UKSC 2021/0079 and 2021/0080

In The Supreme Court of the United Kingdom

BETWEEN:

HER MAJESTY'S ATTORNEY GENERAL
-and-
HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND

Applicants

-and-
THE LORD ADVOCATE

Respondent

-and-
THE COUNSEL GENERAL TO THE WELSH GOVERNMENT

Interested Party

CASE FOR HER MAJESTY'S ATTORNEY GENERAL AND HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND

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(1) INTRODUCTION

1. This Case is filed in support of two references which have been made by Her Majesty's Attorney General and Her Majesty's Advocate General for Scotland under s.33(1) of the Scotland Act 1998 ("**SA**"; "**the references**"). Section 33(1) permits those officers ("**the UK Law Officers**") to refer to the Supreme Court the question of whether a Bill passed by the Scottish Parliament, or any provision of such a Bill, would be within its legislative competence.

2. The references have been made in respect of specific provisions of the two Bills referred: ss.6, 19(2)(a)(ii), 20(10)(a)(ii) and 21(5)(b)(ii) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ("**the UNCRC Bill**") and ss.4(1A) and 5(1) of the European Charter of Local Self-Government (Incorporation) (Scotland) Bill ("**the ECLSG Bill**"). The UNCRC Bill was passed on 16 March 2021 and the ECLSG Bill was passed on 23 March 2021.

3. Both Bills incorporate into Scots law international treaties to which the UK is a signatory: the UNCRC and the ECLSG respectively.

   (1) The UNCRC was ratified by the UK in 1991. Although various provisions of domestic law give effect to the UNCRC, it has not been directly incorporated into domestic law across the UK as a whole. The UNCRC Bill will incorporate a version of the UNCRC as scheduled to the Bill with various textual amendments which purport to reflect the Scottish Parliament's competence limitations.
   (2) The ECLSG was ratified by the UK in 1998. Although various provisions of domestic law give effect to them, Articles 2-11 of the ECLSG have not been directly incorporated into domestic law. The ECLSG Bill will incorporate versions of those Articles as scheduled to the Bill.

4. Neither reference takes issue with the competence of the Scottish Parliament ("**the SP**") to incorporate these treaties. Rather, the competence concerns referred by the UK Law Officers comprise two themes.

(1) Both Bills, in slightly different ways, purport to bestow upon the Scottish courts extensive – and, in part, unparalleled – powers to interpret and to scrutinise the legality of primary legislation passed by the sovereign UK Parliament at Westminster ("**Parliament**"). These powers are contained in ss. 19(2)(a)(ii), 20(10)(a)(ii) and 21(5)(b)(ii) of the UNCRC Bill and ss.4(1A) and 5(1) of the ECLSG Bill. The UK Law Officers consider that these provisions modify s.28(7) SA and are thereby outside competence under s.29(2)(c) SA.

(2) Both Bills also give rise to an important issue concerning the scope and effect of the interpretative provision in s.101(2) SA. The effect of s.101(2) is particularly relevant to the competence of s.6 of the UNCRC Bill, which is a provision of considerable generality requiring extensive reading down; and to ss.4(1A) and 5(1) of the ECLSG Bill, which are more specific provisions where s.101(2) would have to be applied contrary to the purpose of provisions. The UK Law Officers consider that s.101(2) cannot be applied to the ECLSG Bill to render those provisions within competence. It is not clear whether s.101(2) can be applied to s.6 UNCRC Bill to bring it within competence.

(2) THE JURISDICTION OF THE COURT AND THE COMPETENCE OF THE SCOTTISH PARLIAMENT

The jurisdiction of the Court

5. The Court's jurisdiction arises under s.33(1) SA, which provides that the Advocate General, the Lord Advocate or the Attorney General may "*refer the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament to the Supreme Court for decision*". On such a reference, the question of competence is to be assessed at the point the Bill is passed and before it becomes law.

6. An identified Law Officer may refer a Bill or provision of a Bill to the Supreme Court if there is a lack of clarity about the legislative competence of the Scottish Parliament, even if it is then argued by the referring Officer that the provision or Bill is in fact within competence: see *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] AC 1016 at §§1 and 9 *per* Lord Mance.

7. The UK Law Officers have exercised that jurisdiction in the case of s.6 of the UNCRC Bill because the matter is not clear and in any event it is of general importance that there is legal clarity as to the scope of s.6 from the outset. The other provisions of both Bills have been referred because the UK Law Officers consider that they are outside the competence of the SP.

8. A Bill does not become an Act of the Scottish Parliament ("**an ASP**") until it receives Royal Assent: s.28(2). If a s.33 reference is made, the Bill cannot be submitted for Royal Assent until the reference has been decided or otherwise disposed of by the Court: s.32(2)(b).

9. In *Re Local Government Byelaws (Wales) Bill* [2012] UKSC 53; [2013] 1 AC 792 ("*Byelaws Bill*"), §§79-80, Lord Hope gave general guidance as to the approach the Court should take in determining whether a Bill of the National Assembly for Wales is within its legislative competence. That approach is equally applicable in a reference of a Bill passed by the Scottish Parliament under s.33 SA:

> *"79. First, the question whether a Bill of the Assembly is within its legislative competence is a question of law which, if the issue is referred to it, the court must decide. The judicial function in this regard has been carefully structured. It is not for the judges to say whether legislation on any particular issue is better made by the Assembly or by the Parliament of the United Kingdom at Westminster. How that issue is to be determined has already been addressed by the United Kingdom Parliament. It must be determined according to the particular rules that section 108 and Schedule 7 have laid down. Those rules, just like any other rules, have to be interpreted. It is for the court to say what the rules mean and how, in a case such as this, they must be applied in order to resolve the issue whether the measure in question was within competence.*
>
> *80. Second, the question whether the Bill is within competence must be determined simply by examining the provisions by which the scheme of devolution has been laid out. That is not to say that this will always be a simple exercise. But, as Lord Walker of Gestingthorpe JSC observed in Martin v Most 2010 SC (UKSC) 40, para 44 when discussing the system of devolution for Scotland, the task of the United Kingdom Parliament in relation to Wales was to define the legislative competence of the Assembly while itself continuing as the sovereign legislature of the United Kingdom. It had to define, necessarily in fairly general and abstract terms, permitted or prohibited areas of legislative activity. The aim was to achieve a constitutional settlement, the terms of which the 2006 Act was designed to set out. Reference was made in the course of the argument in the present case to the fact that the 2006 Act was a constitutional enactment. It was, of course, an Act of great constitutional significance….But I do not think that this*

description, in itself, can be taken to be a guide to its interpretation. The rules to which the court must apply in order to give effect to it are those laid down by the statute, and the statute must be interpreted like any other statute. But the purpose of the Act has informed the statutory language, and it is proper to have regard to it if help is needed as to what the words mean."

10. In *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64; [2019] AC 1022; 2019 SC (UKSC) 13 ("*Continuity Bill*"), the Court held at §12 that:

"Since the Scottish Parliament commenced its work on 2 July 1999, the courts have had occasion to interpret the law by which it is governed. The main principles may be summarised as follows. The powers of the Scottish Parliament, like those of Parliaments in many other constitutional democracies, are delimited by law. The Scottish Parliament is a democratically elected legislature with a mandate to make laws for people in Scotland. It has plenary powers within the limits of its legislative competence. But it does not enjoy the sovereignty of the Crown in Parliament; rules delimiting its legislative competence are found in section 29 of and Schedules 4 and 5 to the Scotland Act, to which the courts must give effect. And the UK Parliament also has power to make laws for Scotland, a power which the legislation of the Scottish Parliament cannot affect: section 28(7) of the Scotland Act. The Scotland Act must be interpreted in the same way as any other statute. The courts have regard to its aim to achieve a constitutional settlement and therefore recognise the importance of giving a consistent and predictable interpretation of the Scotland Act so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its legislative power. This is achieved by interpreting the rules as to competence in the Scotland Act according to the ordinary meaning of the words used."

11. The principles of interpretation to be applied in determining whether a Bill, or a provision of a Bill, passed by the Scottish Parliament is within its legislative competence were set out by Lord Hope in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153.

12. First, ordinary principles of interpretation apply: *Imperial Tobacco*, §§10-15. There is no different approach to the interpretation of the devolution statutes from that applicable to all other statutes. Parliament is to be taken to have given effect to the policy of devolution only to the extent stated in the SA, and no further.

13. Secondly, rules laid down must be interpreted as having been intended to create a system for the exercise of legislative power by the Scottish Parliament that is coherent, stable

and workable. That involves adopting an approach to the meaning of a statute that is constant and predictable: *Imperial Tobacco,* §14.

14. Thirdly, the purpose of the SA has informed the statutory language. Its concern must be taken to have been that the Scottish Parliament should be able to legislate effectively about matters that were intended to be devolved to it, while ensuring that there were adequate safeguards for those matters that Parliament did not intend to devolve to it: *Imperial Tobacco,* §15.

15. Fourthly, there is no presumption that Bills passed by the Scottish Parliament are within competence. The fact that s.29 SA provides a mechanism for determining whether a provision of an ASP is outside, rather than inside, competence does not create a presumption in favour of competence: *Imperial Tobacco,* §15.

The competence restrictions in the SA

16. Section 28(1) SA provides: "*Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament.*"

17. Section 28(7) provides: "*This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland"*.

18. The restrictions on the legislative competence of the Scottish Parliament are principally set out in s.29 SA. Section 29(1) provides that an ASP is "*not law so far as any provision of the Act is outside the legislative competence of the Parliament*".

19. Section 29(2) provides, in relevant part, that a provision is outside that competence so far as:

    (1) it "*relates to reserved matters*" (s.29(2)(b)), or
    (2) it "*is in breach of the restrictions in Schedule 4*" (s.29(2)(c)).

20. Section 29(3) provides that the question of whether a provision of an ASP "*relates to*" a reserved matter "*is to be determined … by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances*".

21. In *Whaley v Lord Watson* 2000 SC 340, the Lord President (Lord Rodger) referred at pp.348-349 to the *"… fundamental character of the Parliament as a body which – however important its role – has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law."*

22. The competence restrictions in s.29 must also be read in the light of the interpretative provision of s.101, which relevantly provides:

> *"(1) This section applies to—*
> *(a) any provision of an Act of the Scottish Parliament, or of a Bill for such an Act…*
> *which could be read in such a way as to be outside competence.*
>
> *(2) Such a provision is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly.*"

Section 29(2)(b) and relating to reserved matters

23. Section 30(1) introduces Schedule 5 to the SA, *"which defines reserved matters*". An extensive array of subject matters is set out in Schedule 5 as reserved. These include:

(1) By Part I §1(1)(c), "*the Parliament of the United Kingdom*".
(2) By Part I §§1(1)(a) and 2(4), the functions of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters.
(3) By Part I §9(1)(a)-(b), the defence of the realm and the naval, military or air forces of the Crown, including reserve forces.
(4) By Part II §B6, "*Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free*

movement of persons within the European Economic Area; issue of travel documents."

(5) By Part II §F1, "*Schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits.*" This reservation is subject to a detailed series of exceptions, including disability benefits, carer's benefits, maternity expenses assistance and the "*subject-matter of section 13 of the Social Security Act 1988 (benefits under schemes for improving nutrition: pregnant women, mothers and children)*".

(6) By Part II §F2, "*The subject-matter of the Child Support Acts 1991 and 1995.*"

24. The correct approach in order to determine whether a provision of the Bill "*relates to*" a reserved matter is now well established: see especially *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 SC (UKSC) 29 at §§29-32:

(1) The phrase "*relates to*" indicates "*more than a loose or consequential connection*": *Martin v Most* [2010] UKSC 10; 2010 SC (UKSC) 40 at §49 *per* Lord Walker.

(2) Whether a provision relates to a reserved matter is determined by reference to the purpose of the provision in question, having regard (among other things) to its effect in all the circumstances: s.29(3).

(3) The purpose of a provision is "*not merely […] what can be discerned from an objective consideration of the effect of the terms of the provision*": *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43; [2014] 1 WLR 2622 ("*Agricultural Bill*"), §50.

(4) The clearest indication of the purpose may be in a report that gives rise to the legislation, or of an SP Committee, but it may also be clear from its context, including the headings within the legislation itself: *Imperial Tobacco*, §§16-17.

(5) The purpose of a provision may extend beyond its legal effect but is not the same thing as the political motivation behind it: *Continuity Bill*, §27. Nor does the extent to which the policy aim will be realised in practice matter: *Imperial Tobacco*, §39.

(6) The provision does not have to modify the law applicable to the reserved subject matter to relate to it: *Christian Institute*, §33.

(7) The analysis of the application of the test is to be structured by means of two questions (*Imperial Tobacco*, §26 and *Continuity Bill*, §27):

(a) What is the scope of the subject matter of the relevant matter reserved by Schedule 5?

(b) By reference to the purpose of the provision under challenge, having regard to its effect, does that provision relate to the reserved matter?

25. If the provision has two or more purposes, one of which relates to a reserved matter, then the provision is outside competence unless that purpose can be regarded as consequential and of no real significance when regard is had to what the provision overall seeks to achieve: *Imperial Tobacco*, §43. This analysis was *obiter* but was repeated with approval in *Christian Institute* at §31.

Section 29(2)(c) and the prohibition on modification

26. Schedule 4 to the SA specifies various enactments which are protected from modification by an ASP. §4(1) of Schedule 4 provides that an ASP "*cannot modify*" the SA itself. §4(2) provides an exception from that prohibition for specific provisions of the SA. Section 28(7) SA is not one of the specified exceptions.

27. Schedule 4 to the SA also provides, in §§2-3, that an ASP may not modify the law on reserved matters:

"2. (1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters.

(2) In this paragraph, "the law on reserved matters" means —

(a) any enactment the subject-matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament, and

(b) any rule of law which is not contained in an enactment and the subject-matter of which is a reserved matter,

and in this sub-paragraph "Act of Parliament" does not include this Act."

3. (1) Paragraph 2 does not apply to modifications which—

(a) are incidental to, or consequential on, provision made (whether by virtue of the Act in question or another enactment) which does not relate to reserved matters, and

(b) do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision.

(2) In determining for the purposes of sub-paragraph (1)(b) what is necessary to give effect to the purpose of a provision, any power to make laws other than the power of the Parliament is to be disregarded."

28. By s.126(1) SA, *""modify" includes amend or repeal*".

29. In *Imperial Tobacco*, Lord Hope explained at §§44-45 that "*modify*" does not require a direct textual amendment of a provision. He considered that the provisions under challenge in that case (sections 1 and 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010) could not be said to modify the Tobacco for Oral Use (Safety) Regulations 1992 or the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, "*at all*", because they did not "*seek to amend or otherwise affect anything that is set out in those Regulations*" (emphasis added). A provision which, without operating directly on the text of the regulations, affects the content or effect of them can properly be said to modify them in the sense prohibited by the SA. The question, rather than whether there is a direct textual modification of a provision, is therefore how the content or effect of the provision said to be modified will be affected by the impugned ASP.

30. The concept of modification received authoritative reconsideration by the Supreme Court in *Continuity Bill* at §§51 and 99, where it was held that:

"*a protected enactment will be modified by a later enactment, even in the absence of express amendment or repeal, if it is implicitly amended, disapplied or repealed in whole or in part. That will be the position if the later enactment alters a rule laid down in the protected enactment, or is otherwise in conflict with its unqualified continuation in force as before, so that the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one…*

…a protected enactment will be modified by a later enactment, even in the absence of express amendment or repeal, if it is implicitly amended, disapplied or repealed in whole or in part".

(3) THE TERMS OF THE BILLS REFERRED

(A) The UNCRC Bill

31. A summary of the passage of the UNCRC Bill through the SP is set out in the UNCRC reference at §§27-29. A detailed summary of the UNCRC Bill itself is set out in the UNCRC reference at §§30-52. It is not necessary to repeat that full summary here.

32. The UNCRC Bill incorporates an amended version of the UNCRC into Scots law as the "*UNCRC requirements*", rendering it directly enforceable. In doing so, it gives effect to the UNCRC requirements in a variety of ways. It imposes a general duty on public authorities not to act incompatibly with the UNCRC requirements, with legal remedies provided for breach of that duty. It grants new powers to the Scottish courts in respect of incompatible legislation, along with remedial powers to Scottish Ministers. Scottish Ministers will also be subject to a new duty to make a statement of compatibility in relation to legislation. The Bill also creates new ways in which court proceedings raising questions of compatibility with the UNCRC requirements can be commenced and referred to the Supreme Court.

33. Section 1(2) of the Bill explains that in the legislation, "*the UNCRC requirements*" means the rights and obligations from the UNCRC, the first optional protocol and the second optional protocol, as set out in the Schedule. The UNCRC as scheduled set out an array of rights and obligations bearing on most aspects of the wellbeing of the child (i.e. a person below 18 years of age: Article 1). The first optional protocol concerns the use and the protection of child soldiers. The second optional protocol particularly addresses the sale of children, child prostitution and child pornography.

34. Part 2 of the UNCRC Bill makes provision for duties on public authorities. The core duty is set out in s.6 in the following terms:

> "*(1) It is unlawful for a public authority to act in a way which is incompatible with the UNCRC requirements.*
>
> *(2) In subsection (1), "act" includes fail to act.*
>
> *(3) In this section, "public authority"—*
> *(a) includes, in particular—*
> *(i) the Scottish Ministers,*
> *(ii) a court or tribunal,*
> *(iii) any person certain of whose functions are functions of a public nature (but see subsection (4)),*

(b) does not include the Scottish Parliament or a person carrying out functions in connection with proceedings in the Scottish Parliament.

(3A) For the purposes of subsection (3)(a)(iii), "functions of a public nature" includes, in particular, functions carried out under a contract or other arrangement with a public authority.

(3B) Functions are not excluded from being functions of a public nature for the purposes of subsection (3)(a)(iii) solely because they are not publicly funded.

(4) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(a)(iii) if the nature of the act is private."

35. Section 6 does not exclude from its scope Ministers of the Crown ("**UK Ministers**"), including by reference to the reserved or devolved functions they are carrying out, or reserved bodies within the meaning of §3 of Part III of Schedule 5 to the SA, or indeed any other body carrying out wholly reserved functions. In relation to s.6, the Explanatory Notes to the UNCRC Bill state that:

"*26. The phrase "public authority", when used in a provision of an Act of the Scottish Parliament, cannot be read as extending to an authority if it would be outside the Parliament's legislative competence for the provision to extend to that authority (see the interpretation rule in section 101 of the Scotland Act 1998). The limits of the Parliament's legislative competence are set by section 29 of the Scotland Act 1998. In relation to both which bodies are captured and how those bodies exercise their functions, the duty applies only to the extent permissible within the limits of the Scottish Parliament's legislative competence. The Bill makes specific provision in relation to the Scottish Parliament, which is specifically excluded from the definition of "public authority" and therefore the compatibility duty. Persons carrying out functions in connection with proceedings in the Scottish Parliament are also excluded from the definition.*"

36. The Policy Memorandum accompanying the UNCRC Bill explains in relation to section 6, that:

"124. In terms of the functions to which the compatibility duty will apply, the Scottish Government's policy is that the duty should apply to the fullest extent possible within the Parliament's powers. In relation to both which bodies are covered (discussed above) and how those bodies exercise their functions, the duty will apply only to the extent permissible within the limits of the Scottish Parliament's legislative competence. This will encompass the devolved functions of public authorities. So far as reserved functions are concerned, the Scottish Government recognises that there will be circumstances in which the application of the compatibility duty would be beyond the legislative competence of the Scottish Parliament because it would breach the restrictions in schedule 4 of the Scotland Act (for example, by modifying the "law on reserved

matters"). However, this will not necessarily be the case in respect of the application of all UNCRC requirements in respect of all exercises of reserved functions. The question will therefore fall to be analysed on a case-by-case basis."

37. Section 7 provides that a person who claims that there has been a breach of s.6(1) may bring legal proceedings before a civil court or tribunal which has the relevant jurisdiction, and/or may rely on the UNCRC requirements in any legal proceedings (such as by way of defence). Section 7(7) creates a one year limitation period, subject to any stricter time limit in a particular procedure: s.7(8). However, time in respect of a person who is under 18 does not begin to run until they are aged 18: s.7(9). The limitation period may be extended: s.7(10).

38. Section 8(1) provides that "*In relation to any act (or proposed act) of a public authority which the court or tribunal finds is (or would be) unlawful under section 6(1), it may grant such relief or remedy, or make such order, within its powers as it considers effective, just and appropriate*". This includes an award of damages, if the court or tribunal would otherwise have the power to award damages, where it is "*necessary to provide just satisfaction to the person to whom the award is made*": s.8(3).

39. Part 4 of the UNCRC Bill addresses the approach to legislation in the light of the s.6 duty. Sections 19-21 provide:

"***19 Interpretation of legislation***
(1) So far as it is possible to do so, legislation mentioned in subsection (2) must be read and given effect in a way which is compatible with the UNCRC requirements.

(2) That legislation is an enactment (whenever enacted) that it would be within the legislative competence of the Scottish Parliament to make—
(a) that comprises—
(i) an Act of the Scottish Parliament,
(ii) an Act of Parliament, or
(b) that is wholly or partly made by virtue of an enactment mentioned in paragraph (a).

(3) For the purposes of subsection (2), an enactment that extends to Scotland and other jurisdictions is not, for that reason alone, to be regarded as outside the legislative competence of the Scottish Parliament.

(4) Subsection (1) does not affect—
(a) the validity, continuing operation or enforcement of any incompatible Act of the Scottish Parliament or Act of Parliament,

(b) the validity, continuing operation or enforcement of any incompatible enactment mentioned in subsection (2)(b) made by virtue of an enactment mentioned in subsection (2)(a) ("primary legislation") if (disregarding any possibility of revocation) the primary legislation prevents removal of the incompatibility.

20 Strike down declarators

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of relevant legislation is compatible with the UNCRC requirements.

(2) If the court is satisfied that the provision is incompatible with the UNCRC requirements, it may make a declarator stating that the provision ceases to be law to the extent of the incompatibility (a "strike down declarator").

(3) Where the incompatible provision of relevant legislation is an enactment mentioned in subsection (10)(b) ("subordinate legislation") made by virtue of an enactment mentioned in subsection (10)(a) ("primary legislation"), the court may make a strike down declarator in relation to the subordinate legislation only if the court is satisfied that (disregarding any possibility of revocation) the primary legislation prevents removal of the incompatibility.

(4) A strike down declarator has effect only from the date of the declarator and does not affect anything previously done under the provision.

(5) The court may make an order suspending the effect of a strike down declarator for any period and on any conditions to allow the incompatibility to be remedied.

(6) In deciding whether to make an order under subsection (5), the court must (among other things) have regard to the extent to which persons who are not parties to the proceedings would be adversely affected.

(7) Where a court is considering whether to make an order under subsection (5), intimation of that is to be given to the Lord Advocate (unless the Lord Advocate is a party to the proceedings).

(8) The Lord Advocate may, on giving notice, take part as a party in the proceedings so far as the proceedings relate to the making of the order.

(9) Where the determination mentioned in subsection (1) is a decision by the Supreme Court in relation to a UNCRC compatibility issue, the power to make an order under subsection (5) is exercisable by the High Court of Justiciary instead of the Supreme Court.

(10) In this section, "relevant legislation" means an enactment that it would be within the legislative competence of the Scottish Parliament to make—

(a) that comprises—

(i) an Act of the Scottish Parliament the Bill for which received Royal Assent before the day on which this section comes into force,

(ii) an Act of Parliament the Bill for which received Royal Assent before the day on which this section comes into force, or

(b) that is wholly or partly made (at any time) by virtue of an enactment mentioned in paragraph (a).

(11) For the purposes of subsection (10), an enactment that extends to Scotland and other jurisdictions is not, for that reason alone, to be regarded as outside the legislative competence of the Scottish Parliament.

(12) In subsection (10)(a)(i) and (ii), the reference to an Act of the Scottish Parliament or (as the case may be) an Act of Parliament is to such an Act of the Scottish Parliament or (as the case may be) such an Act of Parliament as at the day on which this section comes into force.

(13) In this section and section 21, "court" means—

(a) the Supreme Court,

(b) the High Court of Justiciary sitting otherwise than as a trial court,

(c) the Court of Session.

21 Incompatibility declarators

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of future legislation is compatible with the UNCRC requirements.

(2) If the court is satisfied that the provision is incompatible with the UNCRC requirements, it may make a declarator stating that incompatibility (an "incompatibility declarator").

(3) Where the incompatible provision of future legislation is an enactment made by virtue of an enactment mentioned in sub-paragraph (i) or (ii) of subsection (5)(b) ("subordinate legislation"), the court may make an incompatibility declarator in relation to the subordinate legislation only if the court is satisfied that (disregarding any possibility of revocation) the enactment by virtue of which the subordinate legislation is made prevents removal of the incompatibility.

(4) An incompatibility declarator—

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is made, and

(b) is not binding on the parties to the proceedings in which it is made.

(5) In this section, "future legislation" means an enactment—

(a) that it would be within the legislative competence of the Scottish Parliament to make, and

(b) that comprises, or is wholly or partly made by virtue of—

(i) an Act of the Scottish Parliament the Bill for which receives Royal Assent on or after the day on which this section comes into force,

(ii) an Act of Parliament the Bill for which receives Royal Assent on or after the day on which this section comes into force.

(6) For the purposes of subsection (5)(a), an enactment that extends to Scotland and other jurisdictions is not, for that reason alone, to be regarded as outside the legislative competence of the Scottish Parliament.

(7) In subsection (5)(b)(i) and (ii), the reference to an Act of the Scottish Parliament or (as the case may be) an Act of Parliament includes provision in such an Act of the Scottish Parliament or (as the case may be) such an Act of Parliament which modifies an Act of the Scottish Parliament or (as the case may be) an Act of Parliament which has become relevant legislation by virtue of section 20(10) and (12)."

40. The Explanatory Notes to the UNCRC Bill in relation to ss.19-21 relevantly provide that:

"*76. But the interpretative obligation does not apply to legislation that it is not within the legislative competence of the Scottish Parliament to make. The limits of the Parliament's legislative competence are set by section 29 of the Scotland Act 1998. A provision may be contained within part of an Act of Parliament that extends to Scotland and another UK jurisdiction. Section 19(3) makes clear that that fact alone does not mean that the provision is to be regarded as outside the legislative competence of the Scottish Parliament for the purpose of ascertaining the legislation that is covered by section 19(2).*

...

85. Legislation is only susceptible to being struck down under section 20 if it is legislation that it would be within the legislative competence of the Scottish Parliament to make. The limits of the Parliament's legislative competence are set by section 29 of the Scotland Act 1998. A provision may be contained within part of an Act of Parliament that extends to Scotland and another UK jurisdiction. Section 20(11) makes clear that that fact alone does not mean that the provision is to be regarded as outside the legislative competence of the Scottish Parliament for the purpose of ascertaining the legislation that is covered by section 20(10).

86. Primary legislation can only be struck down if enacted before the day that section 20 comes into force.... If a court finds primary legislation enacted on or after that date to be incompatible with the UNCRC requirements, it can make an incompatibility declarator under section 21. For this paragraph's purposes, primary legislation means: an Act of the Scottish Parliament or an Act of the UK Parliament.

...

93. The legislation in respect of which an incompatibility declarator can be made is legislation that cannot be struck down under section 20 because it is enacted on or after the day that section came into force. In other words, an incompatibility declarator can be made in respect of:

- *a provision of an Act of the Scottish Parliament or an Act of the UK Parliament or legislation made by virtue of an Act of the Scottish Parliament or an Act of Parliament;*
- *provided that the legislation is enacted on or after the day section 21 came into force (the date for which is to be set by regulations under section 40);*
- *provided also that the legislation is within the legislative competence of the Scottish Parliament (see section 29 of the Scotland Act 1998). A provision may be contained within part of an Act of Parliament that extends to Scotland and another UK jurisdiction. Section 21(6) makes clear that that fact alone does not mean that the provision is to be regarded as outside the legislative competence of the Scottish Parliament for the purpose of ascertaining the legislation that is covered by section 21(5)(a).*"

41. The Policy Memorandum accompanying the UNCRC Bill makes clear that the distinction between existing and future legislation in ss.20-21 is derived from what the Scottish Government considers to be a competence restriction on making provision in relation to future legislation. It relevantly explains that:

"*107. The Scottish Government's preferred policy approach would be to require all legislation, past and future, to be compatible with the incorporated UNCRC rights and obligations, with the courts having the power to 'strike down' incompatible provisions, including primary legislation. A provision requiring future Acts of the Scottish Parliament to be compatible with UNCRC would effectively change the power of the Parliament and is, therefore, beyond its current powers. Accordingly, the Bill provides for two different remedies in respect of legislation which is found to be incompatible. In relation to legislation which pre-dates the Bill, the Bill enables the courts to declare that the incompatible provision ceases to be law from the date of the court's declaratory (a 'strike down declarator'). Where the incompatibility is identified in legislation which postdates the Bill, the Bill enables the courts to declare that the provision is incompatible with the UNCRC (an 'incompatibility declarator').*

…

138…The Scottish Government's preferred policy approach would be to require all legislation, past and future, to be compatible with the incorporated UNCRC rights and obligations, with the courts having the power to "strike down" incompatible provisions. Provision requiring future legislation to be compatible with UNCRC would effectively change the power of the Parliament and is, therefore, beyond its current powers.

139. In line with the 'maximalist' approach, it is the Scottish Government's intention that a court should be able to make a strike down declarator where this is possible within legislative competence. This will mean that the Bill will treat legislation that pre-dates and post-dates commencement of the Bill differently….

140. The primary benefit of this approach will be that, as far as is possible within the powers of the Scottish Parliament, breaches of children's rights in historic legislation cannot endure. In relation to future legislation, incompatibility declarators will bring transparency to breaches of children's rights. Whilst it will not be possible to require that future legislation must be compatible, any incompatibility declarator made by the courts would be expected to be taken seriously in practice.

…

146…The Scottish Government considers that legislation should be given effect to in a way that is compatible with children's rights in every case where this is possible. Legislation should only be found to be incompatible where this is not possible. This section of the Bill, therefore, requires legislation to be read and given effect in a way that is compatible with the incorporated UNCRC requirements, so far as it is possible to do so. This is similar to the interpretation regime in section 3 of the HRA."

(B) The ECLSG Bill

42. A summary of the passage of the ECLSG Bill through the SP is set out in the ECLSG reference at §§26-28. A detailed summary of the ECLSG Bill itself is set out in the ECLSG reference at §§29-46. It is not necessary to repeat that full summary here.

43. The ECLSG Bill incorporates Articles 2-11 of the ECLSG into Scots law as "*the Charter Articles*", rendering them directly enforceable. In doing so, it gives effect to the Charter Articles in a variety of ways. It imposes a duty on the Scottish Ministers not to act incompatibly with the Charter Articles in the exercise of their functions within devolved competence (except functions relating to a Bill for an ASP). It grants new powers to the Scottish courts in respect of incompatible legislation, along with remedial powers to Scottish Ministers. Members will also be subject to a new duty to make a statement of compatibility in relation to Bills that they introduce in the Scottish Parliament. Further, the Bill imposes a new ongoing duty on the Scottish Ministers to consider whether there are steps that they could take to safeguard and reinforce local self-government and increase the autonomy of local authorities.

44. Section 1(1)-(2) of the ECLSG Bill explains that in the legislation, "*the Charter Articles*" means Articles 2-11 of the ECLSG, as set out in the Schedule. The Charter Articles set out various rights and principles under the headings: constitutional and legal foundation for local self-government (Article 2); concept of local self-government (Article 3); scope of local self-government (Article 4); protection of local authority boundaries (Article 5); appropriate administrative structures and resources for the tasks of local authorities (Article 6); conditions under which responsibilities at local level are exercised (Article 7); administrative supervision of local authorities activities (Article 8); financial resources of local authorities (Article 9); local authorities' right to associate (Article 10); and legal protection of self-government (Article 11). So far as Scotland is concerned, the UK declared on ratification that it intended to confine the scope of the Charter to councils constituted under s.2 of the Local Government etc. (Scotland) Act 1994.

45. Section 2(1) creates a duty on the Scottish Ministers to ensure that any action that they take in exercise of their functions is compatible with the Charter Articles. "*Functions*" in this context means functions that are within devolved competence within the meaning of

s.54 SA, including the making of subordinate legislation, except functions relating to a Bill for an ASP: s.2(2).[1]

46. The ECLSG Bill makes no provision for the procedure in which the duties, including that in s.2, are to be enforced. According to the Policy Memorandum accompanying the Bill, judicial review is envisaged: §87.

47. Sections 4-5 of the ECLSG Bill address the powers of the courts in respect of legislation. They provide that:

"***4 Interpretation of legislation***
(1) So far as it is possible to do so, legislation mentioned in subsection (1A) must be read and given effect in a way that is compatible with the Charter Articles.

(1A) That legislation is an Act or subordinate legislation (whenever enacted) to the extent that its provisions are within the legislative competence of the Scottish Parliament.

(2) This section does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

5 Declaration of incompatibility
(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of an Act is compatible with the Charter Articles.

(2) If the court is satisfied that the provision is incompatible with the Charter Articles, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation is incompatible with the Charter Articles.

(4) If the court is satisfied—
(a) that the provision is incompatible with the Charter Articles, and
(b) that (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility, it may make a declaration of that incompatibility.

(5) In this section "court" means—
(a) the Supreme Court of the United Kingdom, or
(b) the Court of Session.

[1] As this duty applies only to the Scottish Ministers, and is drafted by references to functions within devolved competence, s.2 of the ECLSG Bill does not give rise to the issues that s.6 of the UNCRC Bill raises.

(6) A declaration under this section ("a declaration of incompatibility") does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given.

(7) A declaration of incompatibility may be made in respect of a provision (whether of an Act or of subordinate legislation) only if the provision is within the legislative competence of the Scottish Parliament."

48. The ECLSG Bill does not define the word "*Act*" in ss.4(1A) and 5(1).

49. The Policy Memorandum accompanying the ECLSG Bill explains at §66 that: "*Under the Bill, the scope of what can be challenged through the courts for incompatibility with the European Charter of Local Self-Government includes all legislation on the statute book in Scotland that is within the legislative competence of the Scottish Parliament. This includes Acts of the Scottish Parliament, together with those provisions in Acts of the UK Parliament that could be included in an Act of the Scottish Parliament"*.

50. The Explanatory Notes to the ECLSG Bill provide at §11 that: "*Section 4 imposes an interpretative obligation on the courts in relation to an Act (defined in schedule 1 of [*the Interpretation and Legislative Reform (Scotland) Act 2010*] to mean an Act of the UK or Scottish Parliament) or subordinate legislation (including instruments made by UK or Scottish Ministers), to the extent that its provisions are within the legislative competence of the Scottish Parliament*."

51. It will be apparent that s.4 of the ECLSG Bill is very similar in purpose and effect to s.19 of the UNCRC Bill, and that s.5 is very similar to s.21. The ECLSG Bill contains no analogy to s.20 of the UNCRC Bill. The Policy Memorandum explains this decision in the following terms:

"*77. This approach has been taken on the grounds that a Bill that conferred on the courts a strike-down power with regard to Charter-incompatible provisions of primary legislation would very likely be held to be outside the legislative competence of the Scottish Parliament. This would be due to it being seen as an attempt to impose a new legal constraint on the powers of the Parliament to make primary legislation. As a result of paragraph 4 of Schedule 4 to the Scotland Act 1998, it is not possible for the Scottish Parliament to legislate to modify sections 28 to 30A of the Scotland Act 1998 – including the section (section 29) that sets out the restrictions which, if breached, lead to an Act of the Scottish Parliament being outside legislative competence and therefore 'not law'. Even if the Bill did not directly amend the Scotland Act, but instead made standalone*

provision that had an equivalent effect (i.e. imposing a new limit on the legislation that the Parliament can competently enact), this is likely to be viewed by the courts as an illicit modification of the Scotland Act in terms of Schedule 4, and so outside the Parliament's legislative competence." (emphasis added)

(4) THE MODIFICATION OF SECTION 28(7) SA

(A) Section 28(7) SA

52. Section 28(1) of the SA provides: "*Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament.*" But s.28(7) provides: "*This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.*" This is an encapsulation of the fundamental rule of law that Parliament is sovereign, and that the devolution settlement was not intended to alter that basic constitutional fundamental. The Supreme Court described the effect of s.28(7) in *Continuity Bill* at §12:

"*The powers of the Scottish Parliament, like those of Parliaments in many other constitutional democracies, are delimited by law. The Scottish Parliament is a democratically elected legislature with a mandate to make laws for people in Scotland. It has plenary powers within the limits of its legislative competence. But it does not enjoy the sovereignty of the Crown in Parliament; rules delimiting its legislative competence are found in section 29 of and Schedules 4 and 5 to the Scotland Act, to which the courts must give effect. And the UK Parliament also has power to make laws for Scotland, a power which the legislation of the Scottish Parliament cannot affect: section 28(7) of the Scotland Act.*" (emphasis added)

53. Section 28(7) is not excepted by §§4(2)-(5) of Schedule 4 to the SA from the general prohibition in §4(1) that an ASP "*cannot modify*" the SA: s.28(7) is accordingly protected from modification by an ASP, such as either of the referred Bills.

54. The context of the discussion in *Continuity Bill* was s.17 of the referred Bill in that case. Section 17 imposed a requirement on UK Ministers to obtain the consent of the Scottish Ministers in respect of any secondary legislation made under any post-Bill enactment containing devolved provision relating to withdrawal from the European Union. Without that consent, such secondary legislation was to be of no effect. Accordingly, it made laws authorised by Parliament (but not primary legislation) conditional on the consent of the Scottish Ministers.

55. The Supreme Court unanimously held at §52 that "*An enactment of the Scottish Parliament which prevented such subordinate legislation from having legal effect, unless the Scottish Ministers gave their consent, would render the effect of laws made by the UK Parliament conditional on the consent of the Scottish Ministers. It would therefore limit the power of the UK Parliament to make laws for Scotland, since Parliament cannot meaningfully be said to "make laws" if the laws which it makes are of no effect. The imposition of such a condition on the UK Parliament's law-making power would be inconsistent with the continued recognition, by section 28(7) of the Scotland Act, of its unqualified legislative power.*"

56. At §53 it went on to explain that "*A provision which imposes a condition on the legal effect of laws made by the UK Parliament, in so far as they apply to Scotland, is in conflict with the continuation of its sovereign power to make laws for Scotland, and is therefore equivalent to the amendment of section 28(7) of the Scotland Act.*" The Court explained that it was no answer that Parliament had the ability to repeal or address the terms of section 17 in subsequent legislation because if it were outside competence section 17 was not law in any event.

57. The effect of the Court's reasoning in *Continuity Bill* was thus that, if a provision of an ASP renders the effect of an Act of Parliament conditional upon, or qualified by, some action by a third party, then the ASP conflicts with Parliament's preserved and continuing sovereignty and constitutes an impermissible modification.

(B) The effect of ss.19-21 of the UNCRC Bill

58. Sections 19-21 of the UNCRC Bill have remarkable effects:

(1) As the Explanatory Notes make clear, s.19 is modelled on s.3 of the Human Rights Act 1998 ("**the HRA**"). It imposes on the courts an obligation to interpret legislation, whenever enacted, compatibly with the UNCRC requirements so "*far as it is possible to do so*". That, by s.19(2)(a)(ii), expressly includes Acts of Parliament (so long as the Act would theoretically have been within the competence of the SP). In other words, s.19 obliges the courts to interpret provisions of an Act of the sovereign Parliament as if the interpretive principles derived from s.3 HRA

applied in relation to the provisions of the UNCRC (see, e.g., *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 at §§29-32 *per* Lord Nicholls and §119 *per* Lord Rodger) but without the direct authorisation of the sovereign Parliament itself. The constitutional problem is accordingly that the SP is purporting to require Acts of the sovereign Parliament to meet a test to which Parliament has not assented and which may indeed conflict with a purpose Parliament is seeking to achieve.

(2) Section 20 permits the higher Scottish courts to make a declarator stating that a provision of relevant legislation which is incompatible with the UNCRC requirements ceases to be law to the extent of the incompatibility. That, by s.20(10)(a)(ii), expressly applies to Acts of Parliament (so long as the Act would be within the competence of the SP) which received Royal Assent prior to s.20 coming into force. In other words, s.20 permits the courts to strike down and invalidate a provision of an Act of the sovereign Parliament. This, as is obvious, goes beyond the terms even of s.4 of the HRA. It purports to create a jurisdiction unparalleled in any domestic rule of law or legislation.[2]

(3) Section 21 is plainly inspired by s.4 HRA. It permits the higher Scottish courts to make a declarator stating that a provision of future legislation is incompatible with the UNCRC requirements, although that declarator does not affect the ongoing legal validity of the provision. That, by s.21(5)(b)(ii), expressly applies to Acts of Parliament (so long as the Act would be within the competence of the SP) which received Royal Assent after s.21 came into force. In other words, s.21 permits the courts to opine on the legal validity of a provision of an Act of the sovereign Parliament in a manner contrary to the ordinary principle that the validity of an Act of Parliament may not be impugned in any way: *Pickin v British Railways Board* [1974] AC 765. Where Parliament intends the courts to be permitted to review the

[2] The requirements of European Union law are in this respect, as in many other respects, *sui generis* and not comparable. As 'Rights Brought Home: the Human Rights Bill' (Cm 3782) recognised in relation to the draft HRA, the power of the courts to disapply primary legislation was a requirement of the UK's participation in the EU legal order which did not apply under the ECHR: at §2.13. At §2.14 the White Paper specifically rejected legislating for a strike down power in the HRA in order to protect the principle of Parliamentary sovereignty.

legality or validity of an Act of Parliament, as in s.4 HRA, Parliament itself must make clear provision to that effect.

59. Each of these provisions modifies s.28(7) SA. That conclusion follows from both: (1) the application of the reasoning in *Continuity Bill*; and (2) the interpretation of s.28(7) in light of its purpose of protecting the sovereignty of Parliament in respect of Scotland.

The Continuity Bill reasoning

60. The reasoning in *Continuity Bill* applies to ss.19 and 20 of the UNCRC Bill. The compatibility of a provision of an Act of Parliament with the UNCRC requirements is purportedly made a necessary condition for the provision having the legal effect that Parliament intended for it.

61. Section 21 of the UNCRC Bill does not affect the legal validity or meaning of an Act of Parliament but it does make compatibility with the UNCRC requirements a condition for the Act's immunity from judgment. Parliament has the power to make any laws it chooses for Scotland. In any case in which Parliament is minded to legislate in a way that might, in the view of the Scottish courts, be incompatible with the incorporation of UNCRC rights into Scots law, s.21 requires Parliament to legislate differently – perhaps by disapplying s.21; perhaps by removing the incompatibility – if it wants to avoid adverse judgment. There is not the "*unqualified legislative power*" (*Continuity Bill* at §52) that s.28(7) recognises and protects.

62. Moreover, some features of s.21 deliberately put pressure on Parliament in practice not to legislate in the manner it wishes: (a) the declarator is made by a court; and (b) the standards that the court applies are fixed by the SP and not by Parliament itself. The intention of Parliament could also be practically frustrated by a s.21 declarator: there is no equivalent to s.6(2) HRA in the UNCRC Bill, so any public authority which exercises a power which has been declared incompatible, or even complies with a duty which has been declared incompatible, may still breach the s.6 duty in the UNCRC Bill. Damages claims against the public authority may follow. In this way, Parliament's ability to legislate for Scotland is adversely affected even in the context of s.21.

Interpreting s.28(7) according to its purpose

63. Parliamentary sovereignty, including over the courts, has been repeatedly recognised as not just a basic principle of the law of the UK, but the highest constitutional principle of the UK legal order. In *R (Miller) v Prime Minister* [2019] UKSC 41; [2020] AC 373, Lady Hale and Lord Reed described Parliamentary sovereignty as "*the foundational principle of our constitution*" at §42. At §41, they characterised this "*fundamental principle*" as being "*the principle of Parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply*" because "*the legislation enacted by the Crown in Parliament*" is recognised "*as our highest form of law*".

64. As Lord Neuberger put it at §20 of *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39; [2016] AC 1531: "*In our system of parliamentary supremacy (subject to arguable extreme exceptions, which I hope and expect will never have to be tested in practice), it is not open to a court to challenge or refuse to apply a statute, save to the extent that Parliament authorises or requires a court to do so*" (emphasis added).

65. The preservation of Parliamentary sovereignty, and the inability of the SP to alter that, is apparent on the face of the SA.

66. First, there is s.28(7) itself and its protection from modification. As the Court described that provision in *Continuity Bill* at §41, it makes "*clear that, notwithstanding the conferral of legislative authority on the Scottish Parliament, the UK Parliament remains sovereign, and its legislative power in relation to Scotland is undiminished. It reflects the essence of devolution: in contrast to a federal model, a devolved system preserves the powers of the central legislature of the state in relation to all matters, whether devolved or reserved.*" Even the convention encapsulated in s.28(8) SA is not legally enforceable: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61.

67. Secondly, there is §1(c) of Schedule 5 Part I, which reserves "*the Parliament of the United Kingdom*" as an aspect of the UK constitution. See too: *Continuity Bill*, §61.

68. The SP can amend or repeal any Act of Parliament so far as applying to Scotland and so far as within devolved competence: see ss.28-29 SA and *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46; 2012 SC (UKSC) 122; [2012] 1 AC 868 at §145 *per* Lord Reed. The competence of the SP to amend or repeal Acts of Parliament is apparent on the face of the SA itself. The SP has the plenary legislative functions given to it by s.28 SA because, as *AXA* emphasises, it is a democratically elected legislature established and set out within the SA itself.

69. However, as *AXA* also made clear, the SP is subordinate to Parliament and subject to the jurisdiction of the courts (as Parliament itself is not): §§138 and 146 *per* Lord Reed. It is essentially exercising authority delegated by Parliament: §§45 and 46 *per* Lord Hope. "*Sovereignty remains with the United Kingdom Parliament. The Scottish Parliament's power to legislate is not unconstrained. It cannot make or unmake any law it wishes*" and ASPs are subject to the supervisory jurisdiction of the courts accordingly: at §46 per Lord Hope. See too: *Miller* at §225 *per* Lord Reed.

70. The question is accordingly one of Parliamentary intent. Is Parliament to be taken to have intended in the SA to devolve to the SP power to legislate to permit courts to sit in judgment on and make declarators as to the legality of a provision of an Act of Parliament, to interpret those provisions in a manner inconsistent with the intention of Parliament, or to invalidate provisions of an Act of Parliament? It manifestly did not have the express intention to permit such an outcome: the protection of Parliamentary sovereignty within the SA itself is testament to that. Instead it may be said by the respondent that Parliament silently authorised and permitted a fundamental inroad into that principle, and permitted the SP to confer on the courts an unparalleled jurisdiction which itself qualifies Parliamentary sovereignty. It is submitted that Parliament cannot be taken to have intended in the SA such an outcome.

71. This is no different in principle to the established approach of the courts to look to the intention of Parliament when granting the power purportedly exercised, and to interpret general words more strictly in order to secure the supremacy of Parliament itself: *Public Law Project* at §§25-28 *per* Lord Neuberger. As Lord Browne-Wilkinson expressed the principle of interpretation in *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 at p.575:

"*A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect … the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.*" (emphasis added)

72. In *AXA*, Lord Reed explained at §§147 and 149-153 that it was indeed the intention of Parliament in enacting the SA to create a body which did not have the power to override common law fundamental rights, or legislate contrary to the rule of law, because Parliament did not make express provision to that effect in the SA. In relation to the principle of Parliamentary sovereignty, the SA is not silent: it expressly preserves that sovereignty within the SA itself and makes no provision which expressly or clearly permits the SP to grant to third parties the power to act inconsistently with the basic principles on which the law of the UK is based, still less the most basic principle of all.

73. Two further points support this submission. First, it is particularly unlikely that Parliament intended the SP to have competence to enact the referred provisions – as opposed to intending that they would constitute an impermissible modification of s.28(7) – where those provisions have the effect of avoiding confronting the political choices which would have to be made in the SP in repealing or amending (for Scotland) any provision of an Act of Parliament thought to be incompatible with the UNCRC and allocating that essentially political, and legislative, function to the courts instead.

74. The creation of the devolution settlement involved the partial delegation by Parliament of its law-making powers to the SP, as a democratically elected representative body subject to various electoral, financial and legal constraints as set out in the SA itself. The SA expressly contemplates that the SP may enact legislation which delegates law-making power to the Scottish Ministers through the making of subordinate legislation: e.g. §1(1) of Schedule 4, which recognises that the SP would – subject to the constraints there imposed – be able to confer power by subordinate legislation to modify primary legislation. Scottish Ministers must all themselves be members of the SP: s.47(1). They are accordingly accountable both to the SP and to the electorate. That is the scheme envisaged by the SA and reflect the intention expressed in the White Paper, *Scotland's Parliament* at §2.6: "*The Scottish Executive, which will be accountable to the Scottish Parliament, will exercise executive responsibility in relation to devolved matters. The*

relationship between the Scottish Executive and the Scottish Parliament will be similar to the relationship between the UK Government and the UK Parliament." This is the context in which the power afforded to the SP to modify provisions of an Act of the sovereign Parliament must be construed. That power is to be narrowly and strictly construed: *R v Secretary of State for Social Security, ex parte Britnell* [1991] 1 WLR 198, 204F *per* Lord Keith, and *Public Law Project*, above. That there are legal limits on the power of the SP to delegate the powers Parliament has provided is obvious: it would, for example, be plainly impermissible for the SP to purport to delegate its functions to some other body acting as a shadow SP. In contrast to the position of subordinate legislation, there is nothing in the SA which indicates that Parliament contemplated or permitted the SP to further delegate its powers in respect of Acts of Parliament to a different entity such as the courts.

75. Secondly, it is not likely that Parliament intended the SP to be able to require the courts, for the purpose of this constitutionally impermissible exercise, to scrutinise provisions of Acts of Parliament against the test of the SP's own legislative competence. Each of ss.19-21 apply to Acts of Parliament insofar as they could have been (but have not been) made by the SP. Any Scottish court considering the application of any of ss.19-21 will, as a pre-condition, have to satisfy itself of the competence question. But this is a question which was wholly irrelevant to the sovereign Parliament when it passed the Act under consideration (whenever this occurred). Where the SP confronts the political and legislative issue itself, it can amend, repeal or if appropriate re-enact the provision of the Act within an ASP having careful regard to competence – and with the s.33 reference procedure to police the boundaries – but nothing in the SA suggests that the SP is entitled to authorise the courts to review (in effect all) Acts of Parliament by reference to an irrelevant competence test.

The modifications of s.28(7) by ss.19-21 of the UNCRC Bill

76. Against this backdrop, it is submitted that each of the three referred provisions of the UNCRC Bill constitutes an impermissible modification of s.28(7) in their grant of remedies to the Scottish courts which are inconsistent with the unqualified sovereign right of Parliament to legislate for Scotland.

77. Section 20 of the UNCRC Bill could hardly be a more obvious qualification on the legislative sovereignty of Parliament. It permits the Scottish courts to invalidate provisions of an Act of the sovereign Parliament, when that is a power conferred only within limits on the SP.[3]

78. The UK Law Officers do not accept that the restriction of s.20 to Acts passed before s.20 itself comes into force renders s.20 within competence. Parliament's sovereign ability to legislate for Scotland – protected by s.28(7) – cannot sensibly or logically be confined to future legislation. That is itself a time-based condition on Parliament's sovereignty; Parliament's sovereignty is not limited to the future. The Court's use of the phrase "*unqualified continuation in force as before*" in *Continuity Bill* at §51 recognises that the modification question asks only whether the provision modified – s.28(7) – continues to apply in precisely the same way as before the ASP under consideration. Section 20 cannot be said to leave Parliament's sovereignty unaffected and unqualified.

79. In contrast, s.21 of the UNCRC Bill applies only to future legislation, including future Acts of Parliament. An impermissible modification of Parliament's continuing sovereign right to legislate for Scotland is not created solely by invalidating that legislation. For the courts to scrutinise primary legislation of Parliament at all is a significant qualification on Parliament's sovereignty. As Lord Hope held in *AXA* at §49, "*A sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty*". A declarator of incompatibility goes well beyond judicial scrutiny: it is a legal statement that a provision of an Act is incompatible with a norm of Scots law (i.e. the incorporated UNCRC requirements).

80. Section 19 of the UNCRC Bill does not attempt to adopt a different approach to Acts of Parliament depending on when they were enacted. It applies the strong interpretative duty

[3] The Court will have noted that the Policy Memorandum for the ECLSG Bill explained that an equivalent power was not to be included in the ECLSG Bill because it would be outside competence. The reasoning there appears to contemplate that granting the power to invalidate ASPs would operate as an impermissible modification of the terms of s.29 SA. The UK Law Officers do not consider that that the SP's legislating to give the courts more extensive powers in respect of its own legislation gives rise to the same sort of constitutional questions as purporting to give the courts powers in respect of Acts of the sovereign Parliament. Nevertheless, even on its own terms, the ECLSG Policy Memorandum supports in principle the arguments made here about the inherent limitations on the ability of the SP to delegate the powers afforded to it by the SA to the courts.

to all such Acts. This is fundamentally inconsistent with the principle encapsulated in s.28(7) SA: Parliament's otherwise unqualified power to legislate for Scotland (at any time) is affected by a provision of an ASP which requires the Scottish courts to interpret Parliament's legislation in a manner which may be contrary to the intention of Parliament and contrary to the words used by Parliament. This is the avowed intention of s.19. Section 3 HRA, on which s.19 is closely modelled, creates interpretative tools which would be constitutionally impermissible for the courts to exercise as a matter of common law.[4] Where s.19 could be used, for example, to interpret 'wife or husband' as encompassing same-sex couples contrary to the original intention of Parliament (as in *Ghaidan*), it would plainly be a qualification on the ability of Parliament to legislate for Scotland and achieve its legislative intention.

81. For these reasons, ss.19(2)(a)(ii), 20(10)(a)(ii) and 21(5)(b)(ii) all, in their application to Acts of Parliament, constitute an impermissible modification of s.28(7) SA and are outwith the competence of the SP by virtue of s.29(2)(c) SA.

(C) The effect of ss.4-5 of the ECLSG Bill

82. Sections 4(1A) and 5(1) of the ECLSG Bill give rise to the same issue as ss.19 and 21 of the UNCRC Bill.

(1) Section 4 creates the same interpretative duty on the Scottish courts, modelled on s.3 HRA, to interpret legislation compatibly with the ECLSG so "*far as it is possible to do so*". Section 4(1A) defines legislation as including an "*Act*".
(2) Section 5 creates a power for the higher Scottish courts to make a declaration of incompatibility in respect of a "*provision of an Act*" which it considers to be incompatible with the ECLSG. Section 5 is also modelled on s.4 HRA, but unlike s.21 of the UNCRC Bill it applies to past and future Acts, and uses the language of a declaration of incompatibility rather than a declarator.
(3) Neither provision specifies what is meant by an "*Act*", but, as set out above, both the principles of statutory interpretation in Scots law and the documents

[4] E.g. *Gilham v Ministry of Justice* [2019] UKSC 44; [2019] 1 WLR 5905 at §39 *per* Lady Hale.

accompanying the ECLSG Bill make clear that it includes and was intended to include Acts of Parliament as well as ASPs.

83. Accordingly, precisely the same reasoning applies to ss.4(1A) and 5(1) in their application to Acts of Parliament as is set out above in relation to the UNCRC Bill generally, and ss.19 and 21 in particular. Sections 4(1A) and 5(1) both, in their application to Acts of Parliament, constitute an impermissible modification of s.28(7) SA and are outwith the competence of the SP by virtue of s.29(2)(c) SA.

(5) SECTION 6 OF THE UNCRC BILL

84. Section 6(1) of the UNCRC Bill imposes a significant and wide-ranging duty which makes it "*unlawful for a public authority to act in a way which is incompatible with the UNCRC requirements*". Section 6(3)(a)(iii) defines "*public authority*" as including "*any person certain of whose functions are functions of a public nature*". The only exceptions to that definition expressed in the Bill are: (i) the SP, (ii) a person carrying out functions in connections with proceedings in the SP, and (iii) where the person who has functions of a public nature carries out an act of a private nature: ss.6(3)(b) and (4).

85. As will be apparent, there is no attempt on the face of the UNCRC Bill to frame the application of s.6 by reference to any of the competence limits applicable to the Bill itself, or to acknowledge within the drafting of the Bill the existence of competence restrictions. Indeed, the express exclusion within s.6 of very specific contexts in which s.6 does not apply would, applying ordinary principles of interpretation (*expressio unius*), indicate that no other limits applied.

86. Section 6 is accordingly an example of highly generalised drafting within an ASP which, if read without s.101(2) SA, would plainly extend beyond the competence of the SP in various respects.

87. The Scottish Government acknowledged in the Policy Memorandum accompanying the UNCRC Bill that s.6 is to some extent outside the legislative competence of the SP on its face, this "*fall[ing] to be analysed on a case-by-case basis*" (§124). The solution posited in the Explanatory Notes is to use s.101(2) SA, with the result that in "*relation*

to both which bodies are captured and how those bodies exercise their functions, the duty applies only to the extent permissible within the limits of the Scottish Parliament's legislative competence" (§24). Neither the Policy Memorandum nor the Explanatory Notes clearly address why s.6 does not make express the competence limitations to its scope on the face of the Bill. The Scottish Ministers declined to introduce clarificatory amendments and the SP made no material amendments to the terms of s.6 during its passage.

88. The question is whether s.101(2) SA can be used to read s.6 of the Bill down so as to render it within competence. Even if it can, the Supreme Court's guidance on this question is necessary before the Bill becomes law because:

(1) The applicability of s.101 is not clear. There is limited authority on its scope. Given the breadth of s.6, there would be a considerable gap between its wording and its effect when read down.

(2) Guidance is needed for legal clarity. As the Scottish Government itself acknowledged in the Policy Memorandum, there is a "*need for the framework which the Bill puts in place to be clear and accessible to public authorities and children and young people in practice*": §88. Yet this is manifestly a standard not met in relation to s.6. When s.101(2) SA is applied, as the Scottish Government avers that it must be, s.6 does not mean what it says. There is no explanation on the face of the UNCRC Bill, or in any of the documents that accompanied its introduction in the SP, of when s.6 does not apply in accordance with its terms or how s.101(2) is applied on those occasions. Public authorities who carry out public functions which might be subject to s.6 cannot be expected to know the answers to those issues. Yet they face a risk of proceedings under s.7 of the UNCRC Bill, and claims for damages under s.8, if they get the answers wrong.

(3) Absent clarification from the Court, there is likely to be extensive litigation on how and when s.6 applies, much of it being at public expense and causing uncertainty and frustration for the children whom the UNCRC Bill is intended to protect, and those who represent them. Indeed, given the referral provisions contained in Part 5 of the UNCRC Bill, the Court would be likely to be faced with a multitude of cases under its new jurisdiction in which it is required to articulate the application of s.101(2) to s.6 in an array of contexts. It is plainly preferable,

and in the interests of justice, for as much clarity to be provided at the outset in the hope that future litigation, and the concomitant burdens on finite court resources, will be reduced accordingly.

89. Two particular respects in which s.6 is, or may be, outside competence on its face indicate the scale of the problem. The first is the reach of s.6 into reserved matters. The second is the effect of s.6 on the role of Parliament and its ability to make laws for Scotland.

Reserved matters

90. Section 6(1) purports to make it unlawful for a UK Minister, or indeed any other UK public authority, to act incompatibly with the UNCRC requirements when he carries out a public function including functions conferred by legislation that it would be outside the legislative competence of the SP to make. To that extent, it is outside the legislative competence of the SP for two main reasons.

91. First, it is outside legislative competence because it modifies the law on reserved matters contrary to section 29(2)(c) SA. Applying the established approach set out above, s.6 implicitly amends Acts of Parliament which concern reserved matters because it imposes a new duty on public authorities to act compatibly with the UNCRC requirements when they carry out the functions that the Acts confer on them. Likewise, it implicitly amends subordinate legislation made under those Acts. These modifications are not "*incidental"* or "*consequential"* provisions for the purposes of §3 of Schedule 4 to the SA: s.6 creates, and was intended to create, new legal duties effectively read into every other set of statutory functions which might relate to children and young people.

92. Secondly, s.6 also relates to some reserved matters contrary to s.29(2)(b) SA. Applying the similarly established approach to "*relates to*" set out above, the purpose of s.6 is to contribute (along with other provisions of the Bill) to the incorporation of each of the provisions of the scheduled UNCRC and its optional protocols into Scots law. That purpose is clear from:

(1) The documents that accompanied the UNCRC Bill on its introduction in the Scottish Parliament. The Policy Memorandum describes a "*maximalist*" approach

to incorporation (§§104-112), with the Bill being a "*legislative framework of duties and requirements incorporating the UNCRC and the first and second protocols into Scots law*": §113. As for the duty in s.6, "*The policy intention is for the duty to have a similar effect to the HRA by making it unlawful for public authorities to act incompatibly with those rights and obligations in the UNCRC and the first and second protocols that the Bill incorporates*": §116. See too the Explanatory Notes at §§5-6.

(2) An objective consideration of the effect of the terms of s.6. It gives each of the UNCRC requirements legal effect in Scotland against public authorities.

(3) The heading of s.6 in the Bill: "*Acts of public authorities to be compatible with the UNCRC Requirements*".

93. That purpose "*relates to*" a reserved matter insofar as incorporation of any of the UNCRC requirements has "*more than a loose or consequential connection*" with a reserved matter. This occurs in relation to s.6 in two ways. The first way is that some of the UNCRC requirements have a close connection with a reserved matter. To take some examples from the reserved matters listed above, there are close and direct connections between the incorporation of: (1) article 10 and the immigration and nationality reservation B6;[5] (2) article 26 and the social security schemes reservation F1;[6] (3) article 27(3) and the child support reservation F2;[7] and (4) article 38 and the reservations in §9(1)(a) and (b) of Schedule 5 Part I to the SA.[8] Those articles relate to reserved matters on their face, and their being given practical effect by s.6 means that s.6 itself relates to those reserved matters.

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[5] The article provides: "*A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents*". The reservation is for: "*Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens...*".

[6] The article provides: "*State parties shall recognize for every child the right to benefit from social security and shall take the necessary measures to achieve full realization of this right in accordance with their national law*". The reservation is for: "*Schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits*".

[7] The article provides: "*State parties...shall take appropriate measures to assist parents and others responsible for the child to implement [the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development]*". The reservation is for: "*The subject-matter of the Child Support Acts 1991 and 1995*".

[8] The article provides: "*State Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities*". The reservations are for: "*the defence of the realm*" and "*the naval, military or air forces of the Crown*".

94. The second way is the failure of s.6 to exclude particular bodies from its application, such that the exercise of their functions which may from time to time affect children and young people and may therefore be said to engage various of the UNCRC requirements, would be caught by s.6 and s.6 will therefore relate to the particular reserved matter. Two obvious examples are: (i) §1(1)(c) of Schedule 5 Part I, "*the Parliament of the United Kingdom*", and (ii) §§1(1)(a) and 2(4), the functions of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters. Even Parliament's legislative functions are not excluded by the UNCRC Bill, and so on a plain reading of s.6 the sovereign UK Parliament must act compatibly, as a matter of Scots law, when it considers passing legislation. (Yet the SP is not so bound, because it is expressly excluded.) Similarly, the security and intelligence agencies would in theory be required by s.6 to act compatibly with the UNCRC requirements in the exercise of all of their functions. The same point can be made for the reserved bodies as designated in §3 of Part III Schedule 5, or other public authorities which exercise wholly reserved functions. Whether or not directly intended by the SP, s.6 in this way relates to these further reserved matters.

The power of Parliament to make laws for Scotland

95. Section 6 is also outside the legislative competence of the SP on its face to the extent that it applies to Acts of Parliament (irrespective of whether their provisions would be within the legislative competence of the SP). That is because it modifies s.28(7) SA, contrary to s.29(2)(c).

96. Applying the approach to s.28(7) set out above, it renders the effect of an Act of Parliament conditional upon, or qualified by, by some action of a third party. It does so by making the lawfulness of the discharge of a function required or authorised by Parliament subject to a new condition relating to the manner – i.e. compatibility with the UNCRC requirements – in which the public authority discharges it, including where that legislation may be reserved. The imposition of that new condition that Parliament did not intend impermissibly qualifies Parliamentary sovereignty.

97. For all these reasons, s.6 is, on its face, outside the competence of the SP unless it can be read down so as to be within competence through the application of s.101(2) SA.

(6) THE APPROACH TO SECTION 101(2) SA

98. Section 101(2) SA cannot be used in a way that is inconsistent with an ASP's/a Bill's clear language or intention. But it can in principle, and depending on the legislative context, be used to read down the scope of a general provision so as to render within competence a provision which is otherwise capable of being read as being outside competence.

99. Section 101(2) provides that "*a provision is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly*". The interpretative tool provided by s.101(2) is accordingly limited to "*possible*" readings of the language in question.

100. Section 101 was inserted into the Scotland Bill as a new clause at the report stage in the House of Lords.[9] There are, as a result, no notes on the clause. The Explanatory Notes to the SA do, however, give some assistance as to what Parliament intended to be the scope of s.101(2):

> "*…The purpose of the section is to enable the courts to give effect to such legislation, wherever possible, rather than to invalidate it. It is intended to ensure that the courts will not invalidate such legislation merely because it could be read in such as a way as to make it outside competence, such as outside the legislative competence of the Parliament or the competence of Scottish Ministers…*
>
> *This section is intended to assist the courts by providing a statutory interpretative rule when they are construing such Scottish legislation. Arguably, it does no more than replicate the normal common law rule of construction which the courts should apply when construing legislation which might be ultra vires, namely to seek, so far as it is possible to do so, to give effect to that legislation rather than invalidate it. This is sometimes called the principle of efficacy.*
>
> *For example an ASP which purports to confer a power on the Scottish Ministers to hold a referendum on any matter could be read as enabling the Ministers to hold a referendum on independence or the Monarchy. Those are reserved matters and the ASP might therefore be read as relating to those reserved matters and therefore outside the*

[9] *Hansard*, H.L. Vol 594, col 98.

legislative competence of the Parliament under section 29(2)(b). Rather than invalidating the ASP (or invalidating it to the extent that it could be so read), this section would require the ASP to be read, if it is possible to do so, as conferring a power to hold a referendum only on matters within the competence of the Parliament. However, if a provision clearly cannot be read to be within competence, for example an ASP providing only for a referendum on independence, then the section will not allow it to be read as being within competence."[10]

101. The Explanatory Notes accordingly indicate that s.101(2) is intended to be capable of being used to read down general words which might otherwise have a meaning which would be outside competence. In other words, s.101(2) is there to address drafting which accidentally engages competence concerns ("*merely because it could be read in such as a way as to make it outside competence*", emphasis added). But the specific analogy drawn with common law principles of interpretation indicate that s.101(2) is not intended to be capable of being applied to language which is not ambiguous, or in a manner contrary to the intention of the SP, or that it is necessarily capable of fixing all drafting decisions which give rise to competence issues. Nor does it authorise the courts to engage in a process which would be tantamount to amendment of a legislative provision.

102. The proper approach to s.101(2) has not been the subject of extensive judicial consideration by this Court, or by the Judicial Committee prior to 2009. (Analogies with decisions from jurisdictions outside the UK are not generally considered useful when interpreting the devolution settlements: *Imperial Tobacco* at §13.[11]) Nonetheless, the following principles emerge from the jurisprudence.

103. First, the Court has emphasised the application of the reading down power to general words which are ambiguous and could otherwise be read as extending to matters outside competence in relation both to the equivalent s.154(2) of the Government of Wales Act 2006 and s.101(2).[12] As to the former, Lord Neuberger explained in *Byelaws Bill* at §64 that:

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[10] This note matches the Minister's statement in Parliament when he moved the amendment inserting the clause that because section 101: *Hansard*, HL, Vol 593, col 1953.

[11] In Canada, for example, reading down is one of the remedies that the Supreme Court has crafted for a law that is inconsistent with the Constitution: see *Attorney General of Ontario v G* 2020 SCC 38 at §§84, 107-108 and 112-116.

[12] There is no material difference between the provisions and there is no reasons to give the two provisions different meanings: c.f. *Medical Costs Bill* at §25.

"*It would not be permissible to invoke that statutory provision if it was inconsistent with the plain words of section 9. However, it would, in my view, be permissible to invoke it to limit the apparently unlimited and general effect of that briefly expressed section. Such an interpretation is consistent with the thrust of the Bill as a whole, and it does not conflict with any other provision in the Bill.*"

104. The Court took a similar approach in *Continuity Bill* at §77, where it held that s.101(2) "*requires the court to read section 36(2) narrowly so that the apparently general power of the Scottish Ministers to bring into force provisions of the Scottish Bill can be exercised in relation to section 33 only when it is competent to do so*".

105. However, it is plain that even general words cannot be read down using s.101(2) where this would be: inconsistent with the existing clear language of the ASP or Bill concerned, or conflict with any other provision of the ASP or Bill, or would be inconsistent with the general thrust of the ASP or Bill; see too the example given in the Explanatory Notes. These are all proper limits to s.101(2), which recognise that Parliament did not intend by s.101(2) to afford to the courts a legislative function.[13] Section 101 remains an interpretative tool only. In particular, to use s.101(2) to adopt an interpretation of an ASP or Bill which is contrary to the intention of the SP which passed it would, aside from ordinary constitutional objections, run counter to the emphasis of the SA on considering competence issues by reference to the purpose of the legislator: s.29(3).

106. Secondly, the limited application of s.101(2) indicates that its use is appropriate where – as the Explanatory Notes envisaged – the drafting of the challenged provision is capable of extending to a matter outside legislative competence, but the language is equally capable of applying (and applying only) to matters within legislative competence. For example:

    (1) In *Byelaws Bill* itself, the Measure referred could have been read as extending to types of local government functions which had not been devolved to the Welsh

[13] See, for the need to maintain the distinction between interpretation and legislation, emphasised in *Donoghue v Poplar Housing & Regeneration Community Association Ltd & Anor* [2001] EWCA Civ 595; [2002] QB 48 at §75 *per* Lord Woolf CJ (in the context of s.3 HRA).

Assembly (as it then was), but where there was no indication that the Measure had been intended to apply so far.

(2) In *Martin v Most*, Lord Rodger's judgment applied s.101(2) at §153 to read down the definition of "*relevant penalty provision*" in s.45(7) of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 to exclude provisions which were outside legislative competence.

(3) In *Anderson v Scottish Ministers* [2001] UKPC D5; 2002 SC (PC) 63, Lord Hope used s.101(2) to read the word "*public*" in s.1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 as meaning a 'section of the public' so as to ensure that the provision in question complied with Article 5 ECHR: at §§36-38. It is apparent from §37 that Lord Hope felt able to interpret "*public*" in that way because it had at least two potential natural meanings, and the narrower one could therefore be adopted to ensure that the provision remained within competence.

(4) In *Henderson v HMA* 2011 JC 96, the High Court of Justiciary used s.101(2) to read the broad power in s.210F of the Criminal Procedure (Scotland) Act 1995 creating a new order for lifelong restriction as not extending to certain convictions under the Firearms Act 1968 which fell outside competence: §10. The UK Law Officers note that the point was there conceded and was not the subject of detailed consideration.

107. Thirdly, s.101 cannot be used to address issues which arise from the legislative scheme. In *Christian Institute*, the Court concluded at §106 that s.101(2) could not be used to remedy the ECHR incompatibility of various provisions of the ASP there challenged (which was not in accordance with the law for the purposes of Article 8 ECHR). This appears to have been because the incompatibility arose from the scheme of the ASP as a whole, and did not arise from a problem which could be interpreted away in the light of that legislative scheme: see, e.g., §§82-85.

108. Fourthly, s.101(2) is not coterminous with s.3 HRA. Lord Hope explained in *DS v HM Advocate* [2007] UKPC D1; 2007 (SC) PC 1 at §§21-24 that the language and focus of the two provisions is different, and that where the competence issue is compatibility with the ECHR, s.3 HRA should be used rather than s.101(2) SA. This distinction between the two provisions is consistent with the terms of the Explanatory Notes; s.3 HRA clearly goes well beyond common law principles of interpretation. (Lord Hope had used s.101

rather than s.3 HRA in *Anderson*, but the approach in *DS* was repeated with approval in *Salvesen & Riddell v Lord Advocate* [2013] UKSC 22; 2013 SC (UKSC) 236 at §46. In any event, the language in issue in *Anderson* was ambiguous and so it could have made no difference whether s.3 HRA or s.101(2) was used.)

109. Finally, there may be a tension between the application of s.101(2) to general legislative language and the need for the law to be accessible, clear and certainty. The greater the degree to which s.101(2) is 'leant upon' by the SP to render overbroad general provisions it has enacted within competence, when their natural meaning is not so limited and the legislation itself makes no reference to competence limits, the greater the degree of uncertainty the ordinary person has as to what the law actually is. The legal uncertainty created will inevitably result in otherwise avoidable litigation.

(7) THE APPLICATION OF SECTION 101(2) OF THE SA

(A) Sections 19-21 of the UNCRC Bill

110. As set out above, ss.19-21 of the UNCRC Bill are outside the legislative competence of the SP on their face to the extent that they apply to Acts of Parliament. In each case, they apply specifically to Acts of Parliament, as distinct from ASPs.

111. Section 19(2) specifies the legislation to which the duty in s.19(1) applies. Section 19(2)(a)(ii) specifies, "*an Act of Parliament*". Since s.19(2)(a)(i) specifies "*An Act of the Scottish Parliament*", "*Parliament*" in s.19(2)(a)(ii) means the United Kingdom Parliament. It is impossible to read s.19(2)(a)(ii) down to exclude that Parliament because to do so would empty the provision of content. The same is true of ss.20(10)(a)(ii) and 21(5)(b)(ii). Each specifies only "*An Act of Parliament*" as legislation to which the court's power applies and is preceded by a provision specifying "*An Act of the Scottish Parliament*". Section 101(2) does not extend to the deletion of entire subsections of a Bill.

(B) Section 6 of the UNCRC Bill

112. Section 6 of the UNCRC Bill is outside the legislative competence of the SP on its face to the extent that s.6(1) applies to functions conferred by a provision that it would be outside the legislative competence of the SP to put in an ASP. Plainly, s.6 is drafted using general words which can be interpreted to extend to contexts which are outside legislative competence, but could also be interpreted narrowly so as only to apply to contexts which are within legislative competence.

113. It may be possible to read down the general words of s.6 to exclude those functions which engage competence limits, consistently with the approach set out in *Byelaws Bill* and the other jurisprudence discussed above. That would involve (at least) conclusions that:

(1) The problem of s.6 relating to and modifying the law on reserved matters can be solved by interpreting s.6 as not applying to functions that it would be outside the legislative competence of the SP to confer.
(2) The problem of s.6 adding conditions to the legal effect of Acts of Parliament can be solved by interpreting s.6 as not applying to functions conferred by such Acts.
(3) To do so would not conflict with the language of the UNCRC Bill. Nor would it defeat the Bill's thrust or intention: on the contrary, the accompanying documents set out above indicate that the SP was aware that the language of s.6 would have an effect extending outside its legislative competence and required and intended s.101(2) SA to apply so as to render s.6 within competence (but without seeking to draft s.6 to make that position clear on its face).

114. Even if s.101(2) solves the legislative competence problems in s.6 of the Bill, it cannot address the legal clarity issue its very use gives rise to. Given the breadth of s.6, it is impossible to identify *ab ante* every function to which it does not apply. Indeed, in the Policy Memorandum and the Explanatory Notes, the Scottish Government did not identify any at all. Even if, say, the Court were to make it clear on this reference that s.6(1) does not apply to functions that it would be outside the legislative competence of the SP to confer, a grasp of those limits on legislative competence will still be required for a proper understanding of s.6's reach. For many of the intended readers of s.6, the requirement is unrealistic.

(C) Sections 4-5 of the ECLSG Bill

115. Sections 4-5 of the ECLSG Bill are outside the legislative competence of the SP on their face to the extent that they apply to Acts of Parliament. Sections 4(1A) and 5(1) apply the duty in s.4(1) and the power in s.5(2) to an "*Act*", a word that is not defined in the Bill. It is impossible to exclude Acts of Parliament from the meaning of the word, by use of s.101(2) or otherwise.

116. First, to do so would be incompatible with the intention of the SP when enacting the ECLSG Bill. That is clear from the documents that accompanied the Bill on its introduction in the SP quoted in §§51-52 above: the Policy Memorandum states that "*Acts of the UK Parliament*" can be "*challenged through the courts*" under the Bill (§66); and the Explanatory Notes expressly state that the duty in s.4 applies to "*an Act of the UK or Scottish Parliament*" (§11). The Policy Memorandum (§§74 - 75) and the Explanatory Notes (§17) also state that ss.4 and 5 apply to all legislation that is "*within the legislative competence of the Scottish Parliament*". It is clear beyond doubt that the SP intended the word "*Act*" in ss.4 and 5 to include both ASPs and Acts of Parliament. To interpret the ECLSG Bill otherwise would be contrary to that clear intention.

117. Secondly, the restriction of the "*Act"* to an ASP would be contrary to the clear meaning of the word read in context:

(1) Read with Schedule 1, s.25(1) of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that the word "*Act*" in an ASP "*means, as the context requires, an Act of Parliament or an Act of the Scottish Parliament*".

(2) Section 2(2)(b) shows that when the SP intended to refer in the Bill only to an ASP it used the phrase "*Act of the Scottish Parliament*".

(3) If "*Act*" referred only to an ASP, the "*within the legislative competence of the Scottish Parliament*" proviso attached to the word in ss.4(1A) and 5(7) would be superfluous: a provision of an ASP that is outside legislative competence does not require to be assessed for compatibility with the Charter Articles because it is not law (s.29(1) SA).

118. Accordingly, s.101(2) cannot be used to render ss.4 or 5 of the ECLSG Bill within competence. It would be inconsistent with the thrust and intention of the provisions and

the Bill as a whole; it would conflict with s.2(2)(b); and it would be inconsistent with the plain words of ss.4 and 5 themselves.

(8) CONCLUSION

119. It is submitted that the answers to the questions referred are that the referred provisions are, save for s.6 of the UNCRC Bill, outside the legislative competence of the SP for the following amongst other **REASONS**:

(1) Section 19(2)(a)(ii) of the UNCRC Bill is not law because it modifies s.28(7) SA as prohibited by §4(1) of Schedule 4, and is therefore outside competence by virtue of s.29(2)(c) SA;

(2) Section 20(10)(a)(ii) of the UNCRC Bill is not law because it modifies s.28(7) SA as prohibited by §4(1) of Schedule 4, and is therefore outside competence by virtue of s.29(2)(c) SA;

(3) Section 21(5)(b)(ii) of the UNCRC Bill is not law because it modifies s.28(7) SA as prohibited by §4(1) of Schedule 4, and is therefore outside competence by virtue of s.29(2)(c) SA;

(4) Section 4(1A) of the ECLSG Bill is not law insofar as it applies to Acts of Parliament because it modifies s.28(7) SA as prohibited by §4(1) of Schedule 4, and is therefore outside competence by virtue of s.29(2)(c) SA;

(5) Section 5(1) of the ECLSG Bill is not law insofar as it applies to Acts of Parliament because it modifies s.28(7) SA as prohibited by §4(1) of Schedule 4, and is therefore outside competence by virtue of s.29(2)(c) SA;

120. Section 6 of the UNCRC Bill:

(1) Would constitute a modification in breach of the restriction in §2(1) of Schedule 4, falling under s.29(2)(c) SA; and/or

(2) Would relate to various reserved matters set out in Schedule 5, falling under s.29(2)(b) SA; and/or

(3) Would constitute a modification of s.28(7) SA in breach of the restriction in §4(1) of Schedule 4, falling under s.29(2)(c) SA; and

(4) It is for the Court to decide if it can be read down using s.101(2) SA so as to render it within competence.

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