

# Devolution and the Prevent Strategy in Scotland: Constitutional Politics and the Path of Scottish P/CVE

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This paper explores the implementation of the ‘Prevent Duty’ in Scotland. Using archival research into Parliamentary debates, as well as research interviews with Scottish government representatives and healthcare professionals, the paper sheds light on the constitutional politics surrounding the Counterterrorism and Security Act 2015 which resulted in the markedly different applications of Prevent between England and Scotland. The divergence of the policy between the nations, and the constitutional anomalies which facilitated a specifically Scottish Prevent program, have remained unaddressed in the academic literature—partly because of a mistaken assumption by researchers that the Prevent Strategy equally applies to all nations (given that Westminster legislates for the UK on matters of defence and security). To fill this gap in knowledge, this paper explores how the Scottish government was able to leverage the devolution settlement and associated constitutional conventions to implement a modest P/CVE program—dropping some components of the English and Welsh Prevent programs entirely. The paper contributes to studies on British constitutional conventions and the nature of inter-governmental politics in the UK by highlighting the surprising freedom to manoeuvre Scotland can enjoy, with regards to reserved policy areas.

**Keywords:** Scottish Devolution, Counterterrorism Legislation, Constitutional Conventions, Prevent Strategy, British Politics

## 1. Introduction

This paper explores the implementation of the ‘Prevent Duty’ in Scotland. Using archival research into Parliamentary debates, as well as research interviews with

Scottish government representatives and healthcare professionals, the paper sheds light on the constitutional politics surrounding the Counterterrorism and Security Act 2015 which resulted in the markedly different applications of Prevent between England and Scotland. The divergence of the policy between the nations, and the constitutional anomalies which facilitated a specifically Scottish Prevent program, have remained unaddressed in the academic literature—partly because of a mistaken assumption by researchers that the Prevent Strategy equally applies to all nations (given that Westminster legislates for the UK on matters of defence and security). Even the sparse literature which touches upon Prevent in Scotland (Boyd-Macmillan, 2016; Morris and Meloy, 2020) does not make clear the specific context of the policy, north of the border and its comparably minimal demands upon public sector organisations. To fill this gap in knowledge, this paper explores how the Scottish government was able to leverage the devolution settlement and associated constitutional conventions to implement a modest P/CVE program—dropping some components of the English and Welsh Prevent programs entirely.

Prevent is the British<sup>1</sup> strategy to ‘counter violent extremism’ (P/CVE). P/CVE policies emerged in the post-9/11 era to intervene in the ‘radicalisation’ process which precedes ‘homegrown terrorism’ (Thomas, 2010; Heath-Kelly, 2013; Martin, 2019). As well as funding community-facing cultural activities which contain messages of tolerance, respect and multiculturalism, Prevent also comprises a multi-agency referral system for persons deemed ‘vulnerable to radicalisation’. Those referred to Prevent by teachers, doctors, nurses, social workers or families are assessed by multi-agency panels which apply radicalisation risk assessment tools (the ERG22+ is used in England and Wales, and VERA2 in Scotland (Augestad-Knudsen, 2020)). Those thought to be at risk of radicalisation (about 5% of total referrals from 2015 until year end 2021) (Home Office, 2021) are allocated a Home Office provided deradicalisation mentor through the Channel program (HM Government, 2020). Those people referred to Prevent who are deemed *not* to be at risk of becoming involved in terrorism are instead offered support with welfare, education, healthcare and help finding employment or housing (HM Government, 2020).

The Prevent Duty has proved controversial in England for many reasons, including concerns that it discriminates against Muslim communities, weakens protections of free speech and inappropriately securitises the roles held by teachers, nurses, doctors, probation officers, prison officers and police (Mythen *et al.*, 2017; Heath-Kelly and Strausz, 2019; Abbas *et al.*, 2021; Winter *et al.*, 2022). These sentiments featured strongly in statements made by Scottish MPs in Westminster during readings of the Counterterrorism and Security Bill in 2015, when the

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<sup>1</sup>I am referring to the strategy as British, as it does not apply to Northern Ireland given the terms of the Good Friday Agreement.

Conservative Government moved to put the implementation of Prevent onto a statutory footing—posing significant implications for Scotland, which had previously limited its engagement with the program to some (minimal) police-led initiatives.

The devolution arrangement looked set to facilitate a like-for-like equivalent policy in Scotland. The Scotland Act of 1998 had made provision for a Scottish Parliament to take-over powers previously held in London. The Act ‘reserved’ some policy areas for the Westminster government (national security; defence and foreign affairs; trade and industry) but ‘devolved’ many others to the Scottish Parliament (health and social work; policing and criminal justice; housing; education and training). As such, the devolution settlement neatly divided policy areas of national security and defence from those relating to social policy, local government and policing. Since devolution, counterterrorism policy has been made in London and applied across England, Scotland and Wales.

However, P/CVE policies overturned this traditional sectoral understanding of where counterterrorism duties lie. CSTA 2015 (HM Government 2015b) placed preventive counterterrorism measures *at the local level* in non-traditional security sectors like local government, youth services, schools, social work and healthcare. Counterterrorism made a paradigmatic shift from policing/intelligence sectors into public sector organisations and local government. In this context, parliamentary records show that Scottish MP’s objected to attempts in Westminster to export the full English model of Prevent to Scotland, raising concerns that it imposed upon devolved competencies without appropriate consent from the Scottish government (given that the Bill sought to place duties upon schools, higher education, NHS bodies, social care providers and beyond).

Through interviews with Scottish healthcare professionals and representatives of the Scottish government, this paper explores how the constitutional puzzle of the Counterterrorism and Security Act 2015 (HM Government 2015b) was resolved, resulting in Prevent being specifically adapted for Scotland. Some of the more controversial aspects of the Duty, like the ‘British Values Curriculum’ in education, as well as counter-extremism policy, were jettisoned and a more prosaic implementation of Prevent in the Scottish NHS was designed. As I will describe in this paper (with reference to the Sewel Convention), the manoeuvring of governments around constitutional conventions led to a minimal Scottish Prevent sphere—and precluded debate in the Scottish Parliament.

Finally, despite the negotiation of a minimal Prevent for Scotland in 2015, the policy field has not remained static—nor does it represent a simple difference in political culture or criminal justice approach between the UK nations. The interviews and data collection conducted for this paper suggest that Prevent is experiencing legitimisation in Scottish policy circles and is now more openly acknowledged. The nations have been growing closer with regards to policy

implementation, despite the original parliamentary rhetoric to the contrary.<sup>2</sup> While some interviews with Scottish officials are quoted in this paper, others were conducted on a no-quotation basis. The Scottish Government has collaborated with this research project and where interviews are un-quotable, public source information has been obtained as an alternate method of evidencing the arguments of this paper.

## 2. Literatures and parliamentary conventions

There is little literature on Scottish security policy, given that defence and national security are reserved for the Westminster parliament. That which exists, postulates the directions which could be taken in a future independent Scotland and the national security issues of relevance which emerged during the 2014 independence referendum (Fleming and Gebhard, 2014; Neal, 2017). Given that Scotland remained in the UK after that referendum, national security and defence policy remain reserved in Westminster (for the time being). As such, the literature on Scottish security, counterterrorism and defence is minimal.

Accordingly, this paper contributes to other academic literatures; the first is, of course, the discussion of Prevent and P/CVE policies. No academic literature specifically covers Prevent in Scotland,<sup>3</sup> rather all discussion of P/CVE in the UK covers the (better known) English and Welsh examples—which are assumed to represent the entire UK. The literature on P/CVE policies covers their rapid ascendance to prominence in International Organisations like the UN and EU (Kundnani and Hayes, 2018); their vertical transmission from International Organisations to local municipality policies (Mattsson, 2019); the current magnitude of P/CVE programming across Europe, North America and Australasia (Shanaah and Heath-Kelly, 2022); and the significant difficulties in measuring the effectiveness of P/CVE programs (Koehler, 2017)—given that terrorist violence is too rare for base rate probability measures to be created, to which the efficacy of P/CVE programs could be compared (Sageman, 2017). But, to date, the variegated implementation of Prevent across the

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<sup>2</sup>This research was conducted before the Shawcross review was released. The ‘voluntary convergence’ on P/CVE between the nations, seen in the past few years, could experience tensions with some of the recommendations of the review (which advocate refocusing Prevent on Islamist-related concerns). But, where the Shawcross review does recommend direct changes to Scottish Prevent, the constitutional mechanisms outlined in this paper seem likely to prevent any enforced homogenisation of Prevent strategies between the nations.

<sup>3</sup>Albeit there is a small academic literature on Muslims in Scotland which addresses the topic of radicalisation. The current paper is focussed on P/CVE structures and their organisation, rather than radicalisation dynamics in the population, so those works are not directly relevant to the present investigation.

UK nations has only been analysed in relation to Northern Ireland (Pettinger, 2020). Scottish P/CVE remains unanalysed.<sup>4</sup>

The second literature of relevance addresses ‘legislative consent memorandums’ (previously known as the Sewel Convention) by which the devolved parliaments debate and decide upon Westminster bills which have significant effects upon devolved competencies (Evans, 2020). While the spirit of devolution implies that political power rests with the Scottish government, the Scotland Act 1998 does not formally alter the sovereignty of the Westminster Parliament, nor impede its ability to legislate for all regions of the United Kingdom (Bowers, 2005). Westminster retains the ability to pass legislation which applies to Scotland, whether the policy area is reserved or devolved. However, it usually refrains from doing so and abides by the spirit of the devolution agreement. In practice, many pieces of legislation will cross the artificial boundary drawn between reserved and devolved sectors—impacting upon both. The ‘Sewel Convention’, later retitled ‘Legislative Consent Memorandums’, is a convention—embodied in a Memorandum of Understanding—designed to resolve the tensions which might emerge from legislation affecting areas of devolved competency. It embodies the principle that the Government will not *normally* seek or support legislation that impinges upon devolved competencies, without the prior consent of the Scottish Parliament. The Department of Constitutional Affairs (now part of the Ministry of Justice) covered the operations of the convention and the MOU in its ‘Devolution Guidance Note 10’. This document explains that:

The convention applies when legislation makes provision specifically for a devolved purpose; it does not bite when legislation deals with devolved matters only incidentally to, or consequentially upon, provision made in relation to a reserved matter (Department for Constitutional Affairs: 2022).

Importantly, both the MOU and the Guidance Note also state that Departments should approach the Scottish Executive to undertake consultation on policy proposals affecting devolved matters:

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<sup>4</sup>The P/CVE landscape is also beset by concerns about the legitimacy of multi-agency interventions upon non-criminal persons, according to unvalidated psychological risk assessment tools (Scarcella *et al.*, 2016). The programs can also be targeted at residential areas housing relatively high numbers of Muslims (Kundnani, 2009) and frequently demonstrate worrying demographic trends in their referral population—for example, ‘Islamist radicalisation’ accounted for 22% of Prevent referrals in the UK in 2020/21, despite the Muslim population constituting only 4% of the UK (Home Office, 2021a). Furthermore, there is significant concern that multi-agency collaborations with the police and security services ‘securitise’ methods which were previously centred upon care and contravene many expectations on information sharing between agencies (Heath-Kelly and Strausz, 2019; Sivenbring and Malmros, 2019; Aked *et al.*, 2021; Haugstvedt and Tuastad, 2021). These concerns informed the parliamentary debates held on CSTA 2015 and contextualised the position of SNP representatives in Westminster on Prevent.

although the convention refers to the Scottish Parliament, UK departments will in practice deal with the Scottish Executive. Departments should approach the Executive to gain consent for legislation when appropriate. It will be for the Scottish Executive to indicate the view of the Scottish Parliament and to take whatever steps are appropriate to ascertain that view (Ibid).

As Paul Bowers has noted, the primacy of the Scottish Executive and the UK government in this relationship has attracted criticism, given that the two Parliaments can become side-lined (Bowers, 2005, p. 1). I will return to this point later in the paper, to underline the circumstances in which the Scottish and English executives smoothed the path of a (minimal) Prevent program into Scotland *without* bringing the matter for discussion in the Scottish Parliament.

It must be noted that Sewel motions (now retitled LCMs) *have* been applied to counterterrorism legislation in the recent era. In November 2001, a Sewel motion was proposed by the Scottish Executive to the Holyrood on the Anti-Terrorism, Crime and Security Bill. In this case, Westminster consulted the Scottish Executive even though the Bill was predominantly associated with reserved powers on national security because it consequentially affected some devolved powers of policing. The Scottish Executive proposed a Sewel Motion to the Scottish Parliament, consenting to most of the Bill but seeking to exclude certain parts of the Bill (incitement to religious hatred; bribery and corruption provisions; police powers to remove face coverings) from the motion, indicating the refusal of consent to these particular components (Scottish Parliament, 2001). A debate ensued, with SNP representatives criticising the broader implications of the Bill for the rule of law, as well as the continued ability of Westminster to propose legislation in areas of Scottish competency. The Sewel motion, as presented by the Scottish Executive to the Parliament, was then passed by 75 votes to 30, with one abstention. This provided consent for Westminster to proceed with the Anti-Terrorism, Crime and Security Bill in all but the three areas of exception.

This shows that considerable flexibility once existed in the area of Sewel motions, with Westminster consulting the Scottish Executive on a Bill primarily concerned with security (a reserved matter)—which impacted upon devolved powers of policing. As we will see later in this paper, such was not the case for CSTA 2015—which followed a different path of ‘consultation’ altogether (one which side-lined the Scottish Parliament and avoided utilising an LCM).

The final issue to be discussed pertains to the (once rare) refusals of consent issued by the Scottish Parliament. According to the Institute for Government, over 400 LCMs have been passed by devolved Parliaments since 1999—but only 20 of these have refused consent (in part, or in full) for Westminster’s proposed legislation (Institute for Government, 2022). The Scottish Parliament first refused

consent on aspects of the Welfare Reform Bill 2011, and then on seven separate occasions (mostly pertaining to Brexit related legislation). The passing of the EU (Withdrawal) Act 2018 without the Scottish government's consent was the first time that Westminster ignored the Sewel convention (McEwen, 2020). It did so again with the EU (Withdrawal Agreement) Act 2020. Michael Gove defended the government's decision to sidestep constitutional convention by pointing to the letter of the law, or in this case—the letter of the convention. The original wording of the Sewel convention stated that the Westminster government 'will not *normally* legislate with regard to devolved matters without the consent' of devolved legislatures; to which Gove added that the circumstances of the UK's withdrawal from the EU were unique, rather than normal (Ibid).

In the empirical discussion of the Parliamentary proceedings surrounding CSTA 2015, it will become clear that an LCM was not issued by the Scottish Government—despite the implications of the bill for devolved Scottish sectors. Inter-governmental negotiations, which side-lined the convention, instead produced a Prevent program specifically adapted for Scottish law.

### 3. CSTA 2015 in Westminster

The War on Terror has frequently exposed fissures in the relationship between the Scottish and Westminster legislatures. As described earlier, the 2001 Anti-Terrorism, Crime and Security Bill was made in Westminster for the UK—but the Sewel Convention process (as it was then known) resulted in Holyrood refusing consent for three measures contained within, which overlapped with devolved policy areas. The Sewel convention enabled the Scottish Parliament to represent its electorate on matters of national security in 2001, but devolution has been criticised by Scottish representatives for *actually reducing* the scope for Scottish influence on reserved areas of policy! In 2005, Lord Forsyth of Drumlean remonstrated with representatives of the UK government in the House of Lords over the Prevention of Terrorism Act. He argued that prior to devolution, a more intensive process of consultation characterised the relationship between the UK government and the Scotland Office. Paradoxically, in his view, the devolution process has resulted in less consultation with Scottish representatives on matters now deemed 'reserved'—such as the introduction of Control Orders within the Prevention of Terrorist Act (detention for those terrorism suspects who the Department of Public Prosecutions felt there was insufficient evidence to prosecute). Lord Forsyth stated:

My recollection is that in the good old days before devolution—before we had a Scottish Parliament—when we had administrative devolution, if a procedure of this nature was being carried out in Scotland the Secretary of State for Scotland would be involved. Looking at the

amendment as drafted there does not seem to be any involvement by any of the people who are democratically accountable in Scotland [...] I find it extraordinary that where draconian powers are being taken we have a proposal—from a Government who say that they want decisions affecting Scotland to be made in Scotland—that marginalises the law officers of Scotland and the First Minister and the Ministers in the Scottish Parliament, who do not seem to be at all involved in the process. (Lord Forsyth of Drumlean, Lords Hansard, 7 March 2005, Columns 539–40).

The democratic representation for the Scottish people on questions of national security remains pertinent. The Counterterrorism and Security Act 2015 was debated for a full five days in the House of Commons (and then additionally during readings in the House of Lords), given the significance of some of the measures included therein—notably, the ‘Prevent Duty’, which placed a statutory duty on public sector organisations to have ‘due regard’ for the prevention of radicalisation. In the context of these debates, Scottish representatives in both the House of Commons and the Lords made vociferous criticisms of the Bill’s intrusion upon civil liberties and democratic culture, but also regarding the unclear application to Scotland.

The Rt. Hon. Pete Wishart joined other Members of Parliament in arguing for an Amendment to the Bill, which would ensure the Government was required to consult Scottish Ministers where provisions overlap with Scottish areas of competence (a restatement of the Sewel Convention, no less). But the discussion went much further, with the SNP representative articulating a powerful critique of the ‘Prevent Duty’ components of the Bill and their imposition upon Scotland. In his statements to the House, we witness the articulation of a distinct Scottish political culture organised around consensus and cohesion, rather than the securitisation of P/CVE attributed to English politics:

We have a different culture in Scotland. We do not have the same size of ethnic communities as there are south of the border, and we have a different and distinct approach to community relations. We see and deliver some things very differently from the UK Government. The vast platform of the Prevent strategy will be administered in Scotland by Scottish public bodies, responsible to the Scottish Parliament and under the guidance of Scottish Ministers [...] Our approach to Prevent is different, of course. We see it more through the lens of safeguarding, with an emphasis on keeping people safe, community cohesion, participative democracy and ensuring that action is consistent with the needs of, and risks to, all our communities [...] For example, we work *with* key sectors in Scotland, such as the NHS, further education, the Prison Service and local authorities. (MP Pete Wishart, Hansard House of Commons Debates 7 Jan 2015, column 337; emphasis added).

This debate was preceded, and characterised by, concerns about the application of Prevent to Scotland—given vagueness in the original text about which Scottish bodies would be bound by the legislation. During the Third Reading of the Bill in the House of Commons, the Rt Hon Diana Johnson warned that: ‘There are also real issues as to how the guidance will cover Scotland and Wales [...] The guidance is therefore supposed to cover all countries in the UK, but consideration has, at this stage, been given only to England’. MPs from both sides of the House raised amendments to ensure that the UK government could not use the ‘enabling provisions’<sup>5</sup> to rewrite the guidance at will, with the added risk that such provisions could be used to overrule policies made democratically by the Scottish Parliament.<sup>6</sup> The amendments demanded that sufficient consultation between Scottish and English governments would occur regarding the guidance for Scottish implementation of Prevent. In this debate, the Parliamentary Under-Secretary for the Home Department (representing the government on this occasion) Karen Bradley replied to the Rt. Hon. Diana Johnson that:

I want to confirm that we are speaking to the Scottish and Welsh Governments about how the duty should be implemented in those Administrations and consulting on how we should make the guidance appropriate to bodies in Scotland and Wales, particularly because the different legal system in Scotland might mean that we need to implement things differently there (MP Karen Bradley, Hansard House of Commons Debates, 7 Jan 2015, column 326).

The Third Reading of the Bill in the House of Commons also contains the first Parliamentary recognition of the Prevent ‘paradox’: the crossover of national security (a reserved power) into the devolved sectors of social policy, policing, education and health. As noted by the Rt. Hon. Diana Johnson: ‘the guidance is very important because it could have a bearing on free speech, academic freedoms and patient-doctor relations.’<sup>7</sup> Furthermore, SNP representative, the Rt. Hon. Pete Wishart emphasised the problems of Westminster legislation for a counterterrorism duty in the health and education sectors, because the Scottish Parliament holds competence for those public sector organisations:

<sup>5</sup>Diana Johnson, Third Reading of the Counterterrorism and Security Bill, 7 Jan 2015, column 318: <https://publications.parliament.uk/pa/cm201415/cmhansrd/cm150107/debtext/150107-0002.htm#15010754000001>.

<sup>6</sup>See also the discussion of Amendment 12, during the Third Reading of the Counterterrorism and Security Bill, at column 336 of the 7 Jan 2015 discussions in the House of Commons: <https://publications.parliament.uk/pa/cm201415/cmhansrd/cm150107/debtext/150107-0003.htm#15010773000276>.

<sup>7</sup>Ibid.

We need consent, rather than consultation, because things are so different in Scotland, and we have responsibility for those bodies. Such issues must surely be up to the Scottish Parliament, and not just through consultation. (MP Pete Wishart, Hansard House of Commons Debates, 7 Jan 2015, column 338)

Karen Bradley sternly rebuked Mr Wishart for not attending a previous discussion on consultation with the devolved administrations and stated in response to his criticisms of the imposition of an English Prevent onto Scotland that: ‘issues of policing [sic] and counterterrorism are clearly reserved matters.’ The amendment removing the ‘enabling provisions’ passed, restating the commitment to ‘consultation’ with the Scottish executive on overlapping matters of competence.

The genre-bending of a national security related power enacted through public sector organisations was discussed in more depth in the House of Lords. Lord Hope of Craighead raised an Amendment concerning the application of the Prevent Duty to Higher Education institutions during the Second Sitting of the House, that:

The problem we have is that we are trying to deal in this chapter with something that is devolved in some respects to Scotland: all the education aspects of the chapter are essentially dependent on Scottish legislation as a devolved matter, but the subject matter of the Bill as a whole, which is a Home Office measure, is reserved [...] There is a real puzzle about what exactly the Government’s thinking is about the position in Scotland, because the Bill is silent about it. It may be that because of the shortness of time the necessary discussions with the Scottish Government have not yet been completed (Lord Hope of Craighead, Hansard House of Lords Report Stage Second Sitting, 4 Feb 2015, column 677–78).

The amendment recommended that Higher Education institutions be reminded of their statutory duty to protect free speech while simultaneously implementing the Prevent Duty. Indeed, the duty to protect freedom of speech was given the more significant moniker of ‘particular regard’, whereas the duty to be alert to radicalisation was framed as ‘due regard’. This compromise position resulted from the failure to gain front-bench support for a tougher amendment, which would have removed Higher Education bodies from the scope of the Duty altogether. The Government acceded to the content of the proposals and amended the Bill accordingly but, given that Scottish Higher Education bodies were not named in the original Bill, Lord Bates argued that the concerns for Scottish institutions were presently unwarranted and could be remedied at a later date, if necessary.<sup>8</sup> The

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<sup>8</sup>Lord Bates, Report Stage Second Sitting, 4 Feb 2015, Column 709. Available from <https://publications.parliament.uk/pa/ld201415/ldhansrd/text/150204-0002.htm>

answer satisfied Lord Hope, who withdrew his amendment. Royal assent was provided to the CSTA 2015 eight days later, on the 12 February 2015. But how would its application to devolved Scottish sectors be negotiated?

### 3.1 *A negotiated Scottish prevent*

Once the CSTA 2015 became law, little was heard in Parliamentary circles—north and south of the border—about the application of Prevent to Scotland. Given that the Prevent Duty attributes significant responsibilities for radicalisation prevention to education, health, local authorities, social care, police and prisons, it could have been expected that the Scottish Government would have tabled a Legislative Consent Memorandum in Holyrood. But the records of LCMs show that no such memorandum was issued to the Scottish Parliament and no debates of the CSTA were held. This is surprising, as previous counterterrorism legislation has been debated in Scotland through such a mechanism—as earlier discussion of the 2001 Anti-Terrorism, Crime and Security Bill shows. When the author asked the Scottish Government to confirm that no LCM had been issued in relation to the 2015 CSTA, they replied by email that ‘the Scottish Government did not consider that a Legislative Consent Memorandum in relation to the 2015 Act was warranted under the Standing Orders’.

What could explain this change in willingness to use LCMs in relation to counterterrorism legislation? The legislative process surrounding the 2005 Prevention of Terrorism Act, and the eventual publication of Guidance for Scotland on implementing the Prevent Duty, both offer clues. In 2005, the controversial Prevention of Terrorism Bill was debated in Westminster but—unlike 2001’s Anti-Terrorism Act—was not debated in Holyrood as no LCM was issued by the Scottish government. During First Minister’s Question Time on 10 November 2005, MSP Margaret Smith inquired about the discussions between the Scottish Executive and the Home Office in respect of the extended Scottish police powers (to detain terror suspects for greatly extended periods) that had resulted from the Prevention of Terrorism Act.<sup>9</sup> In effect, her question can be understood to have a subtext—one relating to the absence of an LCM for the Bill, and the preclusion of debate in Holyrood.

The Rt Hon Jack McConnell responded to the question, on behalf of the Scottish Government. He confirmed that both the Scottish Executive and Crown Office had been involved in discussions with the UK government, providing technical advice to ensure compliance with Scots Law.<sup>10</sup> Effectively, his response confirms that consultation between the governments had taken place during the legislative

<sup>9</sup>Available from: <https://www.theyworkforyou.com/sp/?id=2005-11-10.20585.3> (last accessed 19 Oct 2022).

<sup>10</sup>Ibid.

process, to ensure that the new legislation would appropriately fit the Scottish context. As a result of this inter-government negotiation, the LCM process was side-lined. Scottish Parliamentarians were denied an opportunity to debate the new measures drawn up for Scotland in London, given that their Executive had been significantly involved in the consultation and saw no need to extend that process. Returning to the argument of Paul Bowers (2005, p. 1), this raises difficult questions about the abilities of the Scottish and UK governments to side-line the Holyrood Parliament and the questions which can be accordantly raised about democratic representation.

In March 2015, the Prevent guidance for Scotland was issued by the UK Government (HM Government, 2015a). It articulated the management structure of Scottish Prevent activity as well as articulating the duties placed upon public sector organisations. Major differences between the Scottish and English Prevent programs are evident within the document—confirming that the Scottish and English executives had negotiated an ‘appropriate’ Prevent for Scotland between them, without engaging the parliamentary representatives of the people. The paper will now outline how Scottish Prevent is a more minimal and restrained program than that operating south of the border.

The implementation of Prevent in Scottish schools does not require engagement with the ‘British Values curriculum’, a jingoistic attempt at democratic education which pervades English and Welsh primary education from kindergartens up (Vincent, 2019). Rather, the Prevent Guidance for the Scottish education system recognises that the ‘Curriculum for Excellence’ already includes a democratic education component (HM Government, 2015a). As such, the guidance mandates only that schools create an IT filtering system to protect students from extremist content. Crucially, the Prevent specific referral pathways set up in schools south of the border are *not replicated in the Scottish system*—rather ‘an awareness of Prevent’ is integrated within the ‘Getting it Right for Every Child’ approach to safeguarding children (Ibid). Studies of British schools’ implementation of Prevent have produced mixed results. Some found that the specific referral duty effectively primed teachers to open British Values conversations and *actively look for students* who demonstrated resistance or an inability to change their minds on issues (Winter *et al.*, 2022). This created a securitised atmosphere in the schools studied by Winter *et al.* That atmosphere is largely missing from the implementation of Prevent in Scottish education, due to the absence of a radicalisation-specific referral duty. However, other researchers have found that the initial vocal opposition to Prevent from teachers’ unions in England and Wales has faded. Instead, ‘a complex interplay between effective policy messaging and processes of policy enactment that have served to allay or at least bracket-out professional anxieties about the possible negative impacts of the duty’ (Busher *et al.*, 2019, p. 459; see also Busher and Jerome, 2020).

The Prevent Guidance for Scotland also shows significant variation in the implementation of P/CVE through health. In England and Wales, Prevent is ‘tagged onto’ safeguarding responsibilities. These were formalised by the Care Act 2014 to protect vulnerable persons from financial, sexual or physical abuse, through a referral system which deploys a multi-agency team to support them. In England and Wales, radicalisation has been added to the list of forms of abuse that vulnerable people can suffer—incorporating the Prevent Duty into the daily responsibilities of healthcare professionals (despite significant imprecision around the constitution of ‘vulnerability’ in this case (Heath-Kelly and Strausz, 2019)). ‘Due regard’ for the prevention of radicalisation has thus been formalised through the matrix of vulnerability and safeguarding in healthcare south of the border.

In Scotland, the Prevent Guidance speaks a similar language of ‘embedding Prevent within activities to protect vulnerable people’ (HM Government, 2015a). But the formalised responsibilities for the healthcare sector are limited to a Prevent action plan being produced by each health board, staff training on the signs of radicalisation, the appointment of a Prevent lead position in each health board and for performance reporting on Prevent to occur through the Scottish Government’s NHS Resilience Unit (Ibid). These mirror the training and organisational reporting responsibilities south of the border—but, in Scotland, radicalisation has not been explicitly integrated into safeguarding procedures as a ‘new’ form of abuse to which vulnerable people are exposed. Rather, in an interview with an NHS Scotland Emergency Planning and Resilience Officer, it was confirmed that Prevent practice sits under the broader ‘resilience’ agenda—which covers threats to public health, protest events with a risk of disruption and extreme weather events:

Organisationally it [Prevent] sits under the Resilience Agenda. I report directly into the Planning Department. However, for Resilience I have a dotted line to our Director of Public Health who is the Executive Lead for Resilience and is a kind of Scottish Government link, and he goes to the Regional Resilience Partnerships etcetera. So, yeah, it sits, it sits under Public Health, under the Director of Public Health (Interview with NHS Scotland Emergency Planning and Resilience Officer 2022).

Probing deeper into the conceptualisation of radicalisation within Scottish NHS activities, a profound difference in safeguarding law became apparent between the UK’s constituent nations. Where the Care Act 2014 formalises safeguarding as the duty to protect vulnerable people from *abuse* by others in England and Wales (HM Government, 2014), the Adult Support and Protection Act (Scotland) 2007 uses the terminology of protecting vulnerable people from *harm* (HM Government,

2007). In conversations with NHS Scotland officials, it became possible to see how ‘abuse’—in the terms of Care Act—facilitated a deeper incorporation of the Prevent Duty into healthcare professionals than did the Scottish legislative position on ‘harm’. ‘Abuse’ can incorporate the conception of a ‘radicaliser’, who might groom vulnerable persons (in the framing of the Department of Health, for England and Wales (Department of Health, 2011)); but ‘harm’ focuses specifically on damage that can be done to a vulnerable person. This slight difference in legislative framing has led to significant differences in the implementation of Prevent, north and south of the border. In Scotland, the Prevent and Adult Support and Protection processes work in *parallel*—but are not fully integrated, like in England. In an interview with an NHS Scotland Prevent Lead, it was confirmed that:

My understanding is—we’ve only had a couple of cases, really—but it’s that they [the Prevent system and the Adult Protection system] run parallel, they don’t necessarily interact [...] So if there is any risk that an adult is an adult at risk then, alongside the PMAP and the Prevent processes, a referral would be made through Adult protection and those processes would run in parallel [...] [Prevent] is part of the whole CONTEST, so we have CONTEST groups in each of the four local authority areas that the health board is part of, and the Resilience team are linked into that [...] So, you know, I, I think we’re obviously waiting on updated guidance, but we feel it, it sat very nicely within Public Protection but I link in with Resilience (Interview with NHS Scotland Prevent Lead 2022).

Similarly, the NHS Scotland Emergency Planning and Resilience official also had difficulty understanding how radicalisation could (south of the border) be framed as an issue of adult protection:

Interviewer: [In England and Wales] radicalisation gets portrayed as a form of abuse.

NHS official: Oh.

Interviewer: Yeah, sort of added on top of financial, physical, sexual, it gets, it gets portrayed as, ‘This is a form of abuse, linked to a form of vulnerability’ [...] I can see from your face that that’s probably not something that you hear a lot in Scotland, so is that not how it is...

NHS official: No. No, I wouldn’t necessarily say that. There is definitely an acknowledgment that there is a vulnerability, but I’m thinking in my role before, we used to put an incident form and you would tick if it was ASP [Adult Support and Protection] and then it, it would have a drop-down for all of the things that you mentioned, and I’m thinking, would radicalisation fit in there? [...] I don’t see it fitting under that list, you know? (Interview with NHS Scotland Emergency Planning and Resilience Officer 2022).

Interviews with these Scottish healthcare managers filled the gaps in the Prevent Guidance for Scotland policy document, demonstrating that NHS Scotland implements Prevent through broader frameworks associated with resilience and public protection—and not through Adult Support and Protection/safeguarding. Any safeguarding issues would be picked up separately in a parallel process. NHS Scotland uses government training packages to make staff aware of the signs of radicalisation (like England and Wales), but the centralisation of ‘harm’ in Scottish Adult Protection has meant that the sector has not been deeply penetrated by the notion of radicalisation as a prevalent form of abuse. Instead, radicalisation remains associated with the risk of terrorism in Scotland and sits within the frameworks of resilience and public protection. In practice, this has led far lower numbers of Prevent referrals from NHS Scotland (both in numerical and proportional terms) than NHS England ([Police Scotland, 2021](#)).

Finally, beyond the structural differences to Prevent in the Health and Education sectors, Scotland has also decided not to implement the UK government’s counter-extremism policy and does not participate in the Vulnerability Support Hubs program—a program where the psychiatric diagnoses of Prevent referrals are shared with counterterrorism officers, prompting interventions in cases deemed imminently dangerous, about which significant ethical concerns have been raised in England ([Aked et al., 2021](#)). All these differences indicate that the Scottish executive has negotiated a distinctly Scottish Prevent program, perhaps leaning on the refusal of consent that characterised the LCM process for the 2001 Anti-Terrorism Bill as leverage with Westminster, and the prospect of political embarrassment that would have resulted from any denial of consent from Holyrood. This raises questions, however, about the circumvention of democratic representation in Parliament—as these elected representatives were denied a chance to debate the implementation of Prevent in Scotland through the devolved sectors.

### *3.2 Scottish prevent since 2015: the paradoxical freedoms of implementing policy in a reserved area?*

Since 2015, the implementation of Prevent in Scotland has not stood still. The final substantive section of this paper explores the growing confidence in Scottish Prevent and signs that transparency about the program is increasing. The significance of this, for studies of UK politics, concerns the contrast between the original SNP objections to Prevent in Westminster and the slow legitimisation of the policy at home in Scotland. I will argue here that reserved policy areas paradoxically conjure a space of ‘free action’ for political parties in the devolved nations—allowing them to critique reserved policy in Westminster, but then to implement that same policy at home without fear of public backlash (given that they are not responsible for the policy area).

This (paradoxical) room to manoeuvre in a reserved policy area is striking, especially when compared to the closest devolved example: crime policy (where Scotland can set its own policy direction). A variety of Public Policy and Criminology scholars have noted that the Scottish (Labour led, coalition) Governments, who governed after devolution, implemented crime policies which closely replicated those south of the border. The subsequent SNP led governments of 2007 onwards implemented only mild changes to Scottish crime policy (Croall, 2006; Mooney *et al.*, 2015). As such, crime policy has seen a surprising amount of policy *convergence* between Scotland and England—regardless of partisanship. Despite the rhetoric of a distinct Scottish approach to criminal justice and social welfare, both the Labour/Lib Dem coalition and SNP led governments have demonstrated convergence with English and Welsh policy—in this devolved area, where they could have decided otherwise.

Paradoxically, the *reserved* area of national security policy has seen Scotland achieve a distinctly minimal Prevent program—instituting significant divergence between the policies of UK nations. Given the reserved status of counterterrorism legislation, one might have assumed greater convergence with English and Welsh policy than in the devolved area of crime policy! But, that has not happened. As this paper has shown, Scottish executives have utilised negotiation with Westminster to generate a minimal Scottish Prevent policy.

After 2015, however, Scottish implementation has shown (admittedly minor) moves towards convergence with the English approach. The Safeguarding and Vulnerabilities team in Scotland has overseen the extension of Prevent-related activity towards consideration of counter-extremism more broadly, as well as renaming Prevent-related structures with more transparent nomenclature. Paperwork for public tender processes and recruitment adverts for vacancies<sup>11</sup> both demonstrate that the Safeguarding and Vulnerabilities Team (SVT) coordinates Prevent in Scotland and liaises with the UK Government on Prevent-related matters. The name of the team is quite ambiguous and doesn't conjure associations with the Prevent program—just like the original name of the Prevent referral process, which was called (until 2021) 'Preventing Professional Concerns'. Given the ambiguous nomenclature of the original Prevent bodies, alongside the decision of the Executive not to issue an LCM (and to therefore preclude parliamentary debate of Prevent), Scottish Prevent was somewhat hidden from view in its early years. Since 2021, however, there are signs of change. The 'Preventing Professional Concerns' process for Prevent referrals in Scotland

<sup>11</sup>See [https://applications.work-for-scotland.org/pages/job\\_search\\_view.aspx?preview=1&jobId=18427](https://applications.work-for-scotland.org/pages/job_search_view.aspx?preview=1&jobId=18427). See also p. 9 of the 'additional documents' section, under 'further instructions', at [https://www.publiccontractsscotland.gov.uk/search/show/search\\_view.aspx?ID=JAN438988](https://www.publiccontractsscotland.gov.uk/search/show/search_view.aspx?ID=JAN438988) (last accessed 21 October 2022).

was replaced with the Prevent Multi-Agency Panel (PMAP) system, which is explicitly connected to the UK's Channel program in both name and policy documents (HM Government, 2021). Similarly, the Scottish 'Multi-Agency Strategic Contest Boards' (often shortened to MASCB), through which Prevent operations are reported, are now more frequently referred to on government websites as 'Scottish CONTEST'—making the link to the UK CONTEST Strategy more explicit. Ambiguity is being removed.

This new openness about Prevent and counterterrorism in Scotland is happening alongside extension of activities in its Prevent field—including the SVT's announcement of a new research project into the extent and nature of extremism in Scotland,<sup>12</sup> and cooperation with research into the prominence of mental illness in those referred to Prevent (despite not formally cooperating with the Vulnerability Support Hubs in England) (Morris and Meloy, 2020).

As such, the initial 'shyness' in the early years of Scottish Prevent seems to be maturing into a greater openness about the presence of the program and minimal steps in the direction of counter-extremism policy (as seen in England). While the SNP led government originally negotiated a minimal Scottish Prevent which excludes the British Values Curriculum and counter-extremism policy, and which minimally affects the Scottish NHS and education systems, a degree of policy convergence with London has occurred in recent years.

Unlike devolved crime policy, which has been characterised by a high level of convergence with England across Scottish governments since devolution, the example of Prevent shows that reserved policy areas can become fluid and creative spaces for politics in devolved nations. The SNP had sternly critiqued Prevent in Westminster, before negotiating a minimal Scottish Prevent, then subsequently finding it could become open about the policy—without the fear of public backlash, given that the policy area is a reserved matter on which, supposedly, their hands are tied.

The journey of Scottish Prevent shows us that reserved policy areas can, paradoxically, become a space for freer action than in devolved areas. It serves as a fascinating example of the unexpected constraints and freedoms that are found in the devolution agreement between the nations.

#### 4. Conclusion

This paper has explored the convoluted constitutional politics which surrounded the implementation of the Counterterrorism and Security Act 2015 in Scotland. The devolution settlement neatly classified national security and defence as matters reserved for Westminster, while policing and social policy sectors were

<sup>12</sup>[https://www.publiccontractsscotland.gov.uk/search/show/search\\_view.aspx?ID=JAN438988](https://www.publiccontractsscotland.gov.uk/search/show/search_view.aspx?ID=JAN438988) (last accessed 21 October 2022).

devolved to the Scottish government. But the Prevent component of CSTA 2015 placed national security responsibilities upon Health, Education, Policing and Social Care through 'upstream' prevention measures, causing significant political turbulence in Westminster's Houses of Parliament.

While previous counterterrorism legislation has been debated in Holyrood, according to the Sewel convention, measures were taken in 2015 by both governments to ensure that the CSTA 2015 was not discussed by Scottish Parliamentarians. Instead, the Sewel convention was bypassed through inter-government negotiations of a minimal Prevent program for Scotland. This raises concerns about the democratic legitimacy of the convention, given that governments can decide when—and when not—to allow devolved Parliaments to debate the implementation of Westminster-made legislation.

Finally, the paper explored the legitimization of Scotland's Prevent work since 2015, emphasising that reserved policy areas can, paradoxically, provide room for devolved governments to manoeuvre. Unlike the devolved area of crime policy, which has seen surprising (and consistent) policy convergence between Scotland and England, the reserved area of national security has seen the SNP display fluent and creative negotiation of the constraints and opportunities associated with the devolution settlement.

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## Conflict of Interest

The authors have no conflicts of interest to report.

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