

Resetting devolution: restoring the Scottish Parliament's power to protect human rights across all devolved areas



Briefing from Together (Scottish Alliance for Children's Rights)

About Together (Scottish Alliance for Children's Rights)

Together (Scottish Alliance for Children's Rights) is an alliance that works to improve the awareness, understanding and implementation of the UN Convention on the Rights of the Child (UNCRC) and other international human rights treaties across Scotland. We have over 600 members ranging from large international and national non-governmental organisations (NGOs) through to small volunteer-led after school clubs and interested professionals. The views expressed in this briefing are based on wide consultation with our members but may not necessarily reflect the specific views of every one of our member organisations.

Introduction

Scotland has led the way in embedding children's rights in law. In July 2024 it became the first devolved nation to incorporate the UNCRC into domestic law through the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, passed unanimously and on a cross-party basis by the Scottish Parliament.

That achievement is being held back by a constitutional problem. In many cases, children are unable to challenge rights breaches - even when they relate to devolved issues like education, housing or family support - because they fall outside the scope of the UNCRC Act. This is due to a restrictive interpretation of section 28(7) Scotland Act by the UK Supreme Court. A line of cases has placed a substantive limit on what the Scottish Parliament can do. As a result, the Act as passed reaches only part of the law affecting children's lives, and a Human Rights Bill for Scotland risks facing the same fate.¹

This is a technical problem with a technical solution. When devolution began in 1999, it was widely understood that Holyrood would have practical control over laws in devolved areas, including its ability to build upon and adapt legislation inherited from Westminster. That understanding has been restricted by the UK Supreme Court. The UK Government has the ability to restore the position that everyone understood to apply in 1999, without any loss to the sovereignty of the UK Parliament. With renewed attention at Westminster on strengthening and extending devolution, there is a timely and tangible opportunity to put this right.

¹ University of Glasgow (2026), *Devolved law-making after the UNCRC (Incorporation) (Scotland) Bill Reference*. This briefing draws throughout on that analysis.

Through our Rights Empowered project with Clan Childlaw, we have already seen the practical consequences of this constitutional problem. Children, families and supporting organisations have approached us about rights issues affecting their everyday lives - only to discover they have limited power to challenge these issues as the relevant legislation lies outside the scope of the UNCRC Act. We have included these examples throughout the briefing:

School transport

Children contacted us about the withdrawal of school transport and the safety of alternative walking routes to school. They felt children's views had not been sought and were concerned about the impact on their safety and access to education. While education and transport are devolved matters, the relevant powers are set out in the Education (Scotland) Act 1980, a pre-devolution Act of the UK Parliament. The children therefore had no route to challenge the issue under the UNCRC Act.

"I now need to walk for two hours each day to get to school along a busy main road. There are no traffic lights to cross the road. I am scared to do this walk. I don't think I can walk two hours a day every day either. I will be so tired and fed up. The council says my parents need to walk me to school and back now. I know they can't do this because they work and I am worried about it...I learned that children's rights are now part of the law in Scotland – so it's wrong that no one is listening to us."

(Gerald, age 10, [State of Children's Rights Report 2024](#))

Our call to the UK Government

We call on the UK Government to restore the Scottish Parliament's ability to protect human rights across all areas within its devolved responsibility. The UK Government should:

- Commit to restoring the understanding of devolved competence that applied in 1999, by removing the unintended limit the Supreme Court has read into section 28(7).
- Bring forward a section 30 Order, the fastest and lowest-risk route, confirming that the Scottish Parliament may condition the meaning and effect of UK legislation in devolved areas.
- Treat this as a reset of the devolution settlement, restoring clear democratic accountability in Scotland while leaving the sovereignty of the UK Parliament wholly intact.

Background: Section 28(7) and the Supreme Court

Section 28(7) of the Scotland Act 1998 says that the UK Parliament may continue to make laws for Scotland, including in devolved areas. For almost two decades this was understood as a symbolic reaffirmation of Westminster's sovereignty. It was a reminder of where ultimate authority sits, and was not expected to place any working constraint on Holyrood's day-to-day law-making.

The courts have taken a different view. In the Continuity Bill Reference (2018) and the UNCRC (Incorporation) Bill Reference (2021), the Supreme Court held that section 28(7) is a protected provision that Holyrood cannot modify, and that “modify” extends to anything that conditions the meaning or effect of UK legislation in devolved areas. In practice this means:

- The Scottish Parliament can still amend or repeal specific UK laws in devolved areas, and can pass new free-standing laws.
- The Scottish Parliament cannot apply general conditions, such as a duty to act compatibly with children’s rights, across the whole devolved statute book where that book includes UK legislation.

The most efficient tool for embedding human rights, a general compatibility duty applied across all relevant law, has been placed out of reach. The reasoning has drawn sustained criticism from constitutional lawyers, in part because Holyrood may amend UK law directly but is now prevented from achieving the same result by applying general conditions.² The Supreme Court was clear that it was interpreting the statute as written, so the remedy lies with Government and Parliament rather than with further litigation.

The impact on children’s rights

To survive the judgment, the UNCRC (Incorporation) (Scotland) Act 2024 had to be narrowed. Its duties now apply only to Acts of the Scottish Parliament and to instruments made under them. They do not reach Acts of the UK Parliament operating in devolved areas, whether passed before or after devolution. Much of the law that shapes children’s lives sits in pre-devolution UK statutes, including the Children (Scotland) Act 1995, which still defines what it means to be “looked after”.

A patchwork of protection

Because these areas fall outside scope, a child’s ability to enforce their rights can depend on the technical question of which Parliament passed the relevant law, rather than on whether their rights were respected. Children, families and the professionals who work with them face a legal landscape that obscures where rights actually apply and where redress can be sought. This undermines the everyday accountability that the UNCRC Act was designed to deliver.

Children's voices in court proceedings

We have received numerous reports that children's views are not being properly considered in contact decisions that may place them at risk of harm. While family law is devolved, and children's participation rights are directly engaged, the relevant powers are set out in the Children (Scotland) Act 1995. As this is a pre-devolution UK Act, children cannot use the UNCRC Act to challenge potential breaches of their rights.

2A. McHarg (2024), *The Implications of the UNCRC (Incorporation) (Scotland) Bill Reference for the Scottish Human Rights Bill*, Human Rights Consortium Scotland.

Homelessness

We have received concerns relating to homelessness and temporary accommodation issues affecting children. While housing is devolved, many of the legal duties governing these services are set out in pre-devolution legislation, such as the Housing (Scotland) Act 1987, placing them outside the scope of the UNCRC Act.

The question in the courts

In proceedings, the central question is increasingly whether a provision is in or out of scope, rather than whether a child's rights have been respected. This inverts the purpose of the Act and absorbs legal effort that should be spent on the substance of children's rights and access to justice (Article 4).

The effect on new legislation

Because conditioning is out of reach, Bills are now being shaped around the scope problem. The Children (Care, Care Experience and Services Planning) (Scotland) Act 2026, which helps deliver the Promise,³ shows both sides of this. Provisions on aftercare and the register of foster carers were originally drafted as amendments to the pre-devolution Children (Scotland) Act 1995, which would have left them outside the UNCRC Act. Following concerns raised during the Bill's passage, they were redrafted as free-standing duties so that they now fall within scope.⁴ This is welcome, and it shows the workaround can succeed. It also shows its cost: legislators must now bend the design of Bills around the scope gap, and the technique cannot always be used.

Other legislation illustrates what happens when it cannot. The Housing (Scotland) Act 2025 introduced new homelessness-prevention duties by modifying the pre-devolution Housing (Scotland) Act 1987, leaving them beyond the reach of the UNCRC Act and raising concerns for children's right to adequate housing. Provisions in the Children (Withdrawal from Religious Education and Amendment of UNCRC Compatibility Duty) (Scotland) Bill, drafted as amendments to pre-devolution legislation, have prompted similar concern from the scrutinising Committee, including from Labour members.

Broader impacts

Human Rights Bill for Scotland

Scotland's planned Human Rights Bill would incorporate ICESCR, CEDAW, CERD and CRPD into Scots law. On the current interpretation, the same barrier will blunt it, leaving economic, social, housing and equality rights unenforceable across large areas of devolved law. The workaround of auditing and re-enacting UK statutes one by one is just about conceivable for the self-contained field of children's rights. For a Bill of this breadth it would be enormous, would

³ The Promise Scotland, <https://thepromise.scot/> [Date accessed: 10.07.2026].

⁴ Children (Care, Care Experience and Services Planning) (Scotland) Act 2026 (asp 16). Aftercare (s.1) and the register of foster carers (ss.30–35) are drafted as free-standing duties rather than as amendments to the Children (Scotland) Act 1995.

need to be repeated whenever new UK legislation appeared, and would crowd out other priorities for the Scottish Parliament.

Wider uncertainty

Conditioning is an ordinary drafting technique. Duties to secure best value, to carry out environmental impact assessments, or to contribute to climate targets all condition functions without distinguishing UK from Scottish sources. The judgment therefore casts doubt over legislation well beyond human rights, and the same reasoning is expected to reach Wales and Northern Ireland. The European Charter of Local Self-Government (Incorporation) (Scotland) Bill has already been stalled for five years.

A question of accountability

The purpose of devolution is that the Scottish Government is accountable to the people of Scotland for how it exercises devolved powers. The scope gap weakens exactly that. Where the Scottish Parliament has legislated for human rights standards, but those standards do not reach the UK-derived law that governs the service in question, the effect is a democratic gap:

- The Scottish Government cannot be held to the standards its own Parliament has voted for, because across large areas of devolved responsibility those duties do not apply.
- Children and others cannot obtain redress when their rights are breached in an out-of-scope area, even though the subject matter is fully devolved.
- Scrutiny is muddled, as Parliament, the courts and the public are drawn into arguments about jurisdiction rather than holding Ministers to account for outcomes.

Fixing this is a pro-accountability reform. It restores clear lines: the Scottish Parliament sets the standard, the Scottish Government is held to it, and the people of Scotland judge the result. That is devolution working as it was intended.

A devolution question

Discussions with the UK Government to date have tended to turn on whether incorporating human rights is a good idea. However, whether Scotland incorporates human rights in devolved areas is a decision for the Scottish Parliament, and it has already taken that decision, unanimously and across parties. The UK Government remains free to reach a different view for reserved matters or for England, and nothing proposed here changes that.

This is where the UK Government's responsibility lies: ensuring the devolution settlement works as it was designed to. At present it does not, because of an interpretation of the Scotland Act that no one anticipated when devolution was established. Putting this right would not require the UK Government to endorse the incorporation of human rights in Scotland, or to take any view on it at all. It would simply allow devolution to work as intended, and would show a clear commitment to making it do so.

Commitments in place

The direction of travel is agreed in principle. What is missing is action by the UK Government. The Scottish Government's draft Children's Rights Scheme contains two relevant commitments:

- **Commitment 39**, to work constructively with the UK Government to seek and remove legislative restrictions that limit the Parliament's ability to enhance rights protections across all devolved areas.
- **Commitment 40**, if there is insufficient progress by November 2026, to review UK Act provisions in devolved areas and consider re-enacting them in Scottish Acts to bring them into scope.⁵

These are welcome commitments, but their wording is tentative and no concrete progress has been made. Officials are engaging with Whitehall and exploring options, but advocacy has repeatedly been drawn back into the incorporation debate rather than the devolution question. The re-enactment fallback in Commitment 40 is a last resort. It is slow, resource-intensive and never-ending, and it risks fragmenting the statute book further. The clean solution requires the one actor who has not yet acted, the UK Government.

⁵ Scottish Government, draft Children's Rights Scheme, Commitments 39 and 40.

What needs to happen: a reset to the 1999 understanding

The architects of devolution expected Holyrood to have full practical control of the Scottish statute book in devolved areas, building on and adapting the inheritance of Westminster legislation. Restoring that understanding requires a small, targeted step by the UK Government. There are two routes, and the first is strongly preferred for its speed and simplicity.

Preferred route: a section 30 Order (secondary legislation)

A section 30 Order can amend Schedule 4 of the Scotland Act to make clear that the bar on modifying section 28(7) does not prevent the Scottish Parliament from conditioning the meaning or effect of UK legislation in devolved areas. It needs the consent of both Parliaments but no primary-legislation time, and it does not reopen the wider settlement. Section 30 is a well-established tool, used before to extend the franchise to 16- and 17-year-olds and to enable the 2014 referendum. Equivalent Orders could be made for Wales and Northern Ireland.

Alternative route: amend section 28(7) directly (primary legislation)

A new subsection could confirm that Holyrood has the fullest possible power to legislate, including power to amend, repeal or otherwise condition the effect of UK Acts in devolved areas. Northern Ireland already has almost exactly this: section 5(6) of the Northern Ireland Act 1998 allows the Assembly to modify UK legislation so far as it forms part of Northern Ireland law. Aligning Scotland with that model would bring welcome consistency across the devolution statutes.

Either route leaves the sovereignty of the UK Parliament untouched. The UK Parliament keeps its full power to legislate for Scotland. The only change is that Holyrood may once again apply general protections across the devolved law it is responsible for, as everyone understood it could in 1999.

What the reset would deliver

- **Restored accountability**, so the Scottish Government can be held to the human rights standards its Parliament has set, right across devolved areas.
- **Consistent rights and real redress**, so that children and others can enforce their rights wherever the subject matter is devolved, ending a system where protection depends on which statute happens to apply.
- **A workable Human Rights Bill**, able to protect economic and social rights across devolved law without an impossible re-enactment exercise.
- **Legal certainty for public bodies**, removing the doubt now hanging over best-value, environmental and climate duties, and over Wales and Northern Ireland.
- **A tangible devolution commitment delivered**, a concrete and deliverable act that shows devolution can be made to work, at minimal legislative cost and none to sovereignty.

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