



## The European Union (Withdrawal) Bill: Devolution and Children's Rights

**Summary:** Brexit shall result in powers previously held at EU level being returned to the UK. Some of these powers shall relate to areas which are “devolved” under the Scotland Act 1998. However, the Withdrawal Bill provides that all powers returning from Brussels shall be held at Westminster/Whitehall unless and until they are transferred to the devolved nations. It is not yet clear which powers shall be returned to Scotland and which shall remain at Westminster. This briefing considers the implications of this approach from a children's rights perspective.

The Scottish devolution settlement was founded on the assumption of continuing EU membership. As such, Brexit has the potential to “impact enormously” upon devolution.<sup>1</sup> Presently, relations with the EU itself are reserved to Westminster. The devolved nations, however, have the power to implement and transpose EU obligations where they fall within devolved policy areas. The Withdrawal Bill makes several key alterations to these current devolution arrangements.

### Devolution and the Withdrawal Bill

In its current form, the Withdrawal Bill seeks to: (1) strictly regulate the exercise of devolved powers after Brexit; and (2) retain certain powers at Westminster so that “UK-wide frameworks” can be established.

#### Legislative Competence

The Withdrawal Bill seeks to convert EU law into UK law so that, upon Brexit, the same laws shall apply immediately after exit as applied previously. This shall be known as “retained EU law”. Clause 11 of the Bill provides, however, that the devolved parliaments are prohibited from legislating on “retained EU law”. The devolved parliaments may only legislate on EU-derived *domestic* law and only where this would have been wholly within the competence of the devolved parliament *before* Brexit. Whilst the parameters of Scottish devolved competence after Brexit are therefore defined by reference to “retained EU law”, the scope of this term is not clear. It will therefore be difficult to ascertain precisely what is and what is not within the competence of the Scottish Parliament and Scottish Ministers after Brexit.<sup>2</sup>

The Bill grants power to both Whitehall and Scottish Ministers to enact changes by way of secondary legislation after Brexit. Whilst the Explanatory Notes to the Bill state that Whitehall ministers shall not “normally” act in relation to devolved matters without the consent of the relevant devolved parliament, this safeguard is not found anywhere in the text of the Bill itself.<sup>3</sup> It is therefore possible that UK ministers shall pass secondary legislation affecting children in Scotland without the consent of the Scottish Parliament being obtained. The implications of this for children's rights are discussed further below.

#### Repatriation of Powers from Brussels

Given the above, powers returning from Brussels shall rest with Westminster/Whitehall unless and until they are further transferred to Scotland.<sup>4</sup> The UK Government appears to be adopting a “conferred

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<sup>1</sup> N. Burrows & M. Fletcher, “Brexit as constitutional “shock” and its threat to the devolution settlement: reform or bust” (2017) *Juridical Review* 49, p. 56

<sup>2</sup> See for example the comments of: Stephen Tierney, “[The European Union \(Withdrawal\) Bill: Legal Implications for Devolution](#)” (September 2017) (“when the EU (Withdrawal) Act comes into force it will be almost impossible to articulate the boundaries of devolved competence for Scotland, Wales or Northern Ireland, dependent as these boundaries will be upon the shifting sands of domesticated EU law.”)

<sup>3</sup> See [European Union \(Withdrawal\) Bill Explanatory Notes](#), para 68

<sup>4</sup> Such transfer to be affected by “Order in Council” which must be approved by both the House of Commons and House of Lords.

powers” model, in conflict with the existing “devolved powers” model. Accordingly, it has been described as “the first significant rolling back of devolution since the process started twenty years ago”.<sup>5</sup>

The UK Government’s view is that this approach is justified by the need for “UK-wide common frameworks” to be established. The relevant areas here are those where EU law currently intersects with devolved competence. The Scottish Government has published a list of 111 powers falling into this category.<sup>6</sup> Directly relevant from a children’s rights perspective are powers relating to justice and home affairs, (including equal treatment legislation, cooperation in cross-border family disputes, data sharing and combating child sexual exploitation), and environmental matters (regulating air and water quality, chemicals and pesticide use). Other matters included in the list also affect children’s lives indirectly, such as agriculture and fisheries.

Unfortunately, there is very little clarity so far as to where such UK-wide common frameworks will be required. Whilst the Explanatory Notes to the Bill say that Westminster will “work closely” with the devolved nations in identifying where such common frameworks are *not* needed, the Bill itself provides no mechanism for making such decisions.<sup>7</sup> Also missing is clarity on *how* such powers will be transferred and how much notice the devolved authorities will be given.<sup>8</sup>

Whilst the Explanatory Notes provide that the centralisation of powers at Westminster is to be “transitional”, this is not repeated in the Bill and there is no clause placing a time limit on this arrangement.

### **What this means for children’s rights**

Legislative and policy decisions taken in Scotland are subject to a higher standard of review from a children’s rights perspective than their equivalents made at UK-level. There are four main factors here:

#### [Children and Young People \(Scotland\) Act 2014](#)

The Children and Young People (Scotland) Act 2014 places a duty on Scottish Ministers in relation to the rights of children. It requires that they must consider whether further steps are needed to secure children’s rights under the CRC and, where appropriate, take these steps. Scottish Ministers are under a duty to report on what steps they have taken every three years.

The Part 1 duty under the 2014 Act seeks to embed child rights-based consideration into law and policy making in Scotland. There is no direct equivalent for decisions taken at UK level. Accordingly, this is an area of concern given the Withdrawal Bill’s approach of “pooling” repatriated powers at Westminster/Whitehall, even if this is only to be a transitional arrangement.

#### [Children’s Rights and Wellbeing Impact Assessments \(CRWIAs\)](#)

Child Rights and Wellbeing Impact Assessments (CRWIAs) have been used by Scottish Ministers since June 2015 as part of the implementation of the duties of the 2014 Act. The aim of CRWIAs is to assess whether proposed Scottish Government policies, measures and legislation will protect children’s rights and promote the wellbeing of children and young people as defined under the 2014 Act. CRWIAs have been used to scrutinise new primary and secondary legislation in Scotland, including the Carers (Scotland) Act 2016 and the Secure Accommodation Regulations, as well as developments at policy level. Impact assessments conducted for legislative and policy at UK level have been found to be insufficiently

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<sup>5</sup> Michael Keating, [“To devolve or not to devolve? The European Union \(Withdrawal\) Bill and devolution”](#) (UCL Constitution Unit, July 2017)

<sup>6</sup> See [letter](#) from Michael Russell, Minister for UK Negotiations on Scotland’s Place in Europe, to the Finance and Constitution Committee, 19 September 2017; the Welsh Government has published list of 64 points of intersection.

<sup>7</sup> See [European Union \(Withdrawal\) Bill Explanatory Notes](#), para 36

<sup>8</sup> See discussion on use of Orders in Council in Bingham Centre for the Rule of Law, [Discussion Paper on Brexit and Devolution](#) (October 2017), pp.5-6

child-focused.<sup>10</sup> There is a real concern that if powers are centralised at Westminster/Whitehall after Brexit that decisions made shall lack the level of child rights-based scrutiny that would have been available in Scotland under a CRWIA.

### Scotland Act 1998 and incompatibility with human rights

A further concern arises in relation to protecting rights under the European Convention on Human Rights (ECHR), which is incorporated into domestic law by the Human Rights Act 1998. Under the current devolution arrangements, acts of the Scottish Parliament or Scottish Ministers which are incompatible with the Human Rights Act are invalid and can be struck down. By contrast, UK Acts of Parliament which are incompatible with the Human Rights Act remain on the statute book but subject to a “declaration of incompatibility”. Arguably, the Scotland Act therefore provides for a stronger procedural protection of human rights. Post-Brexit decisions taken at UK level which are incompatible with human rights shall therefore remain on the statute book. However, had the powers been transferred to Scotland and legislated upon there, any human rights incompatibility would have caused the legislation to fall. Arguably, this threat of invalidity improves the human rights-based scrutiny of Scottish Bills.

### Future developments

In the Programme for Government 2017-18<sup>11</sup>, the Scottish Government sets out further steps that it intends to take to progress children’s rights in Scotland. It shall undertake an audit of effective ways to further embed the principles of the UNCRC into policy and legislation, including the option of full incorporation into domestic law.<sup>12</sup> The Programme also includes a commitment to oppose any attempt to undermine the Human Rights Act or withdraw from the ECHR, and to ensure that existing and relevant future human rights protections provided under European Union Law are maintained following UK withdrawal from the EU.<sup>13</sup> It is clear that the Scottish Government is pursuing a progressive approach to strengthen human rights protections in areas of devolved competence, whilst the UK Government has been exploring the repeal of human rights protections.<sup>14</sup> There is valid concern that in retaining control over specific legislative areas at a UK-level, decisions impacting children will undergo lesser rights-based scrutiny than would have been available if they were made at Scottish level.

### Conclusion

There is a need for greater clarity insofar as the Withdrawal Bill relates to devolution. In particular, the provisions relating to the onwards transfer of repatriated powers from Westminster to the devolved parliaments must be clarified. The Bill must include a requirement for sufficient notice to be given to the devolved parliaments in advance of such transfers so that they can have the necessary preparation and resources in place. As far as possible, repatriated powers which fall into devolved areas should be transferred onwards to Scotland. This will allow any future decisions on these matters to benefit from the higher standard of review from a children’s rights perspective available in Scotland, as outlined above.

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<sup>10</sup> See e.g. EHRC criticisms regarding UK Government’s seven impact assessments on the *Welfare Reform and Work Act 2016* which it deemed had not sufficiently taken children’s rights into consideration: EHRC, [Children’s Rights in the UK](#) (April 2016), section 4.2.1

<sup>11</sup> [Scottish Programme for Government 2017-18](#)

<sup>12</sup> [Scottish Programme for Government 2017-18](#), p. 81

<sup>13</sup> [Scottish Programme for Government 2017-18](#), p.112

<sup>14</sup> Whilst the [2017 Conservative Manifesto](#) states that there will be no repeal or replacement of the Human Rights Act whilst the process of Brexit is underway, it states that plans to reform the UK’s human rights frameworks shall be reconsidered after Brexit has concluded, see p.37

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