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The position papers have been written by legal experts in the relevant fields and ILPA is very grateful to all those who have contributed to this work.

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The implications for Scotland of a vote in the EU referendum for the UK to leave the EU

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Introduction

One view of the relevant EU and UK law suggests that the implications for Scotland of the UK leaving the EU are negligible. According to this view, such implications sit squarely within the implications affecting the UK as a whole. This view suggests that distinctive Scottish implications would flow only were Scotland to be an independent country.

This paper suggests that this view is overly strict and certainly not the only 'game in town'. The view we offer is based upon a reality that is more nuanced and messy. Within the terms of the devolution settlement, or perhaps, in spite of it, distinctive Scottish approaches to the EU and to immigration have emerged. As devolution of power to Scotland increases, so too does the intertwining of competences between Holyrood and Westminster. The outcome of the referendum ought to be considered in light of this messier reality. We show that, whether the result is for 'leave' or for 'remain', the outcome creates the potential for constitutional unease between administrations North and South of the border.

We begin by outlining the current legal position vis-à-vis the referendum and withdrawal from the EU. Thereafter we outline the relevant parts of the UK devolution settlement. After that, we consider the reality of how that legal landscape has evolved in practice, and how it is developing. Our account of the lived experience of the devolution settlement sets the scene for us to consider the implications of both a leave and of a remain vote.

The current legal position

The referendum and withdrawal: legal arrangements

A UK Act of Parliament—the [EU Referendum Act 2015](#)—makes provision for a referendum on whether the UK should remain a member of the EU. Legally, the UK Government is not required to implement the result of the referendum. However [it has promised the UK electorate that it will do so](#). A decision to withdraw from the EU would take effect for the whole of the

territory of the UK, even if the majority of the electorate in Scotland voted to remain. This is so as there is no provision in the EU Referendum Act for a 'double lock' threshold requiring each constituent part of the UK to vote to leave before the UK can withdraw from the EU. The SNP tabled an amendment to require such a double lock threshold during the passage of the Bill through Parliament, but were unsuccessful. In short, there is nothing to protect the Scottish electorate from an EU exit against its will.

As a matter of EU law, withdrawal from the EU by a Member State takes place through the operation of Article 50 of the Treaty on European Union (TEU). This provision has never been activated and therefore we would enter new legal territory should the UK seek to do so.

Article 50 lays down the procedural steps for a Member State to leave the EU. It begins by stating simply that 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.' In other words, the UK must come to that decision according to its own domestic laws and procedures: EU law makes no mention of so-called 'sub-state entities' in this withdrawal provision. So, Scotland cannot look to EU law to argue for a greater or specific role to play in the process of withdrawal.

Such a process will entail negotiations between the UK and EU institutions: mostly the European Council, that is, heads of government of the Member States and the European Commission. The process is likely to take years rather than months and—according to Article 50 TEU—should take 'account of the framework for its future relationship with the Union.'

As for that future relationship between the UK and the EU, EU law provides no procedure. It is thought likely that an agreement on this will be negotiated between the UK and the EU and its Member States in tandem with the withdrawal agreement. Such an outcome was highlighted by a recently published [House of Lords EU Committee Report](#), although as so often when the status of Scotland poses tricky political and legal questions, this report was silent on the role of devolved institutions in these processes.

UK devolution arrangements

The [Scotland Act 1998](#) (SA 1998), which created the institutions, powers and administrative responsibilities that make up the devolution arrangements for Scotland within the UK, is described by the Supreme Court as being 'on any view a monumental piece of constitutional legislation' (*Martin v HM Advocate* [2010] UKSC 10, at [44]). The main law-making powers of the Scottish Parliament are set out in sections 28-30 of SA 1998 and, unlike the Westminster Parliament, the Scottish Parliament's legislative powers are limited. Acts of the Scottish Parliament are competent only if they legislate upon devolved matters, are compatible with EU law and the European Convention of Human Rights, and comply with the other limitations in [section 29](#).

The arrangement adopted in SA 1998 is not to specify devolved areas but instead to list the powers reserved to Westminster ([section 30](#) and [Schedule 5](#)); the remaining matters are then considered to be devolved matters. Schedule 5, Part 2 Head B6 states that immigration and nationality, including asylum and the status and capacity of persons in the UK who are not British citizens; free movement of persons within the European Economic Area and the issue of travel documents, are 'reserved matters.' In addition, 'Foreign affairs' (Schedule 5 Part 1 para 7(1)) is a reserved matter, specifically including relations with the EU and its institutions. However the function of implementing EU obligations is exercisable in devolved areas by Scottish Ministers under section 53 of SA 1998.

Notwithstanding this allocation of powers, [section 28\(7\)](#) of SA 1998 is noteworthy because it restates Westminster's unlimited power to legislate in all areas—reserved and devolved—and illustrates why the Sewel Convention (which recognises that Westminster will not normally legislate on devolved matters without the consent of the Scottish Parliament) is an essential

feature of the devolution settlement. The Sewel Convention, which has now been given statutory form in SA 1998 [section 28\(8\)](#), is considered further below.

At face value, the legal provisions in relation to the EU referendum and withdrawal and the devolution settlement suggest that the distinctive Scottish implications of a UK exit from the EU are limited. However, the reality is more nuanced and complex than that.

The messier reality

We need to consider the lived experience of EU membership for Scotland, of immigration more broadly, and of devolution in practice. That lived experience indicates that the outcome of the EU referendum may have consequences unique to Scotland.

Scotland and the EU—a distinctive relationship?

Scotland is said to be pro-EU and to be [‘firmly in the “remain” camp’](#). This is certainly true of the official position of the Scottish government. The Scottish First Minister has spoken in [Brussels](#) and [London](#) about making a positive case for the UK to remain in the EU and has published the case for continued [Scottish EU membership](#). She has also claimed that the Scottish public is more pro-EU than the rest of the UK, although polls have revealed that [Scottish public opinion is not that different](#) on questions concerning transfer of power to the EU. Similarly, public attitudes to *migration* in Scotland while [less negative than south of the border](#) (partly explained by the smaller impact migration has on the [Scottish labour market](#)), are not much less negative.

However, there *is* a remarkable difference in Scottish public opinion on the referendum question: an [analysis](#) of key voter intention surveys suggest that in Scotland those wanting to remain substantially outnumber those who wish to leave. This might be [explained](#) by the enduring dominance of the SNP in Scotland and its strong narrative and vision of ‘independence in Europe’. [Professor Curtice](#) also describes a ‘profoundly different pattern of party politics’ in Scotland. He says “standing up for Scotland” is an objective with which above all the SNP are associated. And nowadays at least the SNP both dominates the electoral scene and is strongly pro-European. South of the border, in contrast, nationalist sentiment is expressed most strongly by the anti-European UKIP.’ It is worth noting that in Scotland all the other major political parties, including the Scottish Conservatives, also have strong pro-EU membership rhetoric.

More devolved powers for Scotland, more intertwined responsibilities, more constitutional unease?

Devolution of power to Scotland has not remained static since the 1998 settlement. The latest amendment, the [Scotland Act 2016](#) (SA 2016), is said to [‘transform the Parliament at Holyrood into one of the most powerful devolved parliaments in the world.’](#) During the 2014 Scottish independence referendum campaign the three main UK political parties made a ‘vow’ to the people of Scotland that substantial further powers would be devolved to Scotland in the event of a ‘No’ vote. The [Smith Commission](#) was convened and ultimately [reported](#) on how that vow might be delivered. Some, but not all, of the recommendations in that report have found their way into the law books through SA 2016. This Act extends the competence of the Scottish Parliament substantially.

For instance it enables Scotland to set income tax rates and thresholds, gives it control over a significant part of the welfare system, and puts the Sewel Convention on a statutory footing.

So, while SA 2016 does not change the fact that immigration and EU matters remain reserved to Westminster, many of these newly devolved powers are intertwined with reserved ones and implementing them will require very careful and detailed inter-governmental cooperation. Such cooperation through the Sewel Convention will in itself bring possible complexity because its new statutory footing may affect how and by whom it is interpreted and in turn how it operates, as we consider below.

Scotland and migration—divergence and tension within the devolution settlement?

The trend for immigration legislation to reach into areas of life beyond those associated with immigration control as traditionally envisaged has intensified in the Immigration Acts of 2014 and 2016. But it is nothing new. Under the provisions of a UK-wide statute, the Immigration and Asylum Act 1999, the early years of devolution coincided with Glasgow becoming a major provider of housing for asylum seekers. The Dungavel Immigration Removal Centre also opened during that time.¹ That period also saw the emergence of Scotland's divergence in practice and policy, even where there was collaboration and agreement with Westminster. One example is the Scottish Government's response to asylum seekers and refugees on matters of integration, health, housing and education. Another is the earlier Scottish Executive negotiation of the 'Fresh Talent Initiative' encouraging certain third country national graduates to remain in Scotland. Alongside this however, one saw the beginnings of [institutional unease in Scotland](#) about the reach of immigration legislation into devolved areas such as housing and social care, a feature that has intensified as that reach has also expanded. Most recently, Immigration Act 2016 provisions that touch upon devolved functions—for instance the landlord and tenant relationship—have highlighted the possibilities for constitutional unease over the Sewel Convention's operation, prompting arguments [for](#) and [against](#) its reform. A UK exit from the EU might similarly raise challenging questions about the future operation of the Sewel Convention, as we consider below.

After the referendum

We need to consider the constitutional unease that may develop between Holyrood and Westminster after the referendum: in the event of a UK withdrawal from the EU and in the case of the UK remaining in the EU.

Vote Leave

As we have seen, neither EU law (Article 50 TEU) nor UK law (SA 1998) guarantees Scotland a specific role in negotiations leading to a withdrawal agreement or the parallel negotiations leading to an agreement between the UK and EU on the post-exit relationship. In relation to both aspects of withdrawal, Scotland will be able at best to feed into UK negotiations. However, the extent to which that will happen, and the extent to which its position will be taken seriously, is dependent on agreement and goodwill between Westminster and Holyrood, in a situation where the former holds the balance of power.

While a [Concordat](#) on the Coordination of EU Policy Issues states that Scottish Ministers and officials should be fully involved in discussions within the UK Government about the formulation of the UK's policy on all issues which touch on matters falling within devolved responsibilities, this does not have the force of law, nor does it commit the UK Government to actually taking on board views expressed in the course of discussions. Nevertheless, under its auspices, Scotland has experienced some degree of success in feeding into and shaping the UK line on EU policy, and Scottish ministers do attend, with the agreement of the UK lead minister, the Council of Ministers when devolved matters are under discussion.

¹ S.Craig (2015) [Surveying migration policy and practice in the independence referendum and beyond](#). *Juridical Review*, 2015(2), pp. 157-166.

While regarding this *indirect* route to influence the EU as important, if too uncertain and *ad hoc* to command confidence, the Scottish Government has worked hard to develop [direct lines of communication and influence](#) with EU institutions and bodies. Indeed, building on these direct lines of engagement, it has been suggested that, if the UK exits the EU, Scotland (from within the UK) might wish to negotiate a distinct and [differentiated settlement](#) with the EU. Such a sought-settlement would be one that reflected Scotland's more pro-EU, pro-immigration stance—although we acknowledge that this would be politically and legally difficult, not least because the European Commission would probably wish to remain neutral as regards to domestic constitutional struggles.

While there may be grounds for hope that Westminster would enable a co-operative relationship with Holyrood in respect of the negotiated withdrawal and future relationship with the EU—if only to avoid increasing support for the independence cause, and the likelihood of a second independence referendum—only time will tell if that will be the case.

More certain is the involvement of the Scottish Government and the Scottish Parliament in the domestic disentanglement of UK law from EU law, a task that would be necessitated by withdrawal from the EU. As part of this task—and since EU laws that relate to devolved matters are implemented in Scots law by Scottish ministers (SA 1998, section 53)—there would be countless pieces of Scottish legislation to review with a view to repealing, reforming or retaining them.

Of potentially even greater significance and concern would be the required amendment to SA 1998: this may raise the more complex question of the operation of the Sewel Convention. Amending the Scotland Act would have the effect of amending the competences of the Scottish Parliament and here the argument that a Legislative Consent Motion (LCM) from the Scottish Parliament would [be necessary](#) becomes forceful. Some [commentators](#) argue that the legal necessity of an LCM is not a foregone conclusion, particularly in light of the Sewel Convention having been put on a statutory footing. However, what emerges is a situation where to proceed to amend the competences of the Scottish Parliament without seeking an LCM would seem politically unthinkable, even without going as far as to take into account the possibility of the Scottish Parliament withholding consent. As a whole it appears that the situation is destined for constitutional unease.

Vote Remain—under terms already negotiated by David Cameron

In the event that the UK chooses to remain in the EU, it is not simply the case that the status quo survives without alteration. Rather, a Remain vote would trigger the reform package or '[renegotiation deal](#)' that David Cameron agreed with the EU in February 2016. That deal was one which the Scottish Government thought was [unnecessary](#) and, ultimately, [a 'dangerous sideshow'](#). Prominent parts of the deal are squarely aimed at [restricting EU immigration](#) to the UK, something that reflects what many lawyers view as a long-standing tendency on the part of [UK governments](#) to [incorrectly implement](#) the law on EU free movement, despite that law being one of the cornerstone principles of the EU. It is not certain that the changes to existing EU free movement law that are entailed would pass muster with the European Parliament, which must consent to them for them to pass into law, or with the Court of Justice of the EU, if they are challenged. Only time will tell.

Just as the road ahead for Cameron's 'deal' is not legally certain at the EU level, it might also be bumpy at home. Here, there is the possibility of tension emerging between the 'deal' (which includes restrictions on in-work benefits for migrants for up to four years) and devolved social welfare powers under SA 2016. Such tensions may be slow to emerge, since the devolved social welfare powers [mostly affect older and disabled people](#) rather than the broader

categories of workers and families. But tensions there may be. If, in the future, the Scottish Parliament was to respond to political pressure to use its powers to top-up certain benefits for families and children, tensions with the UK Government's approach of restricting EU citizens' access to social welfare could arise. This might happen if the Scottish Parliament used its powers in a different way to that of the rest of the UK, so as to augment benefits for families and children, including EU citizens. Again, only time will tell.

Conclusion

Complexity and uncertainty are the watchwords of the post-referendum legal landscape, particularly, but not exclusively, in the event of a Leave vote. This statement is as true from a UK perspective as it is from the Scottish perspective. That said, whether the outcome is 'vote Leave' or 'vote Remain', legislative changes will result in post-referendum effects being felt in Scotland. In both scenarios, the intertwined natures of the responsibilities held at different institutional levels could lead to tensions emerging within the constitutional settlement. This will be particularly the case if, in an era of greater devolution of power to Scotland, Scottish institutions are not involved in settling the post-referendum landscape.

In the event of a (close) Remain vote, the causes and arguments of the Leave 'losers' will undoubtedly cast a shadow, just as the desire for greater autonomy for Scotland, including the independence cause, continues to influence calls for further constitutional change notwithstanding the 'no' vote to independence. As this tricky political and legal landscape is traversed, opportunities for divergence as well as further institutional tensions between Holyrood and Westminster may be revealed.