

## Devolution since the Brexit referendum

### Summary

This paper sets out the impact on devolution and on the powers and responsibilities of the Scottish Parliament of key UK Government decisions since the referendum on EU withdrawal in 2016. The paper draws on evidence and examples and explains the effects of the UK Government's actions, including:

- **Passing legislation – without its agreement – that reduces the effective powers of the Scottish Parliament, and allows UK Ministers to make further changes unilaterally, such as including provision of healthcare in the UK internal market**
- **Giving powers to UK Ministers to intervene directly in matters within the responsibilities of the Scottish Parliament again without agreement**
- **Undermining the Sewel Convention, that the Westminster Parliament will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament**
- **Blocking legislation on devolved matters passed by the Scottish Parliament for the first time**
- **Proceeding with a form of Brexit which the majority of Scotland did not vote for, with major adverse impacts on Scotland's interests and economy**
- **Taking forward legislation that puts at risk EU laws on environmental protection, food standards and other devolved matters**
- **Taking a direct role in devolved policy and decisions on public spending on devolved matters, bypassing the Scottish Parliament**
- **Reducing funding available to Scotland compared to that expected from equivalent EU funding schemes, potentially by some hundreds of millions**

There was always a risk that the Brexit process would result in greater centralisation in Whitehall and Westminster<sup>1</sup>. Fundamental changes can now be seen in the relationship between the governments and the parliaments at Westminster and Holyrood, through actions affecting devolved matters which have been opposed by the Scottish Parliament.

Instead of recognising the role of Scotland's devolved democratic institutions and respecting their choices, or extending an approach based on agreement and consensus, the UK Government's approach increasingly asserts Westminster's authority over the Scottish Parliament and Government, something not previously seen under and inconsistent with devolution.

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<sup>1</sup> The Scottish and Welsh Governments both identified this risk. See, for example, paragraphs 176 and 179 of *Scotland's Place in Europe* (2016): [Scotland's Place in Europe \(www.gov.scot\)](http://www.gov.scot); a joint statement, July 2017: [EU \(Withdrawal\) Bill - gov.scot \(www.gov.scot\)](http://www.gov.scot); and paragraph 118, Official Report, 1 November 2016: [Plenary 01/11/2016 - Welsh Parliament \(assembly.wales\)](http://www.assembly.wales)

**There are highly significant consequences from the UK Government's approach.**

- **They have the real practical impacts on Scotland set out in this paper:** environmental protections on plastics and recycling are delayed and diluted; protections inherited from the EU are at risk of being repealed without agreement from Scotland; legislation on the rights of children has been delayed; the Scottish Parliament's decision on reforming the law on gender recognition has been blocked.
- **These developments have eroded devolution**, the self-government of Scotland voted for by the people of Scotland in the 1997 referendum, and **they obstruct the democratic choices made by the Scottish Parliament, elected by the people of Scotland.**
- Most fundamentally, **the UK Government is taking decisions on devolved areas – spending money, setting policy targets, ignoring the views of the Scottish Parliament.** The devolution settlement recognised there would be difference in priorities and political outlook between Scotland and other parts of the UK: by imposing its view in this way the UK Government fundamentally undermines Scotland's democracy.

## Background

The Scottish Parliament was established in 1999 to address a “democratic deficit”: governments at Westminster without popular support from the electorate in Scotland were able to make decisions for Scotland<sup>2</sup>. The Scottish Parliament reflects the views of the people of Scotland in making choices on key issues such as health, education, justice and the environment. The Parliament has, under different governments, delivered free personal care, the UK’s first indoor smoking ban, minimum unit pricing for alcohol, and world-leading climate ambitions, amongst other achievements<sup>3</sup>.

The Scottish Parliament and Government have secured and maintained a high level of trust and support from the people of Scotland. The latest Scottish Social Attitudes survey showed 66% of people in Scotland trusted the Scottish Government to work in Scotland’s best interests, compared with 22% who trusted the UK Government to do so<sup>4</sup>.

The devolution settlement preserved the sovereignty of the Westminster Parliament over the Scottish Parliament, but it did not create a parallel hierarchy of governments. In 1999 governmental functions and funding in devolved areas transferred to the Scottish Government<sup>5</sup>, which has the experience, knowledge and responsibility for developing policy and allocating funding for devolved matters. The Scottish Government is accountable to the Scottish Parliament and people for these functions, not to the UK Government or Westminster Parliament.

As the Westminster Parliament retained its sovereignty over devolved matters, and over the scope of the powers - and actual existence - of the Scottish Parliament, the devolution settlement provided safeguards to prevent the Westminster Parliament removing its powers or legislating or acting in areas of devolved responsibility without the agreement of the Scottish Parliament and Government.

The most important safeguard is the **Sewel Convention**<sup>6</sup> that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament; this includes changes to devolved competence<sup>7</sup>. Principles for relations between the governments were set out in 1999 in an agreement known as the Memorandum of Understanding<sup>8</sup> (or MOU). **These protections were not legally binding but depend on adherence to agreements and conventions in good faith. The protections worked as intended from 1999 until the EU exit referendum.**

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<sup>2</sup> See pages, 7, 17-20: [Renewing Democracy through Independence \(www.gov.scot\)](http://www.gov.scot)

<sup>3</sup> For more examples see [Renewing Democracy through Independence \(www.gov.scot\)](http://www.gov.scot), page 24-25

<sup>4</sup> See [Scottish Social Attitudes 2021/22 \(www.gov.scot\)](http://www.gov.scot), Chapter 2

<sup>5</sup> See paragraphs 1 and 22 of the Memorandum of Understanding (2013):

[MoU between the UK and the Devolved Administrations.pdf \(publishing.service.gov.uk\)](http://publishing.service.gov.uk)

<sup>6</sup> [Post-Devolution Primary Legislation affecting Scotland \(publishing.service.gov.uk\)](http://publishing.service.gov.uk)

<sup>7</sup> Consistent with statutory requirements in sections 30 and 63 of the Scotland Act 1998: [Scotland Act 1998 \(legislation.gov.uk\)](http://legislation.gov.uk)

<sup>8</sup> Last updated in 2013: [MoU between the UK and the Devolved Administrations.pdf \(publishing.service.gov.uk\)](http://publishing.service.gov.uk)

**Since then, the UK Government has proceeded with legislation, having been refused the consent of the Scottish Parliament on nine occasions<sup>9</sup>, has reduced the Parliament's effective powers and has taken powers itself to act in devolved areas.**

Most significantly, the UK Government proceeded with its [Internal Market Act](#) despite both the Scottish Parliament and Welsh Senedd refusing to agree to it. This makes it more difficult for the Scottish Parliament to bring in measures to protect the environment (like banning single use plastics) and means Scotland has to accept products from elsewhere in the UK that do not meet our standards (for example, genetically edited food). The UK Government is also proceeding with legislation that give it power to repeal or change important protections retained from EU membership – for example or the environment, for animal welfare, workers' rights and food standards – again without the agreement of the Scottish Parliament.

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<sup>9</sup> As of 14 June 2023. See section on the Sewel Convention below for further details; on two of these occasions the Scottish Parliament has refused consent, but the UK Government disputed that its consent was required.

## Effects of UK Government actions since the Brexit referendum

### The effective powers of the Scottish Parliament have been reduced without its agreement

It is fundamental to the devolution settlement – set out in both the Sewel Convention and the Scotland Act – that the powers of the Scottish Parliament and Government should not normally be changed without agreement. Similarly, UK Ministers should not normally take powers to act in devolved areas without consent from the Parliament. However, since 2016 both have happened on a number of occasions.

Most significantly, the [UK Internal Market Act 2020](#) (IMA) makes fundamental changes to the effective powers of the Scottish Parliament. Rules set elsewhere in the UK will apply in Scotland to imports from that part of the UK, whatever the equivalent rules in Scotland say. In contrast to the flexibility of the European Single Market, which recognises both local factors and a balance of different policy objectives<sup>10</sup> – such as health – with economic activity<sup>11</sup>, the IMA imposes a rigid requirement, in almost all cases, that standards set in other parts of the UK must automatically be accepted in Scotland, regardless of laws passed by the Scottish Parliament. The result is that the Scottish Parliament is effectively prevented from setting the standards it wants for Scotland within areas of devolved responsibility.

For example, Westminster has recently passed legislation to allow “precision breeding” (broadly gene editing) of plants and animals, including for human consumption, in England<sup>12</sup>: Under this legislation and the IMA, these products will have to be allowed into the Scottish market, even if they would otherwise be illegal under Scottish rules<sup>13</sup>.

If the Scottish Parliament makes rules that affect what can be bought and sold in Scotland - as it recently did to ban single use plastic items<sup>14</sup> – these rules, unless excluded from the Act, will not apply to suppliers from elsewhere in the UK who can still sell their products in Scotland<sup>15</sup>.

The Deposit Return Scheme demonstrates that the IMA also allows UK Ministers to try and alter policy decisions taken by the Scottish Parliament in legislating on matters clearly within devolved competence<sup>16</sup>, and to effectively block the Parliament’s preferred outcome. The UK Government was only prepared to exercise the powers it has conferred on itself to make an exclusion in a way that demanded important changes to the scheme legislated for by the Scottish Parliament<sup>17</sup>. The

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<sup>10</sup> These are known as the principles of subsidiarity and proportionality.

<sup>11</sup> See paragraphs 96-107, [After Brexit: The UK Internal Market Act & Devolution \(www.gov.scot\)](#)

<sup>12</sup> [Genetic Technology \(Precision Breeding\) Bill - Parliamentary Bills - UK Parliament](#); Scottish Government legislative consent memorandum [Genetic Technology \(Precision Breeding\) Bill | Scottish Parliament Website](#)

<sup>13</sup> See Part 5 of [After Brexit: The UK Internal Market Act & Devolution \(www.gov.scot\)](#)

<sup>14</sup> [Single use plastics ban - gov.scot \(www.gov.scot\)](#)

<sup>15</sup> [Scotland’s Ban on Single-Use Plastics: a case study of the impact of the UK Internal Market Act – SPICe Spotlight | Solas air SPICe \(spice-spotlight.scot\)](#)

<sup>16</sup> [Changes to deposit return scheme - gov.scot \(www.gov.scot\)](#)

<sup>17</sup> [Policy statement: Scottish Deposit Return Scheme - UK internal market exclusion - GOV.UK \(www.gov.uk\)](#)

Scottish Parliament was therefore faced with the option of legislating in a way dictated by the UK Government, or not proceeding at all.

It took over a year to secure an exclusion from the IMA for the ban on single use plastics<sup>18</sup>. The process for an exclusion for the Deposit Return Scheme from the IMA began in 2021<sup>19</sup> and only reached a conclusion in May 2023, which has resulted in further delay to the scheme until 2025<sup>20</sup>, as the UK Government only provided a partial and temporary exclusion from the IMA.

The approach of the UK Government on the Deposit Return Scheme has not adhered to the agreed procedure for exclusions from the IMA<sup>21</sup>, introducing uncertainty.

There is no guarantee that future exclusions<sup>22</sup> will be secured as UK Ministers are, contrary to the devolution settlement and the agreed IMA procedures, asserting a role in deciding whether devolved laws, passed by the Scottish Parliament, are effective in Scotland.

Similarly, UK Ministers – and only UK Ministers – can decide whether to include whole sectors<sup>23</sup> - such as health, social care, transport, waste, water and sewage services<sup>24</sup> - within the IMA principles, effectively changing the devolution settlement unilaterally without the consent of the Scottish Parliament.

**The Internal Market Act was passed despite a refusal of legislative consent from both the Scottish Parliament<sup>25</sup> and the Welsh Senedd<sup>26</sup>. This was the most wide-ranging constraint imposed on devolved competence since 1999, and undermines the Scottish Parliament's ability to make laws for Scotland in devolved areas. The legislation has placed significant control over devolved matters in the hands of UK Ministers.**

The IMA also specifically reserved **Subsidy Control**, giving the UK Government responsibility for this important issue following EU exit. Westminster has now passed its [Subsidy Control Act 2022](#) giving UK Ministers substantial powers over the regulation of subsidies across the UK including for devolved matters such as agriculture and economic development<sup>27</sup>. The Scottish Parliament again refused legislative consent to the Subsidy Control Act<sup>28</sup>, but the UK Government proceeded with the bill despite the views expressed by the Parliament.

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<sup>18</sup> Note that the UK Government has now announced its own proposals for banning single use plastics in England: [Far-reaching ban on single-use plastics in England - GOV.UK \(www.gov.uk\)](#)

<sup>19</sup> [Internal Market Act: correspondence - gov.scot \(www.gov.scot\)](#)

<sup>20</sup> [Deposit Return - gov.scot \(www.gov.scot\)](#)

<sup>21</sup> [Process for considering UK Internal Market Act exclusions in Common Framework areas - GOV.UK \(www.gov.uk\)](#)

<sup>22</sup> See, for example, the effect on proposals to ban rodent glue traps (paragraphs 38-42) : [Policy Memorandum accessible \(parliament.scot\)](#)

<sup>23</sup> Section 18, [United Kingdom Internal Market Act 2020 \(legislation.gov.uk\)](#)

<sup>24</sup> Schedule 2, [United Kingdom Internal Market Act 2020 \(legislation.gov.uk\)](#)

<sup>25</sup> [Meeting of the Parliament: 07/10/2020 | Scottish Parliament Website](#)

<sup>26</sup> [Agenda for Plenary - Fifth Senedd on Tuesday, 8 December 2020, 13.30](#)

<sup>27</sup> See the Scottish Government's legislative consent memorandum: [legislative-consent-memorandum-subsidy-control-bill1.pdf \(parliament.scot\)](#)

<sup>28</sup> [S6M-03647 | Scottish Parliament Website](#)

## UK Ministers have taken powers to act in devolved areas

The [Professional Qualifications Act 2021](#), [Trade \(Australia and New Zealand\) Act 2023](#) and the [Procurement Bill](#) all give UK Ministers powers to implement international treaties in devolved areas without the agreement of the Scottish Government or Parliament. The provisions in the Professional Qualifications Act and the Trade (Australia and New Zealand) Act were again passed after the Scottish Parliament had expressly refused legislative consent,<sup>29</sup> and UK Ministers can now make regulations affecting devolved matters without scrutiny by the Scottish Parliament<sup>30</sup>.

These powers are important as Free Trade Agreements (FTAs) now consist of more than changes to reserved issues like tariffs and quotas for goods, and can cover devolved matters such as food standards, environmental standards, public procurement, recognition of professional qualifications and access to markets that supply public services.

The UK Government remains solely responsible for concluding FTAs and other international agreements on behalf of the United Kingdom. Implementation of any sections of international treaties, like FTAs, that are within devolved competence, is specifically devolved in the Scotland Act. The MOU acknowledges the devolved governments' interests in trade negotiations and the need for their involvement in such negotiations<sup>31</sup>.

However, the Professional Qualifications Act allows the UK Government to impose an approach to implementing FTA rules on professional qualifications, including devolved professions (such as teachers, lawyers and social workers) without agreement by Scottish Ministers or scrutiny by the Scottish Parliament. Professional qualifications standards can vary across the UK; an approach that fits one part of the country may not be suitable for another. UK Ministers could agree through an FTA to standards (for example, teaching qualification requirements) not suitable for Scotland, and then impose these using the Act.

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<sup>29</sup> [S6M-03124 | Scottish Parliament Website](#)

<sup>30</sup> See the reports of the Economy and Fair Work Committee and the Delegated Powers and Law Reform Committee: [Professional Qualifications Bill | Scottish Parliament Website](#); [Trade Australia and New Zealand Bill | Scottish Parliament Website](#)

<sup>31</sup> See paragraphs D4.5 – D4.7: [MoU between the UK and the Devolved Administrations.pdf \(publishing.service.gov.uk\)](#). See also SG proposals for trade negotiations: [Scotland's Role in the Development of Future UK Trade Arrangements: A Discussion Paper \(www.gov.scot\)](#)

Other powers for UK Ministers to act in devolved areas are contained in the [Levelling Up and Regeneration Bill](#), the [Energy Bill](#), the [Retained EU Law \(Revocation and Reform\) Bill](#) and the [Genetic Technology \(Precision Breeding\) Act 2023](#). UK Ministers are not accountable to the Scottish Parliament, so under these powers can take decisions for devolved matters without democratic scrutiny by the Scottish Parliament. The Scottish Parliament and Welsh Senedd have objected to such powers,<sup>32</sup> and refused legislative consent to UK bills on that basis<sup>33</sup>.

UK Ministers are also proposing to take powers under the [Strikes \(Minimum Service Levels\) Bill](#) to set “minimum service levels” (MSLs) in a number of sectors (such as transport, education, fire and health), to be maintained during strike action. UK Ministers’ powers to set these MSLs include the devolved public services affected. Despite robust opposition from the Scottish Government, UK Ministers can therefore take a role affecting operational matters in areas within devolved competence, risking an adverse impact to industrial relations in the Scottish public sector<sup>34</sup>.

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<sup>32</sup> See, for example: [Report on the Legislative Consent Memorandums for the Procurement Bill and the Trade \(Australia and New Zealand\) Bill | Scottish Parliament](#); and [The Impact of Brexit on Devolution \(azureedge.net\)](#); for a Senedd example see: [The Welsh Government’s Legislative Consent Memorandum on the Professional Qualifications Bill](#)

<sup>33</sup> [S6M-03124 | Scottish Parliament Website](#); [S6M-07615 | Scottish Parliament Website](#)

<sup>34</sup> [Strikes \(Minimum Service Levels\) Bill: letter to UK Government - gov.scot \(www.gov.scot\)](#)

## The Sewel Convention has been undermined

The **Sewel Convention** had been followed scrupulously by successive UK Governments of different parties until the [European Union \(Withdrawal\) Act 2018](#), when the UK Government overruled the Scottish Parliament for the first time ever (to give UK Ministers a power to change the powers of the Parliament unilaterally, and by secondary legislation).

The UK Government has now failed to respect the views of the Scottish Parliament on legislative consent on a total of nine occasions:

- [EU \(Withdrawal\) Act 2018](#)
- [EU \(Withdrawal Agreement\) Act 2020](#)
- [EU Withdrawal \(Future Relationship\) Act 2020](#)
- [UK Internal Market Act 2020](#)
- [Professional Qualifications Act 2022](#)
- [Subsidy Control Act 2022](#)
- [Nationality and Borders Act 2022](#)\*
- [Trade \(Australia and New Zealand\) Act 2023](#)
- [Genetic Technology \(Precision Breeding\) Act 2023](#)\*

(\* The UK Government did not consider consent was required for these bills, and did not seek legislative consent.)

There is the prospect of further overrides in the near future. The Scottish Government is currently recommending that the Scottish Parliament withhold consent in full or in part from a number of bills, including the [Levelling Up and Regeneration Bill](#) and the [Energy Bill](#).

The Sewel Convention is vital in protecting the role of the Scottish Parliament and the other devolved legislatures in the UK's constitutional system. Under the doctrine of unlimited Westminster sovereignty<sup>35</sup>, the UK Parliament always retains the power to legislate in devolved areas and to change the powers of the Scottish Parliament, or abolish it completely, without a further referendum<sup>36</sup>. For the Scottish Parliament to have any meaningful autonomy, and security within the UK's constitutional arrangements, it is necessary for the Westminster Parliament to refrain from legislating in areas of devolved responsibility, or changing the powers of the devolved institutions, without their agreement. This was provided by the Sewel Convention.

The consequences of the UK Government no longer considering itself bound by the convention can be seen from the **Internal Market Act**, which was passed without consent and is now operating to constrain the effective powers of the Scottish Parliament; precisely what the Sewel Convention was intended to prevent. If the UK Government had observed the convention, the Act would not have been passed in its current form and the Scottish Parliament would have retained its powers to introduce important environmental measures, like the ban on single use plastics and

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<sup>35</sup> See [Parliament's authority - UK Parliament](#)

<sup>36</sup> See, for example, paragraph 1.1: [Scotland Bill 2015-16 \(Bill 3\) \(parliament.uk\)](#)

the Deposit Return Scheme, without the delay caused by the UK Government. It is also questionable whether the Minimum Unit Price for alcohol could be introduced under the rules in the Internal Market Act<sup>37</sup>.

The UK Government has now indicated that it intends to proceed with the **Retained EU Law (Revocation and Reform) Bill** without legislative consent<sup>38</sup>. As well as repealing specific EU legal measures, this bill would give UK Ministers the power to repeal other EU measures within devolved competence without the agreement of the Scottish Government or Scottish Parliament. Again, this is precisely what the Sewel Convention was intended to prevent.

Moreover, concerns about the UK Government's meaningful commitment to the Sewel Convention, and its respect for the Scottish Parliament, were increased by the very short period (around a working day) between seeking legislative consent for measures in the bill and its announcement of an intention to proceed without such agreement<sup>39</sup>.

Committees of both the Scottish Parliament and Westminster have recognised that the actions of the UK Government in relation to the Sewel Convention have placed it under strain and that there is a case for reform<sup>40</sup>. However, the UK Government has not yet indicated any interest in implementing such proposals<sup>41</sup>.

The current position therefore remains that confidence in the Sewel Convention has been undermined by events since 2018. Mark Drakeford, First Minister of Wales, has said in evidence to the House of Lords<sup>42</sup>:

“When it became inconvenient for the UK Government to observe Sewel, they just went ahead and rode roughshod through it”

“More recently, I am afraid, the Sewel convention has withered on the vine”

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<sup>37</sup> See page 29: [After Brexit: The UK Internal Market Act & Devolution \(www.gov.scot\)](https://www.gov.scot/publications/after-brexits-uk-internal-market-act-devolution/pages/29/)

<sup>38</sup> [Retained EU Law \(Revocation and Reform\) Bill - Hansard - UK Parliament](https://hansard.parliament.uk/commons/2022/01/22/220122HC000603); Column 603

<sup>39</sup> [Retained EU Law Bill “risk to devolution” - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/retained-eu-law-bill-risk-to-devolution/pages/1/); [Cabinet Secretary for Constitution External Affairs and Culture \(parliament.scot\)](https://www.parliament.scot/committees/external-affairs-and-culture/)

<sup>40</sup> See, for example, the CEEAC report of Sep 2022: [The Impact of Brexit on Devolution | Scottish Parliament](https://www.parliament.scot/committees/external-affairs-and-culture/); Lords Constitution Committee report of Jan 2022: [Respect and Co-operation: Building a Stronger Union for the 21st century \(parliament.uk\)](https://www.parliament.uk/committees/lords-constitution/); Commons PACAC report of July 2018: [Devolution and Exiting the EU: reconciling differences and building strong relationships - Public Administration and Constitutional Affairs Committee - House of Commons \(parliament.uk\)](https://www.parliament.uk/committees/public-administration-and-constitutional-affairs/)

<sup>41</sup> See the UK Government report to PACAC: [Government Response to the Committee's Eighth Report: Devolution and Exiting the EU: reconciling differences and building strong relationships - Public Administration and Constitutional Affairs - House of Commons \(parliament.uk\)](https://www.parliament.uk/committees/public-administration-and-constitutional-affairs/)

<sup>42</sup> <https://committees.parliament.uk/oralevidence/2565/pdf/>

## The UK Government has blocked legislation passed by the Scottish Parliament

In January 2023 the UK Government used for the first time a power under the Scotland Act 1998 (known as a **section 35 order**) to prevent a bill passed by the Scottish Parliament– in this case with support from MSPs in all parties – becoming law. As the section 35 order prevents the Scottish Parliament from legislating within its areas of competence, it was intended to be used as a last resort and only following discussions between the UK and Scottish Governments to resolve any problems.

This is set out in the [MOU](#) (see paragraph 27):

Although the UK Government is prepared to use these powers if necessary, it sees them very much as a matter of last resort. The UK Government and the administration concerned will therefore aim to resolve any difficulties through discussion so as to avoid any action or omission by the devolved administration having an adverse impact on non-devolved matters. If formal intervention should become necessary, the UK Government will whenever practicable inform the devolved administration of its intentions in sufficient time to enable that administration to make any representations it wishes, or take any remedial action

Again, this agreement is not legally binding, but relies on the governments to follow the agreed and understood processes. Even though this was the first ever exercise of the power under section 35, the UK Government did not follow the steps set out in the MOU<sup>43</sup>.

A concern now is that the UK Government may use its power under section 35 more regularly, in the same way that one bill passed without devolved consent under the Sewel Convention has been followed with repeated further examples<sup>44</sup>, and that the section 35 power may in the future no longer be regarded by the UK Government as a “last resort”<sup>45</sup>.

The Scottish Government has now initiated a judicial review of the use of the section 35 Order in the Court of Session.<sup>46</sup> The Scottish Government is taking this action to uphold the democratic will of the Scottish Parliament and to have clarity on the interpretation and scope of the Section 35 power and its impact on devolution<sup>47</sup>.

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<sup>43</sup> See [Gender recognition: letter to the Secretary of State for Scotland - 21 January 2023 - gov.scot \(www.gov.scot\)](#) and [Gender recognition: letter to the Secretary of State for Scotland - 24 January 2023 - gov.scot \(www.gov.scot\)](#)

<sup>44</sup> See, for example, the First Minister of Wales on 17 Jan 2023 (at paragraph 38): [Plenary 17/01/2023 - Welsh Parliament \(assembly.wales\)](#)

<sup>45</sup> The Secretary of State for Scotland indicated in the Commons on announcing the s.35 Order concerning the Gender Recognition (Scotland) Bill, "This is not a last resort" - [Scotland Act 1998: Section 35 Power - Hansard - UK Parliament](#), Cols 202, 216

<sup>46</sup> [Gender recognition reform: Section 35 Order challenge - petition - gov.scot \(www.gov.scot\)](#)

<sup>47</sup> [Section 35 Order challenge - gov.scot \(www.gov.scot\)](#); [Challenge to UK Government's Section 35 Order on the Gender Recognition Reform \(Scotland\) Bill: Ministerial statement - gov.scot \(www.gov.scot\)](#)

## **The Westminster Government's choice for a hard Brexit had major adverse impacts on Scotland's interests; the UK Government has also planned to repeal EU laws including in devolved areas**

The Scottish Government and others have set out the adverse effects of Brexit on the interests of Scotland and the UK as a whole<sup>48</sup>. The Office for Budget Responsibility has estimated that Brexit will reduce long-run productivity by 4% compared with remaining in the EU<sup>49</sup>: this equates to a loss of around £100 billion in lost output and £40 billion in public revenues<sup>50</sup>. Scotland's share, calculated by head of population, would be around £3.2 billion less each year. Scottish Government analysis has shown that the value of Scotland's total trade in goods with the EU (imports plus exports) was 12% lower in 2021 than it otherwise would have been under continued EU membership<sup>51</sup>. Many Scottish businesses are facing additional costs due to Brexit in transportation, changing supply chains and increased administration<sup>52</sup>.

The UK Government is now taking its [Retained EU Law \(Revocation and Reform\) Bill](#) through the UK Parliament. The Bill seeks to repeal, reform or preserve an estimated 4,900 articles of retained EU law (or REUL), law that was agreed by EU member states, including the UK, during the UK's membership. These laws provide protections for the environment, for animal welfare, workers' rights and food standards and allow businesses and industry to plan and trade effectively<sup>53</sup>. The Bill itself will repeal around six hundred instruments at the end of the year and allow UK Ministers to repeal more in the future with limited UK parliamentary scrutiny and input from Devolved Governments and the Scottish Parliament. These proposals apply to devolved matters such as food standards, pollution control and protections of the environment and nature<sup>54</sup>.

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<sup>48</sup> See for example, [Building a New Scotland - A stronger economy with independence \(www.gov.scot\)](#) and [The Brexit Referendum 5 Years on – Summary of Impacts to Date - Information note from the Scottish Government \(www.gov.scot\)](#)

<sup>49</sup> [Brexit analysis - Office for Budget Responsibility \(obr.uk\)](#)

<sup>50</sup> [The deafening silence over Brexit's economic fallout | Financial Times \(ft.com\)](#)

<sup>51</sup> [Trade - State of the economy: May 2022 - gov.scot \(www.gov.scot\)](#)

<sup>52</sup> [Supporting documents - BICS weighted Scotland estimates: data to wave 83 - gov.scot \(www.gov.scot\)](#)

<sup>53</sup> See the Scottish Government analysis here: [Retained EU Law Bill: what it means - gov.scot \(www.gov.scot\)](#)

<sup>54</sup> See the evidence taken by the CEEA Committee, 1 December 2022: [Meeting of the Parliament: CEEAC/01/12/2022 | Scottish Parliament Website](#)

Combined with the IMA, the UK Government's approach to REUL, its view on the "regulatory burden" and divergence from the EU, could prevent the Scottish Parliament maintaining high standards, in alignment with EU, for devolved areas<sup>55</sup>.

As recommended by the Scottish Government<sup>56</sup>, the Scottish Parliament withheld its legislative consent to the bill<sup>57</sup>, having already recorded its view that the bill "should...be scrapped by the UK Government"<sup>58</sup>.

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<sup>55</sup> UK Government policy on regulation is set out here: [The Benefits of Brexit: How the UK is taking advantage of leaving the EU \(publishing.service.gov.uk\)](#)

<sup>56</sup> [Legislative consent memorandum \(parliament.scot\)](#)

<sup>57</sup> [https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-08-06-2023?meeting=15358&iob=131030#orscontributions\\_M4934E351P846C2501616](https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-08-06-2023?meeting=15358&iob=131030#orscontributions_M4934E351P846C2501616)

<sup>58</sup> [S6M-06984 | Scottish Parliament Website](#)

## **The UK Government is increasing its role in devolved policy and decisions on public funds, bypassing the Scottish Parliament**

The devolution settlement provided for governmental functions and funding in devolved areas to transfer to the Scottish Government, which is accountable to the Scottish Parliament for these executive functions<sup>59</sup>. The UK Government has few residual functions, and no general oversight role, for devolved policy<sup>60</sup>.

Despite this clear allocation of responsibilities in the Scotland Act, the UK Government is increasingly taking a role in devolved policy making and funding without the consent of the Scottish Parliament.

The UK Government's "**levelling up missions**"<sup>61</sup> set targets for the whole UK for devolved matters such as education, health and policing. These targets were set without the agreement of the Scottish Government or Parliament. In the [Levelling Up and Regeneration Bill](#), the UK Government is now legislating at Westminster for a UK Minister to report annually to Westminster on the delivery of these targets with no role for the Scottish Government or Parliament. Under the devolution settlement, these are not matters for the UK Government. It is for the Scottish Government – accountable to the democratically elected Scottish Parliament – to decide policies, priorities, targets, and resources for these devolved matters.

The UK Internal Market Act also gave UK Ministers **new powers to take decisions on public spending for devolved services in Scotland**, bypassing the Scottish Government and Scottish Parliament. To fund spending under these new powers, UK Ministers have retained money that would usually be allocated to the Scottish Parliament through normal funding arrangements (known as the Barnett formula).

Under the Barnett formula, the Scottish Parliament is allocated a proportion of increases in spending for devolved purposes in England (or England and Wales). Decisions on spending are then made in Scotland<sup>62</sup>, ensuring policy making, including funding decisions, is carried out in an integrated and coherent way, ensuring a consistent and joined up government programme, and good value for money<sup>63</sup>. The UK Government's interventions in these areas, without the agreement of the Scottish Government and Parliament, risk duplication of effort, poor value for money and inconsistent policy objectives.

The UK Government's Autumn 2020 Spending Review announced a £4 billion Levelling Up Fund for England, with consequential funding of £800 million for devolved governments "in the usual way", that is through the Barnett Formula<sup>64</sup>. The Scottish Government would have expected to receive around £430 million of this funding. Instead, without prior notice, the UK Government announced

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<sup>59</sup> See paragraphs 2.6 and 4.7 of *Scotland's Parliament* (1997)

<sup>60</sup> See paragraphs 1 and 22 of the [Memorandum of Understanding \(2013\)](#)

<sup>61</sup> [Levelling Up the United Kingdom - GOV.UK \(www.gov.uk\)](#)

<sup>62</sup> See [Statement of Funding Policy 2021 \(publishing.service.gov.uk\)](#)

<sup>63</sup> This was recognised in the UK Government's Dunlop review, which recommended spending in devolved areas *with the agreement of* the Scottish Government: see chapter 3, [Review of UK Government Union Capability \(publishing.service.gov.uk\)](#)

<sup>64</sup> See paragraph 24 (page 4); paragraphs 3.16, 6.57 and 6.75: [CP 330 - Spending Review 2020 – November 2020 \(publishing.service.gov.uk\)](#)

in the 2021 Spring Budget, that the Levelling Up Fund would be UK-wide, and retained the funds to be distributed to devolved governments to increase the Fund to £4.8 billion<sup>65</sup>. Approximately £97 million remains due to Scotland, with just under half of all local authorities yet to receive any support<sup>66</sup>.

The UK Government has also failed to adequately replace the overall level of funding that was previously available under European Union funding schemes. The Scottish Government has calculated that £183 million a year, or £549 million over a three year period, was required to replace EU Funding (based on funding for a 7 year programme, equivalent to the duration of EU programmes). The UK Government allocation for Scotland of £212 million over three years falls far short of this calculation<sup>67</sup>.

EU funding was distributed through the Scottish Government, whereas the UK Government now provides funding directly and solely to local authorities, risking national programmes coordinated by Scottish Government agencies. For example, adult learning services across the UK are to be delivered by local authorities with an allocation decided by the UK Government<sup>68</sup>, without taking account of the existing Adult Learning Strategy<sup>69</sup>.

By contrast, working together on an agreed objective can allow each government to contribute from their areas of responsibility, expertise and resources in a coherent way. Examples include the City Region Deals<sup>70</sup> and Green Freeports<sup>71</sup>. The UK and devolved governments have also published principles for common frameworks for matters within devolved competence<sup>72</sup>, which emphasise the need for agreement.

These approaches are based on the need for negotiation and consensus<sup>73</sup> to recognise and respect the devolved responsibilities of the Scottish Government and Parliament. They show there is an alternative to the centralising approach adopted by the UK Government in its other actions, one which maintains the purpose of devolution: a Scottish Government, responsible for devolved matters, accountable to the Scottish Parliament and through it to the people of Scotland.

However, as the evidence set out in this paper shows, the underlying constitutional arrangements of the UK, especially Westminster's claim to continuing sovereignty over all matters, will always make the position of devolved institutions and arrangements for intergovernmental relations subject to decisions made by the UK Government and Westminster Parliament<sup>74</sup>.

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<sup>65</sup> See paragraphs 2.2 and 2.3: [Levelling Up prospectus.pdf \(publishing.service.gov.uk\)](#)

<sup>66</sup> As at the announcement of Round 2 in January 2023: [Levelling Up Fund Round 2: successful bidders - GOV.UK \(www.gov.uk\)](#); [Meeting of the Parliament: 07/02/2023 | Scottish Parliament Website](#)

<sup>67</sup> [EU replacement funding £151 million less in first year - gov.scot \(www.gov.scot\)](#)

<sup>68</sup> [UKSPF allocations - GOV.UK \(www.gov.uk\)](#)

<sup>69</sup> [Multiply in Scotland, Wales and Northern Ireland - GOV.UK \(www.gov.uk\)](#) and [Adult learning strategy 2022 to 2027 - gov.scot \(www.gov.scot\)](#)

<sup>70</sup> See: [City Region Deals - Cities and regions - gov.scot \(www.gov.scot\)](#)

<sup>71</sup> See: [Green freeports - Cities and regions - gov.scot \(www.gov.scot\)](#)

<sup>72</sup> [Microsoft Word - Joint Ministerial Committee communique.docx \(publishing.service.gov.uk\)](#)

<sup>73</sup> [Deal agreed to establish Green Freeports - gov.scot \(www.gov.scot\)](#)

<sup>74</sup> See pages 12-16 and 39: [Renewing Democracy through Independence \(www.gov.scot\)](#)

## Conclusion

**Taken together, the evidence and examples set out in this paper demonstrate a worrying trend. The overall effect of the UK Government's actions is reducing the powers and responsibilities of the Scottish Government and Parliament, imposing some decisions of the UK Government in devolved areas, and undermining some of the protections provided to the Scottish Parliament. Ultimately these developments can frustrate the purpose of devolution and risk making the settlement practically unworkable.**

Some have expressed the view that the UK Government has a role that transcends the devolution settlement, and a responsibility for devolved matters in Scotland, and indeed all aspects of national life across the whole of the UK<sup>75</sup>. The UK Government's white paper *Levelling Up the United Kingdom* emphasised a role for devolved governments in delivering services, while describing concern for outcomes as a matter for the whole of the UK<sup>76</sup>.

These views are, however, at odds with the both the devolution settlement as it was established in 1999, and the purpose of the Scottish Parliament in addressing the "democratic deficit" in Scotland. The devolution settlement gave control over devolved matters to Scottish Ministers in a government formed from the Scottish Parliament, elected by the people of Scotland.

The current actions of the UK Government are changing its relationship with the elected Scottish Parliament, allowing it to intervene with its views in areas for which responsibility was transferred to the Scottish Parliament through a choice made by the people of Scotland.

**The risk for the devolution settlement is that, instead of the Scottish Parliament making decisions that reflect the views of the people of Scotland, it is increasingly bypassed or obliged to implement decisions taken, without the Parliament's agreement, towards outcomes set by the UK Government in line with its priorities – contrary to the purpose of devolution.**

**Put simply, the evidence set out in this paper shows there cannot be true self-government under a devolution settlement that retains Westminster's supremacy over the democratic will of the Scottish Parliament.**

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<sup>75</sup> See, for example, the speech of the then Prime Minister to Scottish Conservative Conference in March 2017: [Theresa May's speech to Scottish Tory conference - in full \(inews.co.uk\)](https://www.inews.co.uk/news/theresa-may-speech-scottish-tory-conference-2017/)

<sup>76</sup> See page xx: [Levelling Up the United Kingdom White Paper \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/612212/levelling-up-white-paper.pdf)