ECLSG Bill, which imposes a duty on the Scottish Ministers to comply with the Charter, even though this was *not* one of the provisions referred to the Supreme Court and so has not been held to be outwith devolved law-making competence. However, the Scottish Government has taken a cautious approach to the amendment of both bills, which it maintains is to reduce the possibility of another Supreme Court reference that might otherwise emerge.<sup>17</sup>

# 4. The Challenge: The Effects of the Court's Judgments on Devolved Law-Making Powers

The fate of the Continuity, UNCRC and ECLSG Bills illustrates some of the challenges flowing from the Supreme Court's interpretation of s.28(7): it risks restricting the ability of the Scottish Parliament – and likely the other devolved legislatures – to pass laws that match their policy objectives.

Of course, some restrictions are inherent in any system of devolution, where devolved legislative powers are legally limited. However, the restriction imposed by s.28(7) is different to the other kinds of restrictions contained in the devolution statutes:

- It places limits on the *legislative techniques* that the devolved legislatures are able to employ, rather than restricting the *substantive objectives* that they are permitted to pursue (i.e., it limits their ability to place *general conditions* on the meaning or effect of statutory provisions or the exercise of public functions, through the adoption of framework legislation rather than by amending individual statutes on a case-by-case basis);
- And it limits the use of conditioning techniques by reference to the *source* rather than the *subject matter* of statutory provisions (i.e., general conditions *can* be placed on the meaning or effect of devolved statutes, but not UK statutes, even if they deal with the same devolved subject matter).

This is challenging for three main reasons: it was unexpected; available workarounds are impractical; and it has generated considerable uncertainty around its implications.

## Unexpected

The interpretation placed on s.28(7) by the Supreme Court created a restriction upon devolved competence that was unexpected.<sup>18</sup> When the Scotland Bill was being enacted, UK Ministers were clear that the Scottish Parliament should have competence to amend or repeal legislation passed at Westminster in relation to devolved matters, with no suggestion that general 'conditioning' was not permitted. According to Lord Sewel:

*The Scottish Parliament will be able to develop and build upon the inheritance of legislation already established at Westminster. It should also be able to develop and adapt any future legislation which may, for good reason, be enacted by this Parliament.<sup>19</sup>*

As a consequence, successive Scottish Governments considered themselves to have full control of the Scottish statute book in devolved areas (subject to the express limits in the Scotland Act and the possibility of future Westminster intervention), which has shaped their approach to devolved law-making. Scottish and UK legislation is therefore not entirely distinct but is intertwined: the Scottish Parliament has frequently legislated by amending pre-existing UK legislation rather than enacting entirely free-standing provisions.

The difficulties now created by this approach have so far predominantly emerged in the context of children's rights. This can be illustrated by reference to the Children (Care, Care Experience and Services Planning) (Scotland) Bill - the Bill intended to help meet 'the Promise' made by the Scottish Government and Parliament 'that all Scotland's children and young people will grow up loved, safe and respected so they can realise their full potential'. As well as sections that are wholly new or amend Acts of the Scottish Parliament, sections 1 (on Aftercare) and 10 (Register of Foster Carers) of the Bill amend the Children (Scotland) Act 1995 - a major piece of legislation for children passed by the UK Parliament before the establishment of the Scottish Parliament. The 1995 Act is also the basis for the Bill's definition of what it means to be 'looked after'. Drafting the Bill in this way means that key provisions are left outwith the scope of the UNCRC Act's compatibility duty and remedial provisions. In other words, public authorities will not be under a legal duty to exercise their functions under these provisions compatibly with the UNCRC and there will be no opportunity to seek judicial rulings on whether the legislation complies with the UNCRC. This has sparked widespread concern among lawyers and children's rights advocates that ministerial commitments and the Promise are being broken and rights' protections eroded.<sup>20</sup>

Similar concerns were raised in relation to the Housing (Scotland) Act 2025, and its ability to uphold children's right to adequate housing and related rights.<sup>21</sup> In particular, the legislation introduced new duties on relevant bodies in relation to homelessness prevention via modifications to the Housing (Scotland) Act 1987, again placing them beyond the scope of the UNCRC Act. Likewise, the Children (Withdrawal from Religious Education and Amendment of UNCRC Compatibility

Duty) (Scotland) Bill, while seeking to strengthen children's rights, inserts new provisions into the Education (Scotland) Act 1980, again placing it outwith the scope of the UNCRC Act.<sup>22</sup>

So far, the Scottish Parliament's drafting guidance<sup>23</sup> has not been updated to alert legislative drafters to this problem, and its significance may not always be understood by MSPs when scrutinising Bills.

But the issue does not only emerge when Scottish Parliament laws seek to introduce new provisions by modifying pre-devolution legislation. Post-devolution UK legislation passed with the consent of the Scottish Parliament under the Sewel Convention, by definition, includes provisions on devolved matters and such UK legislation has often been used to amend Acts of the Scottish Parliament<sup>24</sup> as well as existing UK Acts. Using the Sewel Convention to pass laws in the UK Parliament that include devolved matters has long been seen as a convenient and practical way to legislate when the governments share similar legislative goals. But the Supreme Court's interpretation of s28(7) now suggests that what is convenient today may create constraints on devolved government action in the future. For example, future legislation enacted by the UK Parliament affecting children's rights in Scotland would not be subject to the duties contained in the UNCRC Act.

The alternative would be an approach that separated UK and Scottish legislation that covered the same subject matter, so as to avoid the 'conditioning' of UK Acts being a barrier to changes in the future. In other words, the Scottish Parliament could in every case create its own free-standing legislation, rather than amending UK Acts. This has been the focus of demands of those children's rights advocates whose concerns were discussed above.

But while standalone provisions are sometimes feasible and desirable, in many cases (for example, where the changes being made are relatively minor) this approach would lead to a less coherent, workable and accessible statute book. It would be necessary to consult multiple pieces of legislation in order to understand the law in a particular area, and there would be a greater risk of different pieces of legislation not working together effectively (for example, if key terms were defined inconsistently in different statutes).

The need to be able to draw a bright line between UK and devolved legislation thus sits uncomfortably within a system that was seen as evolving in a more integrated way. This might be particularly keenly felt in Wales, where primary legislative powers were slower to be devolved, and reliance on UK Acts of

Parliament is accordingly greater.

## Impractical

There are potential workarounds which could achieve the same results as the general conditions which were held to be outwith competence in the Continuity Bill and Treaty Incorporation Bill References.

For example, the veto power that the Scottish Continuity Bill sought to confer on the Scottish Ministers in relation to the exercise of UK Ministerial powers to make regulations in devolved areas was intended to prevent unwanted changes to retained EU law in Scotland. An alternative approach might have been for the Scottish Ministers to use their own regulation-making powers to repeal or amend any unwanted UK regulations after the event. However, the EU (Withdrawal) Act's later inclusion among the 'protected enactments' in Schedule 4 of the Scotland Act (1998) may have limited the scope of such an approach.

Similarly, in order to bring UK legislation in devolved areas within the scope of the UNCRC Act, the Scottish Parliament could reenact (or consolidate) all UK legislation affecting children's rights in Scotland in new devolved legislation, the vast majority of which was passed by the UK Parliament prior to devolution.<sup>25</sup> Alternatively, the Scottish Parliament could amend UK legislation on a case-by-case basis to ensure that it complies with the UNCRC.<sup>26</sup>

However, these options are significantly more cumbersome than the 'conditioning' approach initially adopted by the Scottish Parliament. Legislative consolidation, for instance, is a very slow and resource-intensive process that would consume a lot of parliamentary and civil service time and resources, crowding out other pressing legislative priorities. In addition, reenactment of UK legislation might not always be legally straightforward. It might come up against other limits on devolved law-making power, for example, where UK legislation covers both reserved and devolved matters, or where it confers functions on devolved public bodies that raise issues of compliance with the ECHR, or that might be regarded as not exercisable only 'in or as regards Scotland' - an issue that emerged unexpectedly when the Scottish Parliament looked to abolish the Scottish Qualifications Authority.<sup>27</sup>

Case-by-case amendment is also a slow process, requiring problems to be identified and parliamentary time (and a suitable legislative vehicle) to be found to resolve them. Even where this had no other policy objective other than to

bring it within the scope of the UNCRC Act, it could mobilise interests looking to use the opportunity of amendment to reshape each piece of legislation – potentially in ways which might themselves be incompatible with the UNCRC. As in the case of the Children (Withdrawal from Religious Education and Amendment of the UNCRC Compatibility Duty) (Scotland) Bill, case-by-case amendment could also attract political opposition of the kind that a conditioning approach is intended to avoid.

Both approaches would require a comprehensive audit of relevant UK legislation. In relation to the UNCRC Act, the Scottish Government committed to undertake a review of relevant UK Acts affecting children's rights in Scotland, in order to identify provisions that might benefit from being re-enacted by the Scottish Parliament in future, so that they can be brought within the scope of the duties to comply with the UNCRC.<sup>28</sup> It is unclear whether this audit has been undertaken as, to date, it has not appeared in the public domain. But while such a legislative audit might be achievable (if time-consuming) in a relatively self-contained area such as children's rights, it would become significantly more burdensome for something like the Scottish Human Rights Bill, which proposes to incorporate a much broader set of rights into Scots law. Moreover, such an exercise would have to be repeated periodically in order to capture any new UK legislation affecting devolved matters.

## Uncertainty

There is considerable uncertainty over the implications of the Supreme Court's interpretation of s.28(7) for existing devolved legislation and future devolved law-making. For example, as already noted, UK Government and Scottish Government lawyers took different views as to the amendments required to the UNCRC Bill and the ECLSG Bill in order to give effect to the Supreme Court's ruling.

But uncertainty extends to other devolved legislation which has not (yet) been challenged before the courts. This is because the imposition of general conditions on the exercise of statutory functions is a commonplace legislative technique. Think, for example, of the duty to secure 'best value' placed on Scottish local authorities,<sup>29</sup> or the duty on relevant authorities to carry out environmental impact assessments,<sup>30</sup> or the duty on Scottish public authorities to exercise their functions in the way best calculated to contribute to the delivery of climate change targets,<sup>31</sup> none of which distinguishes between functions deriving from UK or Scottish legislation.

Similar conditions can be found in devolved Welsh and Northern Ireland legislation. Examples include:

- the duty on the Welsh Ministers to have due regard to the requirements of parts of the UNCRC when exercising any of their functions;<sup>32</sup>
- the duty on Welsh public bodies to take all reasonable steps to meet well-being objectives;<sup>33</sup>
- Northern Ireland departments are subject to a duty to exercise their functions, so far as possible, in a manner consistent with the achievement of Northern Ireland's climate change targets;<sup>34</sup>
- And when courts and adoption agencies in Northern Ireland are making decisions in relation to adoption, their 'paramount consideration ... must be the child's welfare'.<sup>35</sup>

None of these duties distinguishes between functions arising from UK or devolved legislation.

Given the frequency with which general conditions are placed on the meaning or effect of legislation, the key question is: *which types of conditions* – beyond those held to be unlawful in the *Continuity Bill* and *Treaty Incorporation Bill References* – amount to an unlawful modification of s.28(7) of the Scotland Act, or of the equivalent provisions in the Welsh and Northern Ireland devolution statutes?

In the *Treaty Incorporation Bill References*, the Supreme Court appeared to suggest that the Welsh duty to have due regard to the UNCRC was lawful because it was 'much more limited in scope' than the duties in the Scottish UNCRC Bill.<sup>36</sup> The Scottish Government has therefore taken the view that 'procedural' duties of this nature – i.e., which shape the decision-making process, but do not compel a particular substantive outcome – are within devolved competence.<sup>37</sup>

But the duty to secure the consent of the Scottish Ministers that was struck down in the *Continuity Bill Reference* could also be regarded as a procedural duty, rather than a substantive one. Equally, in the *Treaty Incorporation Bill References*, the Supreme Court held that sections empowering courts to declare provisions in UK legislation incompatible with the UNCRC – which would have had no effect at all on the meaning or effect of the relevant statutes – also amounted to an unlawful conditioning of s.28(7).

More generally, it has been argued that the Court's reasoning fails to make

clear why, for example, the (many) Acts of the Scottish Parliament that empower Scottish Ministers to modify Acts of the UK Parliament through so-called Henry VIII powers would not also unlawfully condition the UK Parliament's unlimited law-making power.<sup>38</sup>

It is therefore difficult to identify a clear or consistent distinction between the provisions struck down by the Supreme Court and other provisions on the statute book which have not (so far) been challenged.

This uncertainty may have created a 'chilling effect' on devolved lawmakers, unwilling to take the risk of a successful challenge to their legislation, or even to risk the delay and expense involved in an unsuccessful challenge. Evidence of the impact of uncertainty can be found in the length of time taken for the UNCRC and the ECLSG Bills to be brought back to the Scottish Parliament for reconsideration, following protracted discussions in each case between the UK and Scottish Governments. It can also be seen in the very cautious approach ultimately taken to the amendment of the two Bills, and the pausing of the Scottish Human Rights Bill. The uncertainty may have influenced the choices being made in the development of a similar Human Rights Bill for Wales as well.

Further, uncertainty is having practical effects on administrative decision-making in devolved areas, such as housing or education, where Scottish and UK legislation closely interact. For example, in relation to the implementation of the UNCRC Act, we heard at the workshop in March about the difficulties for public bodies in understanding when the duties under the Act apply.<sup>39</sup>

This was foreseen during the legislative process for the Bill and in the course of its implementation. For example, COSLA raised concerns about the challenges involved for local authorities as a result of their powers and functions being derived from a complex mix of Acts of the Scottish Parliament and Acts of the UK Parliament in devolved areas:

*'In many instances a patchwork of UK and Scottish Acts exist and operate concurrently within a single service area... leaving the legal position and nature of the statutory duty for councils complicated and very unclear.'*<sup>40</sup>

Social Work Scotland's evidence likewise raised concerns about the confusion, given the amount of social work legislation that predates the Scottish Parliament, and that legislation since 1999 often amended legislation previously passed by the UK Parliament:

*'While the duty to act in a compatible manner remains, certain core aspects of the Act, such as the child's right to seek remedy, may not be available for a range of critical core social work functions.<sup>41</sup>*

It may be too early in the implementation process to identify whether this complexity has given rise to inconsistent application of the UNCRC Act and inconsistent recognition of the rights it is intended to protect; to date, much of the focus has been on building capacity and embedding a rights-respecting culture within public bodies.<sup>42</sup> But with finite resources, public bodies may direct efforts towards areas (governed by devolved legislation) where there is greater legal certainty over areas (governed by UK legislation) that might now be vulnerable to legal challenge. This complex landscape creates further uncertainty among children, young people and their families and advocates about when their legal rights under the UNCRC Act apply, what they mean in practice, and what remedies can be sought.

## 5. The Resolution: Options to Clarify Devolved Law-making Power

The challenges to Scottish Parliament legislation in the *Continuity Bill* and *Treaty Incorporation Bill References* came from Conservative-led UK Governments and may have been influenced by the strained and competitive relationship between the UK and Scottish Governments during that period.

The election of the Labour Government in July 2024 heralded a new chapter in UK-devolved relations, marked more by cooperation than competition. Despite continued partisan and constitutional differences with respect to Scotland, the UK Labour Government is more sympathetic to devolution than its predecessors and has sought to 'reset' its relationship with the devolved governments. But a meaningful and lasting reset may require revisiting some of the issues that have challenged the authority of the devolved institutions.

In our view, the effect of the Supreme Court's recent interpretation of section 28(7) of the Scotland Act is one of those issues. It has generated uncertainty with regard to the scope of devolved law-making competence and the validity of devolved legislation that is proving to be problematic in practice.

There are ongoing arguments about constitutional futures, and whether the devolution settlements have the right balance between devolved and reserved powers; **this is not one of them**. Rather, our concern is with the practical impact and effect of the interpretation, which we believe has eroded the law-making power in devolved areas that lawmakers in the UK Parliament had invested in the devolved institutions at their foundation. As such, it merits remedial action.

As already noted, there are potential steps that the devolved legislatures themselves could take to avoid the consequences of the Court's rulings. For example, a new and transparent approach to drafting legislation, with new drafting guidance to include more standalone provisions in place of modifications to UK Act, could ensure that more new Scots law is brought into scope of the UNCRC Act. Consolidating existing measures through new primary legislation, responding to calls among children's advocates to 'declutter' the legislative landscape, could have a similar effect.

But these would entail a significant departure from current approaches to devolved law-making which would be highly cumbersome and time-consuming,

may not be wholly effective and/or might themselves produce unintended consequences. Moreover, the challenges we have identified are not limited to the application of the UNCRC Act but may affect other legislation (or proposed legislation) which imposes general conditions on the meaning or effect of the devolved statute book.

Similarly, better intergovernmental cooperation over the development of devolved legislation, as well as UK legislation that includes or connects to devolved matters, may help to ensure complementarity between the statute books and might help to avoid legal disputes occurring. But this, too, can be a cumbersome and time-consuming process for the respective Governments that can have an inhibiting effect on devolved law-making, with the lack of transparency over intergovernmental negotiations contributing to uncertainty for key stakeholders.

There is much to welcome from improved intergovernmental cooperation which can support the broader system of devolution. Cooperative relations between officials and ministers can foster empathy and shared understanding of the challenges they face, as well as identifying opportunities for collaboration over shared priorities. However, by itself, this is not enough to resolve the issues arising from the Supreme Court's s.28(7) jurisprudence. Even if this UK Government is not minded to challenge devolved legislation, in the manner of its predecessors, Bills cannot be introduced into the devolved legislatures if there are grounds to believe that they are outwith devolved competence. Law Officers within the devolved institutions may also refer future Bills to the Supreme Court in cases of legal doubt. Moreover, legislation which is already on the statute book may be challenged by any individual or group that has a sufficient interest in it, and not just by the UK Government.

We therefore consider that the best approach to resolve the problems caused by the Supreme Court's s.28(7) case law is to restore the previous understanding of the scope of devolved law-making power. In order to do so, legislative intervention will be required, with two main options: amending s.28(7) or a Bill-by-Bill resolution.

## Amend the Interpretation of S.28(7) of the Scotland Act 1998 (and its equivalents)

A comprehensive restoration of the original understanding of the scope of devolved law-making powers, effectively reversing the Supreme Court's

interpretation of s.28(7), would be the most desirable option from the point of view of securing legal certainty, increasing devolved legislative flexibility, and avoiding future disputes about the validity of devolved legislation. This recommendation is not a direct challenge to the Supreme Court, whose role is to interpret the law as they see it. Rather, it is a recognition that the Court's interpretation has generated new complexities, uncertainties and limitations. These have had a debilitating effect on the development and implementation of devolved law, ultimately to the detriment of those it is intended to serve.

Addressing these detrimental and unintended consequences merits remedial legal intervention, which could be achieved through either primary or secondary legislation. Such an intervention would have to be undertaken by the UK Government and the UK Parliament, as the devolution statutes are reserved matters.

The most straightforward way to do this would be to amend s.28(7) and the equivalent provisions in the other devolution statutes to make clear that the devolved legislatures are permitted to condition UK legislation in devolved areas. In our view, this would be in keeping with the prevailing distribution of devolved and reserved law-making competences whilst preserving the sovereignty of the Westminster Parliament and its continued legal authority to legislate in devolved matters.

For instance, s.5(6) of the Northern Ireland Act 1998 already states that:

*This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland.* (emphasis added)

This could be spelled out further to make clear that power to 'modify' UK legislation includes power to 'amend, repeal or in any other way condition its meaning or effect'.

Alternatively, a s.30 Order could be used to amend Sch. 4 of the Scotland Act 1998. Under s.30 of the Scotland Act 1998, UK Ministers, with the consent of the Scottish and UK Parliaments, can make orders adjusting the boundaries of legislative competence.<sup>43</sup> An Order could be used to make clear that the prohibition on modification of s.28(7) does not prevent the Scottish Parliament

from legislating to condition the meaning or effect of devolved matters in UK Acts. Similar orders could be made to amend the relevant schedules in the Government of Wales Act 2006 and the Northern Ireland Act 1998.

Of these two options, the second would be practically easier to achieve, since there would no need to find Parliamentary time to enact primary legislation.

## Bill-by-Bill Resolution

In the absence of a general amendment to restore the original understanding of s. 28(7), steps could nevertheless be taken to address the impracticalities created by the Court's case law on a Bill-by-Bill basis. For instance, under s.104 of the Scotland Act 1998, UK Ministers can make orders consequential on Scottish legislation to deal with matters outside the competence of the Scottish Parliament that are necessary to make the legislation work effectively.<sup>44</sup> This could be used, for example, to deem relevant UK legislation on devolved matters subject to general conditions imposed by Acts of the Scottish Parliament. For example, to broaden the scope of the ECLSG Bill, the duties to interpret legislation and exercise ministerial functions compatibly with the Charter could be extended to UK legislation such as the Local Government (Scotland) Act 1973. Alternatively, s.30 of the Scotland Act 1998, if not used to make more wide-ranging changes as suggested above, could be used to make clear that the Scottish Parliament has power to enact a particular piece of legislation,<sup>45</sup> or a particular class of legislation (such as treaty incorporation Bills), which conditions the interpretation of UK legislation in devolved areas.

However, a Bill-by-Bill approach is less satisfactory than a general remedy in response to the Supreme Court's s.28(7) jurisprudence, in three respects. First, given the uncertainty over the precise implications of the Court's decisions, it is likely to be difficult to anticipate when problems regarding the 'conditioning' of UK legislation might arise, and therefore to address all potential legal issues before they result in litigation or administrative difficulties. Second, it lacks transparency with regard to the delineation of devolved law-making powers that can raise accountability issues. Since the authority of devolved legislatures to enact particular statutes or classes of legislation would depend on intergovernmental agreement, it may be difficult for parliamentarians or civil society actors to know whether specific legislative goals are likely to be achievable. Third, the process of securing that agreement could create considerable additional work for officials in both the UK and devolved governments, potentially generating protracted negotiations that inhibit other

opportunities for intergovernmental collaboration. This would slow the pace of policy and law-making within the devolved institutions and could result in the exercise of devolved powers being subject to a *de facto* veto by UK Ministers. This was not the intention of the advocates or the architects of devolution.

## 6. Conclusion

The Supreme Court's decisions in the *Continuity Bill* and *Treaty Incorporation Bill References* have introduced new and unexpected constraints on devolved law-making. These have created uncertainties for devolved lawmakers and for those with the responsibility to implement and interpret the law. In the case of the UNCRC Act, they have considerably limited the scope of the children's rights it was intended to protect.

Further litigation over the meaning of the 'conditioning' limitation is a real possibility, potentially affecting not only new legislation, but also statutes that have been in force for many years.

Preventing such problems – or dealing with their consequences – will be a headache for the UK Government as well as the devolved administrations, since it might be called upon to use its powers to make devolution orders to untangle the mess, and could lead to renewed intergovernmental tensions that set back the UK Government's 'reset' of these relationships.

In our view, it would be preferable to address the problem at source, by recognising that the Supreme Court's decisions have generated new complexity, uncertainty and unintended consequences in the application of the devolution statutes. A legislative intervention by the UK Parliament to restore the authority of the devolved institutions to make and amend laws in devolved areas, including those laws inherited from the UK Parliament, would reinstate the 'coherent, stable and workable' system for the exercise of devolved legislative power that the Supreme Court previously recognised that the UK Parliament had intended to create.<sup>46</sup>

There are relatively straightforward ways in which this could be achieved, without reopening the balance of powers in the devolution settlement or weakening the authority of the UK Parliament. None of the options proposed here would alter the constitutional competences of the devolved institutions or undermine Westminster parliamentary sovereignty. But they do require the governments to work together, and spend time together, to foster empathy and a shared understanding of the problems that have resulted from the Supreme Court ruling. Addressing the issues set out in this report, and laid bare in the process of developing, passing and implementing legislation, would symbolise a new culture of cooperation reflective of the reset in the relationships between the UK and devolved governments.

# References

1 Reference re the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill [2018] UKSC 64; References re the United Nations Rights of the Child (Incorporation) (Scotland) Bill and the European Charter of Local Self-Government (Incorporation) (Scotland) Bill [2021] UKSC 42.

2 C. Himsworth, 'Incorporation Bills in the Scottish Parliament: the theoretical and practical consequences of uncertainty' [2024] Public Law 674.

3 As the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

4 See A. Deb, N. Kilford, 'Conditioning the UK Parliament's Power to Legislate for a Devolved Part of the UK: Part II – Some Challenges Posed by Northern Ireland', U.K. Const. L. Blog (25<sup>th</sup> July 2025) (available at [Anurag Deb and Nicholas Kilford: Conditioning the UK Parliament's Power to Legislate for a Devolved Part of the UK: Part II – Some Challenges Posed by Northern Ireland – UK Constitutional Law Association](#)); C.R.G. Murray, 'An Alternative Bill of Rights for Northern Ireland, in Instalments: Assembly Incorporation of International Rights Instruments' (2025) 76 Northern Ireland Legal Quarterly 622, pp. 637-8.

5 In Wales, devolved legislative competence initially followed a 'conferred powers' model, but this was altered by the Wales Act 2017.

6 Scotland Act 1998, s.29(1); Government of Wales Act 2006, s.108A(1); Northern Ireland Act 1998, s.6(1).

7 The Northern Ireland Act 1998 makes a distinction between 'reserved' and 'excepted' matters; both refer to non-devolved law-making powers, but the former can be 'transferred' (i.e. devolved) to the Northern Ireland Assembly, subject to cross-community consent.

8 Scotland Act 1998, s.28(7); Government of Wales Act 2006, s.107(5); Northern Ireland Act 1998, s.5(6).

9 See Institute for Government, Sewel Convention [2025]. <https://www.instituteforgovernment.org.uk/explainer/sewel-convention>

10 R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.

11 For discussion of the Supreme Court's recent, more restrictive approach, to devolution cases, see Gregory Davies, 'The UK Supreme Court and Devolution: Guardian of the Passive Revolution?' [2025] Public Law 58, and Aileen McHarg, [The Contested Boundaries of Devolved Legislative Competence](#). Report prepared for the Institute for Government/Bennet Institute for Public Policy Review of the UK Constitution [2024].

12 Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998 [2022] UKSC 31. The Court held that the draft Bill related to the reserved matter of the Union and the role of the UK Parliament in Scotland) and was therefore outwith the competence of the Scottish Parliament.

13 Continuity Bill Reference, para 51.

14 The Law Derived from the European Union (Wales) Bill was passed by the Welsh Assembly in March 2018 and referred to the Supreme Court by the Attorney General. The legal challenge was dropped following a breakthrough intergovernmental agreement between the Welsh and UK Governments which was sufficient for the Welsh Government to recommend consent to the EU (Withdrawal) Bill. The Bill had received Royal Assent in June 2018, and this Law Derived from the EU (Wales) Act 2018 was subsequently repealed by regulation in November 2018.

15 Letter from Shona Robison MSP to Mark Ruskell MSP, 15 January 2026, [European Charter of Local Self-Government \(Incorporation\) \(Scotland\) Bill - Cab Sec FLG to Mark Ruskell 15 January 2026](#); Motion for Reconsideration lodged by Mark Ruskell MSP, 22 January 2026, [S6M-20525 | Scottish Parliament Website](#).

16 In particular, the Supreme Court did not expressly state that it would be unlawful to impose an obligation on public authorities to comply with the relevant treaties in relation to functions governed by UK legislation where the statute conferred discretion to decide how to act.

17 See letter from Shirley-Anne Somerville MSP to Kaukab Stewart MSP, 13 September 2023, [Cabinet Secretary for Social Justice](#); letter from Shona Robison MSP to Mark Ruskell MSP, 15 January 2026.

18 See Himsworth (above, note ii).

19 HL Deb 21 July 1998, col 789.

20 See, for example, Stage 1 evidence from [Children and Young People's Commissioner Scotland; Who Cares? Scotland](#) evidence; [NSPCC](#) evidence; [Together \(Scottish Alliance for Children's Rights\) briefing paper](#); the [Law Society of Scotland](#); and [Report of Education, Children and Young People Committee meeting](#), 10 September 2025

21 [Children and Young People's Commissioner Scotland](#), 2025, [Housing \(Scotland\) Bill – Stage 3 Briefing](#)

22 [Letter from Together \(Scottish Alliance for Children's Rights\) to the Convener of the Equalities, Human Rights and Civil Justice Committee](#), 27 October 2025

23 [Drafting Matters!: guidance - gov.scot](#).

24 E.g., the Coronavirus Act 2020 amended various Acts of the Scottish Parliament as well as regulations made by the Scottish Ministers, N.b., devolved legislation is also sometimes altered by the UK Parliament without devolved consent – see, e.g., the Illegal Migration Act 2023, ss.24 and 25 (now repealed), which disappled duties on the relevant devolved governments arising under Acts of the Scottish Parliament and Northern Ireland Assembly relating to human trafficking.

25 See The Promise draft document, [National Legislation, connected regulations and policies](#), for a list of legislation affecting children and young people who are care experienced.

26 See, e.g., the Children (Withdrawal from Religious Education and Amendment of the UNCRC Compatibility Duty) (Scotland) Bill, which will amend the Education (Scotland) Act 1980. The Bill's Policy Memorandum notes that this is being done to implement the international law obligation to comply with the UNCRC, rather than to comply with the UNCRC Act.

27 S.29(2)(a) Scotland Act 1998. See, e.g., s.66(3)(a) of the Education (Scotland) Act 2025, which provides that the abolition of the Scottish Qualifications Authority cannot come into effect until such time as it 'has no functions exercisable otherwise than in or as regards Scotland', which requires the enactment of an Order under s.104 of the Scotland Act by the UK Government.

28 Shirley-Anne Somerville MSP, SPOR Session 6, 7 December 2023, col 68.

29 Local Government in Scotland Act 2003, s.1.

30 Environmental Impact Assessment (Scotland) Act 2005, s.3.

31 Climate Change (Scotland) Act 2009, s.44.

32 Rights of Children and Young Persons (Wales) Measure 2011, s.1.

33 Well-being of Future Generations (Wales) Act 2015, s.3.

34 Climate Change (Northern Ireland) Act 2022, s.52(1). On the possible effects of the s.28(7) jurisprudence on the operation of this Act see A. Deb, N. Kilford, 'Conditioning the UK Parliament's power to legislate for a devolved part of the UK – part I – the Climate Change Act (Northern Ireland) 2022', U.K. Const. L. Blog (22 July 2025) (available at [Anurag Deb and Nicholas Kilford: Conditioning the UK Parliament's power to legislate for a devolved part of the UK: Part I – The Climate Change Act \(Northern Ireland\) 2022 – UK Constitutional Law Association](#)).

35 Adoption and Children Act (Northern Ireland) 2022, s.1(2).

36 [2021] UKSC 42, para 33.

37 See Scottish Government, A Human Rights Bill for Scotland: Discussion Paper (July 2025), p. 20, [A Human Rights Bill for Scotland: Discussion Paper](#).

38 G. Cowie, 'The Power to Make Laws for Scotland: the Treaty Incorporation Bills Reference' [2022] Public Law 189.

39 See also Scottish Government, A Human Rights Bill for Scotland: Discussion Paper, p.10.

40 COSLA, [Letter to the Equalities, Human Rights and Civil Justice Committee](#), [2023] 25 September

41 Social Work Scotland, [Response from Social Work Scotland to consultation on the United Nations Convention on the Rights of the Child \(incorporation\) \(Scotland\) Act 2024: statutory guidance on part 2 and 3 \(section 18\) \[2024\]](#).

42 Improvement Service, 2025, [UNCRC Implementation Framework. A practical resource for Public Authorities to develop their approach to the UNCRC \(Incorporation\) \(Scotland\) Act 2024](#).

43 See also Government of Wales Act 2006, s.109; Northern Ireland Act 1998, s.4.

44 See also Government of Wales Act 2006, s.150; Northern Ireland Act 1998, s.84(2).

45 See, e.g., the draft s.30 Order to facilitate the enactment of the Assisted Dying for Terminally-III Adults (Scotland) Bill - [The Scotland Act 1998 \(Modification of Schedule 5\) Order 2026](#).

46 Lord Hope, in *Imperial Tobacco v Lord Advocate* [2012] UKSC 61 at para 14.

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