**UKSC 2021/0079 and 2021/0080**

**IN THE SUPREME COURT OF THE UNITED KINGDOM**

**IN THE MATTER OF**

**A REFERENCE BY HER MAJESTY'S ATTORNEY GENERAL AND HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND**

**UNDER SECTION 33(1) OF THE SCOTLAND ACT 1998**

**IN RELATION TO**

**(FIRST) THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (INCORPORATION) (SCOTLAND) BILL AND (SECOND) THE EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT (INCORPORATION) (SCOTLAND) BILL**

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# WRITTEN CASE FOR THE LORD ADVOCATE

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## PART 1: INTRODUCTION

1. This is the written case for the Lord Advocate in the References by the Attorney General and the Advocate General for Scotland (the "**UK Law Officers**") under section 33(1) of the Scotland Act 1998 ("**SA**") in relation to the legislative competence of specific provisions of (a) the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (the "**UNCRC Bill**"); and (b) the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (the "**ECLSG Bill**"). The UNCRC Bill was introduced on 1 September 2020 and was passed unanimously by the Scottish Parliament on 16 March 2021. The ECLSG Bill was introduced on 5 May 2020 and was passed unanimously by the Scottish Parliament on 23 March 2021. For the reasons set out in this Case, the Lord Advocate invites the Court to answer the questions set out in each Reference (at §§54-55 and §48, respectively) by finding that the impugned provisions are within the legislative competence of the Scottish Parliament.

### *(i) The Bills*

2. The UNCRC Bill incorporates certain provisions or aspects of provisions of the UN Convention on the Rights of the Child ("**UNCRC**") into Scots law (as the "UNCRC requirements": s.1(2)). It imposes a compliance duty on public authorities (s.6) as regards the UNCRC requirements and makes provision for the enforcement of those requirements in courts and tribunals (s.7). An interpretative obligation is imposed as regards specified legislation (s.19) and various remedies are provided for where that legislation is found to be incompatible with the UNCRC requirements, including, as regards the Court of Session, the High Court of Justiciary, and this Court, the making of an incompatibility declarator (where the legislation is future legislation, as defined) (s.21) and a "strike down" declarator (where the legislation is, read short, past primary legislation or secondary legislation made under it) (s.20). The full text of the UNCRC and its Optional Protocols, with those parts which are not incorporated by the UNCRC Bill shown by striking through, is produced in the Appendix.

3. The ECLSG Bill incorporates, to a more limited extent, certain articles of the European Charter of Local Self-Government (the "Charter Articles": s 1(1) and the Schedule). It imposes a duty on the Scottish Ministers to act compatibly with the Charter Articles in

the exercise of their functions (s.2); an interpretative obligation as regards specified legislation (s.4); and provides for the making of a declaration of incompatibility (s.5) where the Court of Session or this Court considers that a provision of specified legislation is incompatible with the Charter Articles. The main differences between the UNCRC Bill and the ECLSG Bill, other than the substantive content of the Treaties which they incorporate, are: (i) the absence in the ECLSG Bill of a general compliance duty on public authorities (the Charter being concerned with how the state manages its relationship with local government); and (ii) the type of declaratory relief available in cases of incompatibility.

*(ii) The questions posed by the UK Law Officers*

4. Four questions have been referred to the Court in respect of the UNCRC Bill. Those questions raise two distinct issues. The first three questions[1] ask whether the interpretative obligation in section 19, and the related remedies in sections 20-21 for legislation that cannot be read and given effect to in accordance with section 19, modify section 28(7) SA. The fourth question[2] asks whether the requirement imposed upon public authorities by section 6 to act in a manner that is compatible with the UNCRC requirements: (a) is a modification of paragraph 2(1) of Schedule 4 SA; and/or (b) relates to various reserved matters set out in Schedule 5 SA; and/or (c) is a modification of section 28(7) SA; and (d) cannot be read down using section 101(2) SA so as to render it within competence.

5. Two questions have been referred to the Court in respect of the ECLSG Bill. They are broadly similar to the first issue raised in relation to the UNCRC Bill. The first question asks whether the interpretative obligation in section 4(1A) is a modification of section 28(7) SA that cannot be read down using section 101(2) SA so as to render it within competence. The second question asks whether the declaration of incompatibility procedure in section 5(1) is a modification of section 28(7) SA that cannot be read down using section 101(2) SA so as to render it within competence.

[1] UNCRC Reference, §54.

[2] UNCRC Reference, §55.

*(iii) Summary of the Lord Advocate's submission*

6. In summary, the Lord Advocate's submission is that: (i) section 28(7) SA is a declaratory provision which reflects the underlying legal proposition that, notwithstanding the establishment of the Scottish Parliament, the UK Parliament may, as a matter of law, make or unmake any law for Scotland; (ii) on a proper reading none of the impugned provisions in either Bill modifies section 28(7) SA; (iii) section 6 of the UNCRC Bill does not relate to a reserved matter; nor does it modify section 28(7) SA contrary to paragraph 2(1) of Schedule 4 SA; (iv) insofar as the application of section 6 of the UNCRC Bill would, in particular circumstances, be beyond the legislative competence of the Scottish Parliament, the provision falls to be "read down", first by reason of the structural limits which the Scotland Act 1998 places on the legislative competence of the Scottish Parliament and, in any event, as required by section 101(2) SA.

## PART 2: CONSTITUTIONAL FRAMEWORK

### (A) The Scotland Act 1998

*(i) The constitutional function of the Court*

7. The constitutional function of the Court when its jurisdiction is invoked in a Reference under section 33 SA was explained by the Court in ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill***:

> "*It is not the role of this court to form or express any view on those questions of policy, which are the responsibility of our elected representatives and in which the wider civil society has an interest. Our role is simply to determine as a matter of law whether and to what extent the Scottish Bill would be within the legislative competence of the Scottish Parliament. That question is answered, as we explain below, by analysing the provisions of the Scotland Act.*"[3]

[3] ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64; 2019 SC (UKSC) 13 at §11. See also: ***Imperial Tobacco Ltd v Lord Advocate*** [2012] UKSC 61; 2013 SC (UKSC) 153 at §13; and ***In re Medical Costs for Asbestos Diseases (Wales) Bill*** [2015] AC 1016

8. The decisions to incorporate the UNCRC and the ECLSG into Scots law by way of the UNCRC and ECLSG Bills were decisions for the Scottish Parliament, subject only to the limits on its legislative competence set out in the SA. On both Bills the decision of the Parliament was unanimous. The UK Law Officers do not challenge the competence of the Scottish Parliament to incorporate these Treaties into Scots law. The only question for this Court is whether, in effecting that incorporation, the Bills or either of them infringe the limits on the Scottish Parliament's legislative competence set out in the SA for one or more of the reasons identified by the UK Law Officers in the Reference.[4] As Lord Hope observed in ***Attorney General v National Assembly for Wales Commission***:

> "[T]*he 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.*"[5]

*(ii) The Devolution Settlement*

9. The SA fundamentally altered the constitutional structure of the United Kingdom.[6] It constituted the Scottish Parliament as a democratically elected legislature[7] from among whose members Scottish Ministers are drawn to form (with the Scottish Law Officers) the Scottish Government and to which those Ministers and Law Officers are

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at p 1034 §32 (Lord Mance: "Either the Welsh Assembly has competence to do what it proposes or it does not").

[4] ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64; 2019 SC (UKSC) 13 at §86: "The remit of this court under section 33 of the Scotland Act to scrutinise Bills of the Scottish Parliament does not extend to addressing arguments which are either complaints about the quality of the drafting of a Bill or seek to raise uncertainties about the application of a Bill's provisions in future circumstances which may or may not arise and which, should they occur, may require amending legislation."

[5] ***Attorney General v National Assembly for Wales Commission*** [2012] UKSC 53, [2013] 1 AC 792 at §80 (Lord Hope of Craighead).

[6] ***BH v Lord Advocate*** [2012] UKSC 24, 2012 SC (UKSC) 308 at §30 (Lord Hope of Craighead).

[7] SA, ss.1-12.

accountable.[8] The Scottish Parliament and the Scottish Government are declared to be a permanent part of the constitutional arrangements of the United Kingdom.[9]

10. As Lord Reed expressed it in ***AXA General Insurance Company Ltd v Lord Advocate***:

> *"As a result of the Scotland Act, there are thus two institutions with the power to make laws for Scotland: the Scottish Parliament and, as is recognised in sec 28(7), the Parliament of the United Kingdom."*[10]

11. The Scottish Parliament has the power to make laws which have the same effect as Acts of the UK Parliament.[11] It may, within the limits of its legislative competence, legislate so as to amend or repeal, in whole or in part, Acts of the UK Parliament so far as applying to Scotland, whenever those Acts were passed.[12] Where an Act of the Scottish Parliament ("**ASP**") is clearly inconsistent with an earlier provision in an Act of the UK Parliament, the ASP will prevail by virtue of the doctrine of implied repeal.[13] When legislating within its competence, the Scottish Parliament, like the UK Parliament, enjoys plenary powers which do not require to be exercised for any specific purpose or with regard to any specific considerations.[14] An ASP, enacted within the limits of legislative competence, enjoys the highest legal authority.[15]

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[8] SA, ss.44-49.

[9] SA, s.63A.

[10] ***AXA General Insurance Company Ltd v Lord Advocate*** [2011] UKSC 46, 2012 SC (UKSC) 122 at §146.

[11] Cp. ***AXA General Insurance Company Ltd v Lord Advocate*** [2011] UKSC 46, 2012 SC (UKSC) 122 at §§45-46 (Lord Hope of Craighead).

[12] ***AXA General Insurance Company Ltd v Lord Advocate*** [2011] UKSC 46; 2012 SC (UKSC) 122 at §145 (Lord Reed).

[13] Although there is a strong presumption against implied repeal: ***BH v Lord Advocate*** [2012] UKSC 24, 2012 SC (UKSC) 308 at §30 (Lord Hope of Craighead).

[14] ***AXA General Insurance Company Ltd v Lord Advocate*** [2011] UKSC 46, 2012 SC (UKSC) 122 at §§147 (Lord Reed).

[15] ***AXA General Insurance Company Ltd v Lord Advocate*** [2011] UKSC 46, 2012 SC (UKSC) 122 at §§45-46 (Lord Hope of Craighead).

12. The permanence of the constitutional structure introduced by the SA was declared by the Scotland Act 2016 which inserted a new section 63A SA. Section 63A SA provides:

> *"(1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements.*
>
> *(2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government.*
>
> *(3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum."*

13. The Scotland Act 2016 also inserted a new section 28(8) after the original section 28(7) SA. Section 28 SA now provides *inter alia*:

> *"(1) Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament.*
>
> *...*
>
> *(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.*[16]
>
> *(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."*

[16] The comparable provision in section 75 of the Government of Ireland Act 1920 was drafted in much broader terms: "Notwithstanding [the establishment of the Parliaments of Southern and Northern Ireland, or the Parliament of Ireland, or] anything contained in this Act, the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters, and things in Ireland and every part thereof." The section was headed: "Saving for supreme authority of the Parliament of the United Kingdom." The words in square brackets were removed on the abolition of the Northern Ireland Parliament in 1973. Practically identical provision was made by section 1(2) of the Government of Ireland Act 1914; whereas section 4(4) of the Northern Ireland Constitution Act 1973 used the same formula as s28(7) SA.

14. Section 28(8) is a statutory recognition of the constitutional convention established since 1999, which recognises that the Scottish Parliament normally has legislative primacy with regard to devolved matters. Not only may the Scottish Parliament legislate with regard to such matters (provided it respects the other limits on its competence, in particular the restrictions in Schedule 4 SA), but it is recognised that the decision of the Scottish Parliament to consent to, or to withhold consent from, legislation in the UK Parliament in respect of such matters will normally be respected. Central to the constitutional arrangements established by the SA is, accordingly, an allocation of policy responsibilities. Policy responsibility for reserved matters (identified in Schedule 5 SA), including in respect of Scotland, lies with the UK Government[17]; and sole legislative competence for such matters lies with the UK Parliament. Policy responsibility as regards Scotland otherwise rests with the Scottish Government[18], which is accountable to the Scottish Parliament. The Scottish Parliament has legislative competence in respect of such non-reserved matters, and, as a matter of constitutional propriety, the UK Parliament will not normally legislate on such matters without the consent of the Scottish Parliament.

[17] ***Martin v Most*** [2010] UKSC 10, 2010 SC (UKSC) 40 at §74 (Lord Rodger of Earlsferry).

[18] Section 53 SA transferred statutory, prerogative and other executive functions so far as exercisable within devolved competence (which is equiparated in section 54 SA with the legislative competence of the Scottish Parliament) from Ministers of the Crown to the Scottish Ministers. That transfer of powers means that Scottish Ministers generally have *exclusive* executive competence for Scotland in relation to non-reserved matters; and Ministers of the Crown generally have no executive competence for Scotland in relation to such matters. The legal responsibility, and political accountability, for the exercise of non-reserved policy matters accordingly rests with Scottish Ministers. As a consequence of section 53, the House of Commons passed a resolution on 25 October 1999 providing that "questions may not be tabled on matters for which responsibility has been devolved by legislation to the Scottish Parliament or the National Assembly of Wales" except in certain particular circumstances: see *Erskine May* (25th edn. 2019) at §11.13 headed "The self-denying ordinance". It should be noted that the Scottish Ministers, like other Scottish public authorities, also have statutory functions in reserved areas, and, to that extent, their functions go beyond the legislative competence of the Scottish Parliament.

*(iii) Legislative Competence*

15. The limits of the legislative competence of the Scottish Parliament are set out in section 29 SA.[19] Section 29 provides (emphasis added):

> "*(1) An Act of the Scottish Parliament is not law* ***so far as*** *any provision of the Act is outside the legislative competence of the Parliament.*
>
> *(2) A provision is outside that competence* ***so far as*** *any of the following paragraphs apply –*
>
> *(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,*
>
> *(b) it relates to reserved matters,*
>
> *(c) it is in breach of the restrictions in Schedule 4,*
>
> *(d) it is incompatible with any of the Convention rights or in breach of the restrictions in section 30A(1),*
>
> *(e) would remove the Lord Advocate from his position as head of the system of criminal prosecution and investigation of deaths in Scotland.*
>
> *(3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.*
>
> *(4) A provision which –*
>
> *(a) would otherwise not relate to reserved matters, but*
>
> *(b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters,*

[19] There are common law limits to the legislative competence of the Scottish Parliament: ***AXA General Insurance Company Ltd v Lord Advocate*** [2011] UKSC 46, 2012 SC (UKSC) 122 at §153 (Lord Reed). Those limits do not arise in the context of a reference under section 33 SA: ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64, 2019 SC (UKSC) 13 at §26.

*is to be treated as relating to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters or otherwise.*

*(5) Subsection (1) is subject to section 30(6).*"

16. The words "so far as", emphasised in subsection (1) and (2) above, are of considerable significance. It is only so far as a provision is outside legislative competence that it will not be law. A number of points are worth making at this stage. First, it follows from the structure of the devolution arrangements that all legislation of the Scottish Parliament falls to be read and applied subject to the limits on legislative competence set out in section 29. Second, section 29 SA specifically envisages that, in legislating, the Scottish Parliament might make provision which, applied in accordance with its terms, could extend beyond the competence of the Parliament. Third, the UK Parliament has specifically mandated, in section 29 that such a provision is *to that extent* (but no further) not law. Fourth, it follows from the terms of section 29 itself (and regardless of the interpretative obligation in section 101 SA) that a provision which is overbroad must be "read down" to apply only within the legislative competence of the Parliament. Fifth, it also follows that it is not necessary for drafters to "copy out" all of the limits on legislative competence into every Bill. To do this would not only, in light of the terms of section 29, be otiose but would add considerably to the complexity of legislation.

Section 29(2)(b)

17. "Reserved matters" are defined in Schedule 5 SA: s.30(1). Determining whether the restriction in section 29(2)(b) applies requires, first, an understanding of the scope of the matter which is reserved, before considering, second, and by reference to the purpose of the provisions under challenge (having regard among other things to the effect of those provisions in all the circumstances), whether those provisions "relate to" the reserved matter in question.[20] The purpose of an enactment for this purpose may extend beyond

[20] ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64, 2019 SC (UKSC) 13 at §27 citing ***Imperial Tobacco v Lord Advocate*** [2012] UKSC 61, 2013 SC (UKSC) 153 at §26 (Lord Hope).

its legal effect, but it is not (necessarily) the same thing as its political motivation.[21] It has been observed that in order for a provision to 'relate to' a reserved matter, a provision must have "*more than a loose or consequential connection*" with it[22] although that phrase should not be treated as if it supplanted or is definitive of the statutory tests set out in the SA itself.[23]

Section 29(2)(c)

18. The restrictions in Schedule 4 SA comprise a series of prohibitions on the modification of certain listed enactments[24] and of "the law on reserved matters", defined in paragraph 2(2) of Schedule 4 to include "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". In terms of paragraph 3 of Schedule 4 SA the protection against modification of the law on reserved matters found in paragraph 2 of Schedule 4 SA 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."*

[21] ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64, 2019 SC (UKSC) 13 at §27.

[22] ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64, 2019 SC (UKSC) 13 at §27, citing ***Martin v Most*** 2010 UKSC 10, 2010 SC (UKSC) 40 at §49 (Lord Walker).

[23] In particular, whilst a provision which does not have more than a loose or consequential connection with a reserved matter is unlikely, on an application of the statutory "purpose" test, to relate to that reserved matter, it does not follow that a provision which has more than a loose or consequential connection with a reserved matter will necessarily, on an application of the statutory "purpose" test, relate to that matter.

[24] Including, subject to certain exceptions which are not relevant, the SA itself: §4 of Sch 4.

19. The Scottish Parliament is not prevented, by virtue of the restriction in section 29(2)(c), from making additional provision in the same field of law as a protected enactment, provided it does not modify it.[25] To modify includes to amend or repeal[26], and it includes implicit amendment, disapplication or repeal, in whole or in part.[27] In ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill***, the Supreme Court said this on the issue of modification:

> "*Without attempting an exhaustive definition, 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.*"[28]

20. The Lord Advocate's position is that, in order to constitute a modification for these purposes, any conflict between a protected enactment and a later one requires to be an actual conflict in operation, such as where "compliance with one is defiance of the other".[29] Otherwise, the distinction between Schedules 4 and 5, which was emphasised by this Court in ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** would be lost.

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[25] ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64, 2019 SC (UKSC) 13 at §51.

[26] SA, s.126(1).

[27] Ibid.

[28] ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64, 2019 SC (UKSC) 13 at §51.

[29] See ***Multiple Access Ltd v McCutcheon*** [1982] 2 SCR 161 at 191 (Dickson CJ).

*(iv) Section 28(7) SA*

21. Section 28(7) SA provides:

> *"This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland."*

For the reasons discussed further below, this provision is declaratory of the legal rule which would apply, in any event – namely that the UK Parliament retains, as a matter of law, the power to make laws for Scotland, even if that power is, as a matter of constitutional propriety, constrained as set out in section 28(8).

22. In the ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill***, the Supreme Court held that section 17 of that Bill would modify section 28(7) SA. Section 17 provided that certain subordinate legislation made by a Minister of the Crown under a future Act of the UK Parliament was "*of no effect*" unless the Scottish Ministers granted consent to the instrument before it was made. The Supreme Court was concerned that making the operation of subordinate legislation made by a Minister of the Crown under an Act of the UK Parliament conditional upon the consent of the Scottish Ministers would limit the UK Parliament's power 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*"[30] and that section 17 of the Bill was tantamount to implicitly amending section 28(7) SA. On the other hand, the Court did not consider that section 17 impinged upon the sovereignty of Parliament: see paragraph 63 of the judgment. At paragraph 61, the Court observed that the reservation in paragraph 1(c) in Part I of Schedule 5 SA, which encompassed the sovereignty of Parliament *"cannot have been intended, ordinarily at least, to protect legislation enacted by Parliament from the effects of legislation passed by the Scottish Parliament, since that purpose is effected by other provisions of the Scotland Act, which reserve matters to the UK Parliament and*

[30] ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64, 2019 SC (UKSC) 13 at §52.

*thereby prevent the Scottish Parliament from legislating on those matters, or which protect enactments made by the UK Parliament from modification by legislation passed by the Scottish Parliament."*

23. Neither of the Bills that have been referred by the Law Officers in these References contains any provision akin to section 17 of the Legal Continuity Bill. Section 19 of the UNCRC Bill is concerned only with the interpretation of provisions which it would be within the power of the Scottish Parliament to repeal or amend. The "strike down" declarator that may be made under section 20 of the UNCRC Bill is concerned only with pre-existing legislative provisions which it would be within the power of the Scottish Parliament to repeal or amend; it establishes, in effect, a statutory regime to regulate and constrain the impact of the doctrine of implied repeal as regards such provisions. The incompatibility declarator that may be made under section 21 of the UNCRC Bill has no effect on the validity of any such enactment. Nonetheless, supposed modification of section 28(7) SA features prominently in the UK Law Officers' case. For the reasons discussed below, the Lord Advocate maintains that section 28(7) SA does not have the effect contended for by the UK Law Officers.

*(v) Interpretation of SA*

24. The rules in the SA which govern the question of competence are to be interpreted in the same way as any other rules that are found in a UK statute.[31] The aim of the SA to achieve a constitutional settlement by way of a coherent, stable and workable scheme is achieved by interpreting the rules of the SA according to the ordinary meaning of the words used.[32] Guidance has been given by the Court in a number of cases over the last decade. That guidance was drawn together and summarised by the Court in ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill***:

> "*The powers of the Scottish Parliament, like those of Parliaments in many other constitutional democracies, are delimited by law. The Scottish Parliament is a*

[31] ***Imperial Tobacco Ltd v Lord Advocate*** [2012] UKSC 61, 2013 SC (UKSC) 153 at §14 (Lord Hope)

[32] ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64, 2019 SC (UKSC) 13 at §12

*democratically elected legislature with a mandate to make laws for the people of 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 sec 29 of and schs 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 (Scotland Act, sec 28(7)). 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.*"[33]

25. The principles of interpretation to be applied in determining whether a provision of a Bill passed by the Scottish Parliament is within its legislative competence are, as the UK Law Officers observe, broadly settled. On the specific point of presumption, mentioned at paragraph 15 of the UK Law Officers' Case, while there is no presumption of competence it should be noted that at paragraph 15 in ***Imperial Tobacco v Lord Advocate*** to which the UK Law Officers refer, Lord Hope was not considering the specific issue of overbreadth, which is addressed by the phrase "so far as" in sections 29(1) and (2), or the application of section 101 SA which ensures that when it is possible to read a provision as within legislative competence, it will be so read and therefore its lawfulness will be upheld.

[33] ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64, 2019 SC (UKSC) 13 at §12. The cases from which those propositions are derived are set out at §13.

## (B) Parliamentary Sovereignty

### *(i) Introduction*

26. At various points in their case, the UK Law Officers assert that the UK Parliament's sovereignty[34] is challenged or otherwise threatened by the Bills that have been referred to the Court.[35] For the reasons explained below, this is incorrect,

27. Dicey's articulation of the principle of Parliamentary sovereignty is almost too well known to bear citation:

> "*The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament … has … the right to make or unmake any law whatever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament.*"[36]

28. The enactment of the devolution statutes and the Human Rights Act 1998, along with increased recognition of constitutional and fundamental rights, have in some respects tempered this formulation. Thus, the second part of Dicey's principle is qualified, in the context of devolution, by the legislative competence granted by the UK Parliament itself to the devolved legislatures to make laws, including by amending and repealing legislation of the UK Parliament. The first part of the principle is reflected in section 28(7) SA, which is essentially declaratory of the proposition that the UK Parliament retains an unlimited legal competence to legislate for Scotland. That legal competence has always been subject to practical limitations, as Dicey himself acknowledged.[37] Those limits now include the constitutional convention recognised by the UK Parliament itself in section 28(8) SA.

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[34] Which was endorsed by this Court in ***R (Miller) v Secretary of State for Exiting the European Union*** [2017] UKSC 5, [2018] AC 61 at §43.

[35] UK Law Officers' Case at §§4, 58, 70, 75 and 79.

[36] A.V. Dicey, *The Law of the Constitution*, 10th ed., pp.39-40.

[37] See footnote 62.

*(ii) Implied Repeal*

29. As a necessary consequence of the first part of Dicey's formulation, the UK Parliament cannot bind the hands of future Parliaments.[38] Where the provisions of an Act of Parliament are inconsistent with the provisions of an earlier Act, the earlier provisions may be impliedly repealed by the later. The doctrine of implied repeal preserves Parliament's continuing sovereignty. Implied repeal is the exception, not the rule and there is a presumption against it.[39] The effect of that presumption is simply that the courts should, where possible, interpret the provisions of a later Act in a way that is compatible with the earlier one.[40]

*(iii) Section 28(7) SA*

30. It is a consequence of the first part of Dicey's formulation that nothing in the SA could limit the legal power of the UK Parliament to legislate for Scotland. Section 28(7) reflects the legal rule (which is a feature of the sovereignty of the UK Parliament) that, notwithstanding the enactment of the SA, the UK Parliament retains the legal power to make or unmake any law for Scotland. The UK Law Officers are correct at paragraph 52 to describe section 28(7) as an "*encapsulation*" of that fundamental rule. Put another way, it is a declaratory provision.[41] As this Court has noted:

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[38] ***Ellen Street Estates Limited v Minister of Health*** [1934] 1 KB 590 at p 597 (Maugham LJ). More recently: ***R (on the application of Jackson) v Attorney General*** [2005] UKHL 56, [2006] 1 AC 262 at §113 (Lord Hope of Craighead). See also: *Craies on Legislation*, 12th ed., §14.4.4 and *Bennion et al on Statutory Interpretation*, 8th ed., §8.9. The theory of Parliamentary sovereignty is based on the absence of *legal* limitations on Parliament's power. In reality, there are practical and political limits, as observed by the Lord Chancellor, Lord Sankey in ***British Coal Corporation v The King*** [1935] AC 500 at p 520. The UK Parliament can of course bind future Scottish Parliaments if it so chooses, but subject to (i) the convention that Parliament will not normally amend the SA without the consent of the Scottish Parliament and (ii) the political consequences of limiting the power of future Scottish Parliaments without first obtaining such consent.

[39] ***BH v Lord Advocate*** [2012] UKSC 24, 2012 SC (UKSC) 308 at §30 (per Lord Hope of Craighead).

[40] *Bennion et al on Statutory Interpretation*, 8th ed., §8.9.

[41] Or a "recognition" of the UK Parliament's sovereignty, as Lord Reed put it in ***AXA General Insurance Company Ltd v Lord Advocate*** [2011] UKSC 46, 2012 SC (UKSC) 122 at §146. The UK

"*That provision makes it 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.*"[42]

31. As that observation makes clear, all that section 28(7) SA recognises is that the UK Parliament's power to make laws for Scotland is "*undiminished*". In other words, the UK Parliament has exactly the same legal powers which it had immediately prior to the enactment of the SA. Nothing in the SA changed those powers. The Lord Advocate's position is that section 28(7) SA has no additional or separate content beyond the principle that, as a matter of law (whatever may be the position as a matter of constitutional propriety), the UK Parliament retains unlimited legislative competence to legislate for Scotland. There is nothing controversial about regarding section 28(7) being no more than declaratory. The SA contains a number of provisions which are declaratory.[43] The purpose of the declaration in section 28(7) is to make clear that the SA enacted a devolution settlement and not a federal one.

32. That is not to say that the legislative sovereignty of the UK Parliament does not represent a limit on the legislative competence of the Scottish Parliament. The Lord Advocate accepts that it does; and that a provision in an ASP which purported to modify the continuing power of the UK Parliament to make laws for Scotland would not be within the legislative competence of the Scottish Parliament. Whether that is on the basis that such a provision would modify section 28(7) SA, or that it would be inconsistent with the underlying constitutional principle that an Act of the UK Parliament cannot qualify

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Government's Notes on Clauses prepared in January 1998 for the passage of the Scotland Bill make clear the confirmatory nature of the provision: *"Subsection (7) confirms the sovereignty of the United Kingdom Parliament by providing that the clause does not affect the power of the UK Parliament to make laws for Scotland."*

[42] ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64, 2019 SC (UKSC) 13 at §41. This is the position as a matter of law; as a matter of constitutional propriety, the position is qualified by the constitutional convention recognised in section 28(8) SA.

[43] Most obviously section 28(8), as explained in ***R (Miller) v Secretary of State for Exiting the European Union*** [2017] UKSC 5, [2018] AC 61 at §147; and section 63A in respect of the "permanence" of the devolved institutions.

Parliament's ongoing competence to make or unmake laws, makes no substantive difference in the present case. That is because the impugned provisions, for the reasons set out more fully below, do not purport to modify the legislative sovereignty of the UK Parliament.

33. The UK Law Officers argue at paragraphs 71 and 74 of their Case that any power conferred on the Scottish Parliament to modify provisions of an Act of the UK Parliament must be "narrowly and strictly construed". That proposition is not consistent with the scheme of devolution enacted by the SA and should be rejected. Their submission rests on the citation of authorities dealing with the *executive's* exercise of powers conferred upon them by Act of Parliament, namely ***R (Britnell) v Secretary of State for Social Security*** [1991] 1 WLR 198 and ***R (Public Law Project) v Lord Chancellor*** [2016] UKSC 39, [2016] AC 1531. The same approach is not appropriate in the context of a scheme of devolution which has established a Parliament, elected on a democratic franchise to represent the whole of Scotland, which has been granted plenary law making power subject to the limits set out in its founding statute. The very purpose of devolution was to establish a Parliament which could, across the many areas of policy responsibility which are not reserved, make laws for Scotland which have the same legal effect as those of the UK Parliament itself.

## (C) The Human Rights Act 1998

### *(i) The Human Rights Act 1998 and Parliamentary Sovereignty*

34. The structure of both Bills is modelled generally on the Human Rights Act 1998 ("**HRA**"). To put the complaint by the UK Law Officers at paragraph 58 of their Case in its proper context, it is helpful to recall the effects of the HRA. They are well explained by Lord Rodger of Earlsferry in his speech in ***Wilson v First County Trust Ltd (No.2)***:

> "*179. The 1998 Act is beautifully drafted. Its structure is tight and elegant, being marred only by the obvious interpolation of sections 12 and 13 as a result of amendments made while the Bill was passing through Parliament. The presence or absence of particular features in the Act is therefore unlikely to be due to oversight.*

*180. Although the Act is not entrenched, the Convention rights that it confers have a peculiar potency. Enforcing them may require a court to modify the common law. So far as possible, a court must read and give effect to statutory provisions in a way that is compatible with them. Rights that can produce such results are clearly of a higher order than the rights which people enjoy at common law or under most other statutes.*

*…*

*182. The 1998 Act is unusual – perhaps unique – in its range. While most statutes apply to one particular topic or area of law, the 1998 Act works as a catalyst across the board, whenever a Convention right is engaged. It may affect matters of substance in such areas as the law of property, the law of marriage and the law of torts. Or else it may affect civil and criminal procedure, or the procedure of administrative tribunals.*"[44]

35. Given the extent to which the UNCRC Bill is modelled upon the HRA, its effects are very similar. It is the intention of the Scottish Parliament that the UNCRC Bill should generally have a similar effect on the law of Scotland so far as that is within the legislative competence of the Scottish Parliament. The question is whether the Scottish Parliament can legislate for such a scheme.

36. It is well established that, notwithstanding the potency of the higher order rights conferred and the breadth of its reach, the HRA respects the sovereignty of Parliament:

"*In applying section 3* [HRA] *courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament.*"[45]

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[44] ***Wilson v First County Trust Ltd (No.2)*** [2003] UKHL 40, [2004] 1 AC 816 at §§179-182.

[45] ***In re S (Care Order: Implementation of Care Plan)*** [2002] UKHL 10, [2002] 2 AC 291 at §39 (Lord Nicholls of Birkenhead). See also: ***Ghaidan v Godin-Mendoza*** [2004] UKHL 30, [2004] 2 AC 557 at §§112-120 ("*…the* [HRA] *deliberately maintains the sovereignty of Parliament and section 3(1) is*

37. The UK Law Officers take no issue with the competence of the Scottish Parliament to incorporate either Treaty.[46] No issue is taken with the overall scheme used to effect incorporation. Instead, under reference to section 28(7) SA and the supposed protection of Parliamentary sovereignty, they object to the application of the scheme to provisions of primary legislation which has been passed by the UK Parliament but which it would be open to the Scottish Parliament itself to enact, repeal or amend.

38. That is a surprising complaint. Given that the Bills are, in this respect, closely modelled on the HRA, and the HRA respects the sovereignty of Parliament, it would be a surprising conclusion to find that the Bills did not also respect that principle. Put another way, both the HRA and the Bills confer upon the Scottish courts extensive powers to interpret and scrutinise primary legislation passed both by the Scottish Parliament and by the UK Parliament (but as regards the latter only in respect of legislation which the Scottish Parliament itself could have enacted, repealed or amended). If the HRA respects Parliament's sovereignty, so do the Bills. Against that background, the assertion (at paragraph 79 of the UK Law Officers' Case) that "[f]*or the courts to scrutinise primary legislation of Parliament <u>at all</u> is a significant qualification on Parliament's sovereignty*"[47] is an assertion that the tract of authority attesting to the HRA's respect of Parliamentary sovereignty is bad law. In fact, the UK Law Officers' assertion at paragraph 79 is simply wrong. Nothing in the HRA, and nothing in the Bills that have been referred, challenges or modifies Parliament's sovereignty.

39. There is a final point worth noting at this stage about the nature and scope of the courts' power to review primary legislation passed by the UK Parliament for compatibility with these Convention or Charter articles.[48] Under each Bill, ultimate authority rests with the legislature. The declaratory provisions in sections 20 and 21 of the UNCRC Bill are

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*framed accordingly*": §120) (Lord Rodger of Earlsferry); ***R (Anderson) v Secretary of State for the Home Department*** [2002] UKHL 46, [2003] 1 AC 837 at §58 (Lord Steyn); ***R (Kebeline) v Director of Public Prosecutions*** [2000] 2 AC 326 at p 367 ("*It is crystal clear that the carefully and subtly drafted Human Rights Act 1998 preserves the principle of parliamentary sovereignty.*" (Lord Steyn)).

[46] UK Law Officers' Case at §4.

[47] The emphasis is that of the UK Law Officers.

[48] UK Law Officers' Case at §§4, 58, 70, 75.

concerned only with enactments which it would be within the legislative competence of the Scottish Parliament to make. By definition, therefore, these powers are concerned with the scrutiny of provisions which the Scottish Parliament has the power to repeal or amend – including, in furtherance of its adopted policy, on the basis that the provision is incompatible with the UNCRC. Like the HRA, the UNCRC Bill (and, in a slightly different way, the ECLSG Bill) makes provision for its relationship with the existing and future statute book, insofar as that statute book is within the legislative competence of the Scottish Parliament. That being so, it is, the Lord Advocate submits, open to the Scottish Parliament to establish a scheme, along similar lines to the HRA, for scrutiny by the courts of such provisions by reference to the UNCRC requirements.

40. The Courts routinely interpret legislation, where it is possible to do so, in a manner which reflects the UK's international obligations. Each Bill (section 19 of the UNCRC Bill and section 4 of the ECLSG Bill), in the same way as section 3 HRA, reinforces that interpretative presumption[49]. But where conflict remains notwithstanding those requirements, the declaratory provisions become relevant. In the absence of those declaratory provisions, any conflict between the provisions of the Bill and existing legislation would fall to be addressed by reference to the doctrine of implied repeal. In the event of such a conflict, the earlier provision would be held to have been impliedly repealed. Such a conclusion would ordinarily have effect in the case in which the point arose and would immediately have been available for others. Under section 4 HRA, implied repeal is disapplied both as regards pre-existing and future legislation, and a declarator *may* (it is discretionary[50]) be made about the incompatibility. The same approach is taken under section 5 ECLSG Bill. A different approach has been taken by the UNCRC Bill. For future legislation (i.e. that which post-dates the coming into force of the UNCRC Bill), a declarator of incompatibility may be issued in the same way as under the HRA. However, for pre-existing legislation, the effect which would otherwise arise from the doctrine of implied repeal is qualified and managed by the scheme set out in section 20 – which empowers the Court to declare that the pre-existing provision (ex hypothesi one which is incompatible with the UNCRC provisions enacted into domestic

[49] See *Bennion et al on Statutory Interpretation* at §26.9.

[50] E.g. ***R (Steinfeld) v Secretary of State for International Development*** [2018] UKSC 32, [2020] AC 1 at §§56-57.

law by the Bill) ceases to be law. Such a declarator has no retrospective effect and the court can suspend the effect of its finding.

## PART 3: THE GROUNDS OF REFERENCE: UNCRC BILL

### (A) Introductory Comments

41. The UNCRC is one of the core international human rights treaties. It comprises "a holistic framework for the rights of all children and an agreed set of minimum child rights standards"[51]. It was unanimously adopted by the UN General Assembly on 20 November 1989 and was ratified by the United Kingdom on 16 December 1991 subject to a number of reservations, all of which have now been withdrawn. After a preamble that sets out its key principles, the UNCRC is divided into three parts. In Part I, articles 1-41 set out the substantive provisions and set out the obligations incumbent on states parties. Part II (articles 42-45) codifies procedures for monitoring the implementation of the Convention, including the constitution of the UN Committee on the Rights of the Child (the "**Committee**"). Finally, Part III (articles 46-54) contains provisions providing for the Convention's entry into force (which occurred on 2 September 1990). In 2000, the UN General Assembly adopted two optional protocols. The protocol on the Sale of Children, Child Prostitution and Child Pornography entered into force on 18 January 2002 and was ratified by the United Kingdom on 3 July 2003. The protocol on the Involvement of Children in Armed Conflict entered into force on 12 February 2002 and was ratified by the United Kingdom on 24 June 2003. Among available aids to interpretation of the UNCRC are (i) General Comments made by the Committee; (ii) Concluding Observations by the Committee evaluating reports by state parties[52]; (iii) views and findings by the Committee under the Optional Protocol on a Communications

[51] Policy Memorandum at §16.

[52] The most recent such Committee Concluding Observations in relation to the UK's implementation were issued on 12 July 2016 (reference CRC/C/GBR/CO/5). Among the recommendations (at §7(a)) was the following: "Expedite bringing in line with the Convention its domestic legislation, at the national and devolved levels and in the overseas territories and the Crown dependencies, in order to ensure that the principles and provisions of the Convention are directly applicable and justiciable under domestic law".

Procedure[53], which makes provision for individuals to communicate claims of violations of rights by state parties; and (iv) reports from Days of General Discussion hosted by the Committee to consider specific articles.[54]

42. The UNCRC Bill, in so far as it incorporates into Scots law provisions or aspects of provisions of the UNCRC, implements existing international obligations of the United Kingdom so far as that is within devolved competence[55]. Reflecting the principle *"pacta sunt servanda"*, article 26 of the Vienna Convention on the Law of Treaties (1969) provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." In international law, a state cannot plead insufficiency of its domestic law as an excuse for failure to implement a convention's provisions. Nor can a state rely on provisions of its domestic law for any failure to perform (or for a violation of) the provisions of any international convention by which it is bound. Individuals may plead that the convention obligations of the state are relevant to their interests and must therefore be recognised by the domestic court.[56]

43. The constituent nations of the United Kingdom have, to date, taken a variety of steps to implement the UNCRC by means of both legislation and policy. In terms of section 1 of the Rights of Children and Young Persons (Wales) Measure 2011, Welsh Ministers must, when exercising any of their functions, have due regard to the substantive articles in the UNCRC and the two Optional Protocols set out in the Schedule to the Measure. Part 1 of the Children and Young People (Scotland) Act 2014 ("**2014 Act**") imposes duties on Scottish Ministers and various public authorities in relation to securing the requirements

[53] The UK has neither signed nor ratified the Optional Protocol on a Communications Procedure (which was adopted by the UN General Assembly on 19 December 2011 and entered into force on 14 April 2014), which does not therefore form part of the UK's international obligations. Nevertheless, views and findings made under this Protocol may be used as aids to the interpretation of the Treaty and its Optional Protocols.

[54] See section 4 of the UNCRC Bill, which references these four categories among the things that a court or tribunal may take into account so far as it is relevant to the interpretation of the UNCRC requirements in proceedings before it.

[55] The reservation of international relations in paragraph 2 of Schedule 5 SA does not reserve observing and implementing international obligations.

[56] See *The Rights of the Child: Law and Practice* (MacDonald QC, 2011) at §3.23.

of the UNCRC in Scotland. Part 2 of the 2014 Act enhances the powers of the Children and Young People's Commissioner Scotland, a role originally established under the Commissioner and Young People (Scotland) Act 2003.[57] Part 1 of and Schedule 1 to the 2014 Act (the latter listing the public authorities to which the duty applies) will be repealed if the UNCRC Bill is given Royal Assent (s.17).

44. Alternative approaches to the implementation of international human rights instruments were considered in 2018 by the First Minister's Advisory Group on Human Rights Leadership.[58] In 2019, before the introduction of the UNCRC Bill, legislative options were widely consulted upon. In addition, a UNCRC Working Group was established in 2019 to consider legislative and policy options, and reported to the Scottish Ministers in July 2020. On introduction in the Scottish Parliament, the UNCRC Bill was accompanied by a Policy Memorandum, a Financial Memorandum, statements on legislative competence and Explanatory Notes. The Bill's long title states that it is:

> *"An Act of the Scottish Parliament to incorporate in Scots law rights and obligations set out in the United Nations Convention on the Rights of the Child; to make related provision to ensure compliance with duties relating to the Convention; and for connected purposes."*

45. The Policy Memorandum explains that within the constitutional constraints of devolution, the intention is to adopt a 'maximalist' approach *"meaning that the rights and obligations in the UNCRC and optional protocols are being incorporated to the maximum extent possible within the powers of the Scottish Parliament"*.[59] That 'maximalist' approach is reflected in the drafting of the UNCRC Bill.

46. Part 1 of the UNCRC Bill (ss. 1-5) sets out the meaning of the "UNCRC requirements" and related expressions (ss.1-2) and makes provision for their interpretation (s.4). Part 2

[57] For a summary of Scottish legislation giving effect to particular rights and obligations under the UNCRC, see §§25-27 of the Policy Memorandum accompanying the UNCRC Bill.

[58] The recommendations of that Advisory Group are at First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf (humanrightsleadership.scot).

[59] See: Policy Memorandum at §§7, 58-60 & 104-112.

(ss.6-10B) makes provision in relation to the duties on public authorities (s.6); proceedings for unlawful acts (s.7) and judicial remedies in respect of such acts (ss.8-9); and amends the Commissioner for Children and Young People (Scotland) Act 2003 to enable the Commissioner to bring or intervene in proceedings (ss.10-10A). Part 3 of the UNCRC Bill makes provision in relation to a newly-established Children's Rights Scheme (ss.11-13); child rights and wellbeing impact assessments (s.14); and reporting duties on listed authorities (ss.15-16A) and the Scottish Parliament (s.16B). Part 4 of the UNCRC Bill makes provision in relation to legislation and the UNCRC requirements, including statements of compatibility (s.18); interpretation (s.19); and declaratory remedies (ss.20-23). Part 5 makes provision in relation to compatibility questions arising in civil proceedings in relation to relevant legislation or acts of public authorities (s.24), and, by way of amendment of the Criminal Procedure (Scotland) Act 1995, compatibility issues arising in criminal proceedings (s.25). Provision is also made in relation to the institution of (s.26) and intervention in proceedings (s.27) concerning a compatibility question, and the reference of compatibility questions to a higher court (s.28) or (directly) the Supreme Court (ss.29-30). Part 6 of the UNCRC Bill makes provision in relation to remedial regulations in light of incompatible legislation or acts (ss.32-34). Part 7 (ss.35-41) makes final provision including in relation to interpretation (s.35), and confirms (s.36) that nothing in the Bill modifies the HRA. The Schedule to the UNCRC Bill sets out the articles or parts of articles of the UNCRC and the first and second Optional Protocols which have been incorporated.

## (B) The UNCRC Bill and the UK Parliament's Legislative Sovereignty

47. As this Court has recognised on a number of occasions, the SA was intended to provide for the Scottish Parliament a "*coherent, stable and workable system within which to exercise its legislative power*."[60] In order to have such a system, and to ensure that the democratically elected Scottish Parliament can legislate effectively to achieve legitimate policy aims within its competence, the Scottish Parliament must be able to ensure that the devolved statute book, comprising both UK Acts and ASPs, is treated in a consistent

[60] For example: ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64, 2019 SC (UKSC) 13 at §12.

manner.[61] The means by which the Scottish Parliament has chosen to secure such consistency in relation to the UNCRC requirements is through the scheme of domestic incorporation set out in the Bill – in particular, by conferring functions on Scottish courts to interpret legislation compatibly where possible, and to grant certain remedies where such interpretation is not possible, and by imposing certain duties on public authorities.

48. There is no force in the points made by the Law Officers at paragraphs 73-75 of their Case. The suggestion that the Scottish Parliament is somehow "*avoiding confronting the political choices*" which would otherwise arise is simply wrong. A political choice has been made: to incorporate into domestic law the rights set out in the UNCRC so far as within the legislative competence of the Scottish Parliament, to provide a scheme for the enforcement of those rights, and, in that regard, to follow generally, but with some modifications, the model adopted by the UK Parliament in the HRA. Legislative responsibility remains squarely with the Scottish Parliament, and democratic political accountability to that Parliament lies with the Scottish Ministers.

49. Each provision is discussed more fully below but in summary (and dealing principally with the points made by the UK Law Officers at paragraph 58 of their case):

    (i) Section 19 does not, contrary to the UK Law Officers' submission, impose a "test". In respect of statutory provisions which are within the legislative competence of the Scottish Parliament, section 19 does for the UNCRC requirements exactly what section 3 HRA does for Convention rights. It is well recognised and accepted that section 3 HRA respects the legislative sovereignty of the UK Parliament[62]. Separately, section 19 simply gives

[61] The value of consistency is recognised in section 29(4) SA, which provides: "A provision which (a) would otherwise not relate to reserved matters, but (b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters, is to be treated as relating to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise."

[62] As Dicey himself recognised, as soon as the UK Parliament has spoken, it has surrendered control of its words: "*Parliament is the supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges*": A.V. Dicey, *The*

statutory form to a long established common law rule of statutory construction – namely the rule that statutory provisions should be interpreted, so far as possible, in a manner consistent with the UK's international obligations – and ensures that this is applied to the UNCRC requirements. Beyond a vague plea to the legislative sovereignty of the UK Parliament, the UK Law Officers identify nothing in the SA which precludes the Scottish Parliament from making such a provision. Section 19 seeks to ensure, so far as possible, an interpretation of legislation that is compatible with the UNCRC requirements. Where the UK Parliament has enacted measures which can be interpreted compatibly with the UNCRC requirements, to oblige the courts to give effect to such an interpretation ensures that the UNCRC requirements are given effect in the domestic legal order. It is in any event presumed that Parliament intends to legislate in compliance with the UK's international obligations. If the UK Parliament has enacted measures within the legislative competence of the Scottish Parliament that cannot be interpreted compatibly with the UNCRC requirements, then section 19 does not touch them.

(ii) Section 20 is concerned only with legislative provisions which: (i) would be within the legislative competence of the Scottish Parliament to pass or repeal; and (ii) which is primary legislation of the Scottish or UK Parliament which received Royal Assent before section 20 came into force, or secondary legislation made as a result of such legislation. In other words, it is concerned with provisions which the Scottish Parliament could, in this Bill, have amended or repealed in their entirety. Consistent with the general purpose of the Bill, the Scottish Parliament has enacted a legislative scheme for assessing such provisions against the UNCRC requirements, and for regulating the consequence of any finding that a provision is incompatible with those requirements. Had the matter been left to the common law

*Law of the Constitution*, 10th ed., p. 413. Accordingly, it has always been recognised that the meaning, and as a result the effect, of the words chosen by the UK Parliament is "*subject to*" the court's interpretation of them. The application of rules of interpretation to the legislation of Parliament poses no threat to its power to make or unmake any law whatever.

(which must be the consequence of the UK Law Officers' argument), the question could have been raised in legal proceedings as to whether or not the enactment of the Bill had impliedly repealed a pre-existing legislative provision which was incompatible with the UNCRC requirements. Rather than leaving the matter to the common law, section 20 establishes a statutory scheme regulating the remedial consequences where such an incompatibility between pre-existing legislative provisions and the UNCRC requirements is found to exist. The UK Law Officers' complaint about section 20 is, on analysis, no more than a complaint about its heading; there is, on analysis, no legitimate complaint as to its substance.

(iii) Section 21 does not, as the UK Law Officers assert, "*permit the courts to opine on the **legal validity** of a provision of an Act of the sovereign Parliament*" (paragraph 58(3), emphasis added). That it does not is expressly stated in section 21(4): "*An incompatibility declarator – (a) does not affect the **validity** … of the provision in respect of which it is made…*" (emphasis added). To the extent that the UK Law Officers suggest that section 4 HRA is an example of the UK Parliament authorising such a review of the validity of an Act of Parliament, they are wrong. Section 4(6) HRA is in near identical terms to section 21(4) and states in terms that a declaration under section 4 HRA does not affect the ***validity*** of the impugned provision. To the extent that the UK Law Officers suggest that section 21 would put pressure on the UK Parliament not to legislate as it wishes (§62), their complaint is ill-founded, for the following reasons. First, legislative sovereignty is concerned with the *legal* limits on the UK Parliament's legislative authority. Second, a declarator under section 21 does not affect the validity of the provision, nor does it constrain the UK Parliament's legal freedom to legislate directly contrary to the UNCRC requirements should it decide to do so. Third, any pressure not to do so flows from the expectation that the UK Parliament will not legislate in a manner which would put the UK in breach of its international treaty obligations. Even Dicey accepted there were in practice limits on the

legislation which the UK Parliament could or would pass.[63] Among the practical constraints are the obligations of the United Kingdom under international law; and the responsibilities which lie on both UK and Scottish Ministers to comply with the law, including international law.[64] That a domestic court should be empowered to declare that a provision is incompatible with the UNCRC requirements does not contravene the principle of Parliamentary sovereignty any more than does the power given to the domestic courts under section 4 HRA to declare that a provision is incompatible with the ECHR requirements.

50. In respect of section 6, the argument advanced by the UK Law Officers at paragraph 96 adds nothing of substance to those advanced in respect of sections 19-21. For essentially the same reasons, nothing in section 6 can be said to qualify the legislative sovereignty of the UK Parliament.

51. In respect of the ECLSG Bill, the UK Law Officers' complaints are the same as those in respect of section 19 and section 21 of the UNCRC Bill. For the same reasons, the UK Law Officers' complaints are unfounded. The interpretative duty imposed by section 4 ECLSG is the same as section 19 UNCRC and section 3 HRA. Section 5 ECLSG expressly states that a declarator does not affect the validity of the provision in respect of which it is given (subsection (6)) and declarator can only be issued in respect of provision that is within the legislative competence of the Scottish Parliament (subsection (7)).

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[63] A.V. Dicey, *The Law of the Constitution*, 10th ed., p.71: "*There are many enactments … which Parliament never would and (to speak plainly) never could pass. If the doctrine of Parliamentary sovereignty involves the attribution of unrestricted power to Parliament the dogma is no better than a legal fiction, and certainly is not worth the stress here laid upon it.*" See also: ***Madzimbamuto v Lardner-Burke*** [1969] 1 AC 645 at 723 (Lord Reid).

[64] See e.g. Scottish Ministerial Code (2018) at §1.3; UK Ministerial Code (Cabinet Office, August 2019) at §1.3. Unlike the UK Code, the Scottish Code makes express reference to ministers' duty to comply with international law. However, as is clear from the judgment of the Court of Appeal in ***R (Gulf Centre for Human Rights) v The Prime Minister, The Chancellor of the Duchy of Lancaster*** [2018] EWCA Civ 1855, there is no difference in substance between the two Codes' respective formulations of the ministerial duty to comply with the law.

52. In short, the Lord Advocate agrees with the UK Law Officers when they say that when enacting the SA, the UK Parliament did not intend to compromise its legislative sovereignty. But that takes the UK Law Officers nowhere in their criticism of these Bills because on a proper analysis, none of the provisions that have been referred to the Court purports to modify that sovereignty.

**(C) Section 19(2)(a)(ii) of the UNCRC Bill**

53. At paragraph 54(1) of the UNCRC Bill Reference, the UK Law Officers ask whether section 19(2)(a)(ii) of the Bill is outside the legislative competence of the Scottish Parliament because it modifies section 28(7) SA and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) SA.

54. Section 19 of the Bill provides as follows (emphasis added):-

> *"(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."*

55. In light of the above submissions, and for the following reasons, the provision made in section 19(2)(a)(ii) does not modify section 28(7):

(i) The provision cannot and does not interfere with the UK Parliament's legislative power. It imposes no condition on the UK Parliament's exercise of legislative power: cp. ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** at §52. That sovereign power will remain unchanged once section 19 comes into force, just as section 3 HRA did not change the UK Parliament's power to legislate, if so minded, contrary to the Convention rights set out in Schedule 1 to that Act or, indeed, section 3 itself.[65] As has been recognised in the context of section 3 HRA, there are limits to the "possible" so far as interpretation is concerned.[66]

(ii) The provision applies only to enactments that it would be within the legislative competence of the Scottish Parliament to make. Accordingly, insofar as section 19 falls to be applied to Acts of the UK Parliament, it does so in relation to Acts of that Parliament which could be amended or repealed by an Act of the Scottish Parliament. The provision enacts the policy intention that within the legislative competence of the Scottish Parliament, the Scottish statute book (whether comprised in ASPs or Acts of Parliament) should, as far as it is possible to do so, be read and given effect to consistently and in a way that is compatible with the UNCRC requirements set out in the Schedule to the Bill. In doing so, the provision respects the limits of devolved competence. That there might have been other legislative means by which to effect the incorporation of the UNCRC

[65] ***R v Secretary of State for the Home Department, ex parte Simms*** [2000] 2 AC 115 at 131 (Lord Hoffmann).

[66] ***Ghaidan v Godin-Mendoza*** [2004] 2 AC 557 at §121 (Lord Rodger of Earlsferry).

is irrelevant to the question whether the impugned provisions of that Bill are within legislative competence[67].

(iii) Like the UK Parliament, the Scottish Parliament may give legislative direction to the courts about the interpretation of provisions which are within its legislative competence. In the present case, the UK Law Officers accept that it is generally within the legislative competence of the Scottish Parliament to decide how best to incorporate the UNCRC requirements into Scots law. It is, it is submitted, open to that Parliament to seek to give effect to those requirements *inter alia* by prescribing rules of interpretation which fall to be applied to legislative provisions which it would be open to the Scottish Parliament itself to enact. The UK Parliament, of course, retains the legal power to disapply those rules, or indeed other parts of the UNCRC Bill, should it wish to do so.

(iv) If the concern is that the UK Parliament may need to consider compatibility with the UNCRC when passing legislation, then that is hardly an intrusion into Parliament's sovereignty. The UK Parliament is presumed to have intended to legislate compatibly with the United Kingdom's international obligations.[68] That has been specifically recognised by this Court in the context of the UNCRC: *"Article 3 UNCRC is contained in an international treaty ratified by the UK. It is binding on this country in international law. It is not, however, part of English law. Such a treaty may be relevant in English law in at least three ways. First, if the construction (i.e. meaning) of UK legislation is in doubt, the court may conclude that it should be construed, if otherwise possible, on the footing that this country meant to*

[67] ***In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*** [2015] UKSC 3, [2015] AC 1016 at §32 (Lord Mance).

[68] ***Assange v Swedish Prosecution Authority*** [2012] UKSC 22, [2012] 2 AC 471 at §122: *"there is no doubt that there is a 'strong presumption' in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations"* (Lord Dyson). Further, the UK Government is committed, in terms of the UK Ministerial Code, to complying with the law, including international law.

*honour its international obligations."*[69] Such approaches to interpretation do not limit the UK Parliament's sovereignty. They have no effect on the *power* of the UK Parliament to make law.

(v) The opening words of section 19(1) ("So far as is it possible to do so…"), clearly set the limits to the interpretative obligation. Moreover, section 19 makes quite clear that the interpretative obligation has no effect on the validity, continuing operation or enforcement of any incompatible Act of Parliament: see subsection (4)(a).

56. The short point is that section 19 operates, in relation to the UNCRC requirements and for legislative provisions within the competence of the Scottish Parliament, in exactly the same way as section 3 HRA. That is not, as the Law Officers say (at paragraph 58(1) of their Case), to impose a "test". It is to apply a long established rule of statutory interpretation which is well accepted as consistent with the legislative sovereignty of the UK Parliament. For all of these reasons, the question posed at paragraph 54(1) of the UNCRC Reference should be answered 'no'.

**(D) Section 20(10)(a)(ii) of the UNCRC Bill**

57. At paragraph 54(2) of the UNCRC Reference, the UK Law Officers ask whether section 20(10)(a)(ii) of the Bill is outside legislative competence of the Scottish Parliament because it modifies section 28(7) SA and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) SA. Section 20 of the Bill provides as follows (emphasis added):-

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

[69] ***R (SG) v Secretary of State for Work and Pensions (Child Poverty Action Group and another intervening)*** [2015] UKSC 16, [2015] 1 WLR 1449 at §137 (Lord Hughes).

*(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."*

58. In light of the submissions above, and for the following reasons, the provision made in section 20(10)(a)(ii) does not modify section 28(7) SA. The meaning and effect of section 28(7) will remain the same once the Bill becomes law.

(i) This provision only applies where a court is dealing with a provision comprised in an Act of the UK Parliament which received Royal Assent <u>before</u> the day on which section 20 comes into force. It therefore cannot affect the present or future power of the UK Parliament to make legislation for Scotland. An Act of the Scottish Parliament may repeal or amend a provision of any Act of Parliament, or disapply or restate common law principles, as long as the ASP is within the scope of the Scottish Parliament's legislative competence. Such amendment or repeal does not affect the power of the UK Parliament to make laws for Scotland and does not therefore modify section 28(7) SA.

(ii) The Scottish Parliament could have enacted legislation to repeal specific existing statutory provisions, including provisions contained in (or made under) Acts of Parliament, and which are potentially inconsistent with the provisions of the UNCRC contained in the Schedule to the Bill. The policy decided upon by the Scottish Ministers, and eventually passed by the Scottish Parliament, was to establish a scheme to enable litigants to bring proceedings to identify and address specific incompatibilities, if there should be any such incompatibilities in the existing statute book, on a case by case basis, with the court having a discretionary power to grant a remedy by way of a "strike down" declarator in respect of incompatible, relevant legislation. The effect of such an order, if and when made, is to declare that the provision is no longer law to the extent of the incompatibility. That effect is no greater than the effect of amendment or repeal. Section 20(4) of the Bill provides that such a declarator has effect only from its date and does not affect anything previously done under the provision. Such a declarator therefore has a lesser effect than implied repeal. It is an effect which could be achieved by the Scottish Parliament through amendment or repeal of the existing legislation.

(iii) Though not determinative of the issue, it is worth noting the likely consequences had the Scottish Parliament adopted a different policy approach to the incorporation of the UNCRC requirements, such as the repeal or amendment of provisions applicable to Scotland: see paragraph 73 of the UK Law Officers' Case. That approach would have required all those statutory provisions contained in UK Acts applicable to children to be identified and an assessment made as to whether or not every one of them is compatible with the UNCRC requirements. Like the HRA, the Bill creates a framework which puts it into the hands of those who are affected by provisions to test the compatibility of provisions with the UK's international legal obligations, and empowers the courts to adjudicate on those questions. By establishing that legal framework, the Scottish Parliament seeks to secure, so far as within devolved legislative competence, compliance with the UK's international obligations under the UNCRC: see paragraph 7(2) in Part I of Schedule 5 SA.

59. For all of these reasons, the question posed at paragraph 54(2) of the UNCRC Reference should be answered 'no'.

**(E) Section 21(5)(b)(ii) of the UNCRC Bill**

60. At paragraph 54(3) of the UNCRC Reference, the UK Law Officers ask whether section 21(5)(b)(ii) of the Bill is outside the legislative competence of the Scottish Parliament because it modifies section 28(7) SA and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) SA. Section 21 of the Bill provides as follows (emphasis added):-

> *"(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)."*

61. In light of the submissions above, and for the following reasons, the provision made in section 21(5)(b)(ii) does not modify section 28(7) SA. The meaning and effect of section 28(7) SA will remain the same once the Bill becomes law. The Scottish Parliament has legislative responsibility for the statute book in Scotland within the limits of its legislative competence. It is entitled to make general provision to enable individuals to bring proceedings to identify whether specific enactments within Scots law are or are not compatible with the UNCRC requirements. An incompatibility declarator has no effect on the validity, continuing operation or enforcement of the provisions in respect of which it is made; and is not binding upon the parties to the proceedings in which it is made: section 21(4). Following the making of an incompatibility declarator, the Scottish Parliament would, within its legislative competence, have power to make further provision to remove any incompatibility. So too would the UK Parliament, subject to the conventional and political constraints noted above.

## (F) Section 6 of the UNCRC Bill

### *Introduction*

62. At paragraph 55 of the UNCRC Reference, the UK Law Officers ask whether section 6 of the UNCRC Bill is outside the legislative competence of the Scottish Parliament because:

(i) It constitutes a modification in breach of the restriction in paragraph 2(1) of Schedule 4 [i.e. modifies the law on reserved matters] falling under section 29(2)(c) SA;

(ii) It "relates to" various reserved matters set out in Schedule 5, falling under section 29(2)(b) SA;

(iii) It modifies section 28(7) SA and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4 [i.e. modifies a protected enactment] falling under section 29(2)(c) SA;

(iv) It cannot be read down using section 101(2) SA so as to render it within competence.

63. Section 6 of the UNCRC Bill provides as follows:-

*"(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."*

64. Section 6 is closely modelled on section 6 HRA. The compatibility requirement applies generally to public authorities, but that term does not include "the Scottish Parliament or a person carrying out functions in connection with proceedings in the Scottish Parliament". An Act of the Scottish Parliament cannot modify the Parliament's legislative competence or limit the Parliament's future exercise of its own powers: see paragraph 4 in Part I of Schedule 4 SA.

65. The Policy Memorandum explains that the purpose of this duty *"is to protect children's rights and to further the fulfilment of children's rights in Scotland"* (§120). To that end, the policy intention is to ensure that the duty applies *"to all public authorities in respect of which it is within the power of the Scottish Parliament to apply the duty"* (§122). At paragraph 124, the Policy Memorandum explains the Bill's approach to the scope of this duty:

> *"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."*

***Issue (ii): Does section 6 relate to reserved matters?***

66. It is convenient to consider this issue first. In a passage mentioned at paragraph 25 of the UNCRC Reference, Lord Hope of Craighead said this of the SA in ***Imperial Tobacco*** at paragraph 15 (emphasis added):-

> *"The statute must be interpreted like any other statute. But the purpose of the Act 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 were intended to be reserved. That purpose provides the context for any discussion about legislative competence.*** *[…] It was intended, within carefully defined limits, to be a generous settlement of legislative authority*."

67. The UNCRC Bill is concerned with furthering children's rights in Scotland. The UK Law Officers' approach to purpose at paragraph 92 of their Case is an artificial and mechanistic one that leads to a false analysis. The true purpose of placing the section 6 duty on public authorities is to protect children's rights and to further the fulfilment of those rights in Scotland: see the Policy Memorandum at §§120-122. As those paragraphs explain, section 6 is drafted to operate in a similar way to section 6 HRA and is intended to ensure that children's rights under the UNCRC (which the United Kingdom and all its ministers, whether of the UK Government or devolved administrations, are obliged to uphold) enjoy the same protection, as far as possible within devolved competence, as children's rights under the ECHR. The effect of section 6 will be to secure that protection and thus to further the purpose of the Bill. The purpose of the compatibility duty is the same regardless of the context in which it may fall to be applied.

68. The UK Law Officers do not appear to advance a general proposition that section 6 itself relates to any particular reserved matter. Rather, their approach is to cite certain specific

reserved matters under this heading, and certain specific articles of the UNCRC which are said to "relate to" those matters. Even if they were to be correct in their analysis of any of these particular Articles and matters, that would not justify the conclusion that section 6 itself relates to a reserved matter. The Bill has carefully excluded from the UNCRC requirements set out in the Schedule those provisions of the UNCRC which the Lord Advocate accepts have only reserved content. If the Court were to conclude that this would be the case for other Articles or parts of Articles set out in the Schedule, the consequence would be that the inclusion of those provisions within the UNCRC requirements set out in the Schedule would not be within the legislative competence of the Scottish Parliament. But that would not justify the conclusion that the compatibility duty set out in section 6 itself relates to those reserved matters.

69. At paragraph 93 of their Case, the UK Law Officers identify certain Articles of the UNCRC which they assert "relate to reserved matters on their face". They do not seek to analyse the reserved matters upon which they found, or to address the purpose of the provision or provisions which they assert relates to the reserved matter. In order to determine whether the inclusion of a particular Article of the UNCRC can, within legislative competence, be included in the Schedule, one would require to address the relevant reserved matter in its entirety and also consider the potential for the Article to apply to non-reserved matters. To take the Articles cited by the UK Law Officers:

    (i) Article 10 has been partially incorporated by the UNCRC Bill. As so incorporated, it is concerned with the maintenance of personal relations and direct contact as between parents and children under exception of any associated migration rights (provision for which is made in the excepted Article 10(1) and the excepted remainder of Article 10(2)). Issues of maintaining personal relations and direct contact between parents and children may and do arise in family law proceedings before the Scottish courts and in decisions of Scottish local authorities taken relative to children in Scotland. Provisions dealing with such issues do not (and Article 10 as incorporated does not) relate, as such or on their face, to the reserved matter of immigration and nationality.

(ii) Article 26 UNCRC has been partially incorporated by the UNCRC Bill. The Article put in issue by the UK Law Officers is the partial incorporation of Article 26(1), which concerns the right to benefit from (cp. an entitlement to) social security. The F1 social security reservation in Schedule 5 SA includes a significant number of exceptions, the effect of which is that significant areas of social security are within the legislative competence of the Scottish Parliament. Article 26 can, accordingly, be given substantial effect in relation to matters which are within the legislative competence of the Scottish Parliament.

(iii) Article 27 has been partially incorporated by the UNCRC Bill. The Article put in issue is the partial incorporation of Article 27(3), which concerns the taking of measures to assist parents and others responsible for the child to implement the right to an adequate standard of living and the provision of material assistance in the case of need. On the face of it, the obligation in this Article does not relate to the child support reservation in F2, specifically "[t]he subject-matter of the Child Support Acts 1991 and 1995", which reservation is in any event subject to the exception of "[t]he subject-matter of section 1 to 7 of the Family Law (Scotland) Act 1985 (aliment)"; and, in any event, the Article on the face of it would appear to have non-reserved content.

(iv) Article 38 has been partially incorporated. Article 38(2) which is put in issue by the UK Law Officers requires the taking of all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities (a term which has a wider meaning than war or military action). That part of the Article is not concerned with recruitment, that matter being dealt with by Article 38(3) which has been excluded from the Schedule. Article 38 as incorporated is not concerned with and does not relate to the defence of the realm or the naval, military or air forces of the Crown.

70. If any of the Articles referred to by the UK Law Officers was found to be wholly reserved, that would not affect section 6 itself, since that provision's purpose remains as explained at paragraph 67 above.

71. The UK Law Officers argue that the UNCRC Bill fails to exclude particular bodies from the scope of application of the compatibility duty. There is no requirement for an ASP to spell out on its face all of the respects in which it does not fall outside the legislative competence of the Scottish Parliament (for example, that it would not form part of the law of a country or territory other than Scotland: section 29(2)(a) SA). It is clear from the SA itself that the Scottish Parliament cannot confer functions on (or remove functions from) the class of reserved bodies specifically listed in paragraph 3 of Part III in Schedule 5 SA. It is plain that the Scottish Parliament may, within its legislative competence, confer functions on other bodies. All public authorities, including the Scottish Government and the UK Government, are obliged to obey the general laws applicable in Scotland, including those passed within its legislative competence by the Scottish Parliament. That is basic to the rule of law. There is nothing intrinsically objectionable about the application of public general statutes, made within the legislative competence of the Scottish Parliament, to the UK Government or its agencies. In any event, section 6 is concerned with international treaty obligations which the United Kingdom is bound to perform and uphold. So far as the UNCRC is relevant to their activities, therefore, UK Government departments and agencies will already be seeking to comply with its provisions.

***Issue (i): Does section 6 modify the law on reserved matters?***

72. The UK Law Officers suggest at paragraph 91 of their Case that the application of the compatibility duty to the exercise of reserved functions[70] would modify the law on reserved matters, on the basis that section 6 "implicitly amends" Acts of Parliament and subordinate legislation "which concern reserved matters" and which confer such functions, arguing that "[t]hese modifications are not *"incidental"* or *"consequential"* provisions". They do not specify Acts of Parliament, subordinate legislation, rules of law or provisions which would be modified by the application of section 6.

[70] The SA does not define the term "reserved functions". However that term is used in various provisions of the SA to refer to functions that could not be conferred by an Act of the Scottish Parliament, and in contradistinction to the term "devolved functions".

73. The approach of the UK Law Officers under this heading (being directed to legislation which "concern[s] reserved matters") appears to conflate the Schedule 4 constraint with that in Schedule 5. The "law on reserved matters" is not the same as "reserved matters". It is a defined term meaning either: (a) an enactment the subject-matter of which is a reserved matter; or (b) a rule of law which is not contained in an enactment, the subject-matter of which is a reserved matter: §2(2), Sch 4.

74. For the avoidance of doubt, the Lord Advocate accepts that there will be certain cases in which the compatibility duty cannot apply. First, it cannot apply to the exercise of functions by the bodies listed in paragraph 3(2) of Part III of Schedule 5 to the SA (reservation of reserved bodies). Second, it cannot apply to the exercise of reserved functions (i.e. functions that are not within devolved competence in terms of section 54) to the extent, but only to the extent, that such application would involve an *impermissible* modification of the law on reserved matters – an issue which is addressed further below. These limits are, for the reasons explained above, intrinsic to the devolution settlement. Acts of the Scottish Parliament are "not law ***so far as*** any provision of the Act is outside the legislative competence of the Parliament" (section 29(1)) and "***so far as***" any of the paragraphs in section 29(2) apply (all emphasis added). Moreover, any provision of an Act of the Scottish Parliament (or a Bill for such an Act) which could be read in such a way as to be outside competence "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" (s.101(1) & (2)): see ***The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64, 2019 SC (UKSC) 13 at §77; ***Attorney-General v National Assembly for Wales Commission*** [2012] UKSC 53, [2013] 1 AC 792 at §§60-64 (Lord Neuberger) and §84 (Lord Hope).

75. If the application of the compatibility duty to the exercise of a particular reserved function would amount to an impermissible modification of the law on reserved matters, the duty would *to that extent* not apply. That is simply an application of the terms of section 29(1) and is part of the structure of the devolution settlement. However, before deciding that there is an impermissible modification of the law on reserved matters, it would be necessary in each case to consider and apply the terms of paragraph 3 of Schedule 4 SA which provides that the protection against modification of the law on

reserved matters found in paragraph 2 of Schedule 4 SA 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."*

Paragraph 3 of Schedule 4 SA was considered by this Court in ***Martin v Most*** [2010] UKSC 10, 2010 SC (UKSC) 40.

76. The imposition of the compatibility duty is necessarily subject to the limits of the Scottish Parliament's legislative competence. It cannot, as a matter of law, apply to any function to the extent that this would breach the restrictions in Schedule 4 (taking full account of paragraph 3). At the same time, the question of whether, in any particular context, the application of the compatibility duty would impermissibly modify the law on reserved matters would require to be determined by reference to specific provisions of the UNCRC requirements, to the specific provisions of the law on reserved matters and to the exception made by paragraph 3 of Schedule 4 SA. The matter cannot be addressed in the abstract. Had section 6 been drafted so as to limit the ambit of the compatibility duty to devolved functions only, as the UK Law Officers implicitly argue to be the only acceptable solution, that would unnecessarily limit the scope of the duty, contrary to the policy intention to protect children's rights under the UNCRC as far as possible and consistently across the statute book.

***Issue (iii): Does section 6 modify section 28(7) SA?***

77. For the reasons given above, section 6 cannot and does not modify section 28(7) SA. The interpretative provision at section 19 has been considered above. It is important to note that the Bill can and does apply only to Scotland and to Scots law. In that regard, it has always been within the legislative competence of the Scottish Parliament to make provision concerning the performance in Scotland of statutory functions so far as not reserved.

***Issue (iv): Can section 6 be read down using section 101(2) SA so as to render it within competence?***

78. In so far as it is necessary to do so, section 6 can and should be read so as to have full effect within the Scottish Parliament's legislative competence. That follows, firstly and principally, from the phrase "so far as" in section 29 SA. This makes clear that a provision of an ASP is only "not law" so far as it is outside legislative competence. Other than to that extent, it will be and remain "law". Secondly, and where necessary, it follows from the terms of section 101.

79. Section 101 provides as follows:-

> *"(1) This section applies to-*
>
> *(a) any provision of an Act of the Scottish Parliament, or of a Bill for such an Act, and*
>
> *(b) any provision of subordinate legislation made, confirmed or approved, or purporting to be made, confirmed or approved, by a member of the Scottish Government,*
>
> *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.*
>
> *(3) In this section "competence"-*
>
> *(a) in relation to an Act of the Scottish Parliament, or a Bill for such an Act, means the legislative competence of the Parliament, and*
>
> *(b) in relation to subordinate legislation, means the powers conferred by virtue of this Act."*

Section 154 of the Government of Wales Act 2006 is in substantially identical terms.

80. In ***DS v HM Advocate*** [2007] UKPC 36, 2007 SC (PC) 1 at §23, Lord Hope explained the difference between section 101 SA and section 3 HRA by referring to the limits laid down in Schedules 4 and 5 SA: *"An attempt by the Scottish Parliament to widen the scope of its legislative competence as defined in those schedules will be met by the requirement that any provision which could be read in such a way as to be outside*

*competence must be read as narrowly as is required for it to be within competence."* Section 101 therefore applies the principle of effectiveness[71], ensuring that a provision that might on a plain reading be regarded as outside competence is, so far as it is possible to do so, read in order to give effect to the provision so far as it is within competence. This follows from the wording found in section 29(1) SA:

> *"An Act of the Scottish Parliament is not law* ***so far as*** *any provision of the Act is outside the legislative competence of the Parliament."* (emphasis added)

81. The effects of section 29 and 101 SA are very similar to the provision in the Constitution of Canada that "any law that is inconsistent with the provision of the Constitution is *to the extent of the inconsistency*, of no force or effect" (Constitution Act 1982, s.52, emphasis added).[72] Section 29(1) does not look to identify particular words that are outside legislative competence. The narrow reading mandated under section 101 does not therefore have particular words as its focus, but can be a reading that is conceptually narrow, the aim being to ensure that, within the Scottish Parliament's full legislative competence, the provision can have full force and effect. The same wording is adopted by reference in section 54(1) in respect of the devolved competence of the Scottish Ministers to make subordinate legislation; while section 54(2) using the same formula "so far as" to set the limit to devolved competence in the case of other ministerial functions.

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[71] *Bennion et al on Statutory Interpretation*, 8th ed., §11.8: "An enactment must be construed so as to implement, rather than defeat, the legislative purpose."

[72] This provision was applied by the Supreme Court of Canada in ***R v Appulonappa*** [2015] 3 SCR 754 to read down an enactment as not applicable to three particular categories of case, drawing upon earlier guidance in ***Schachter v Canada*** [1992] 2 SCR 679. The Supreme Court of Canada has recently updated its guidance in the case cited by the UK Law Officers at §102 in their Case: ***Attorney General of Ontario v G*** 2020 SCC 38. The approach taken by the Supreme Court of Canada is analogous to the doctrine of "substantial severance" applied by the Judicial Committee of the Privy Council in ***Jersey Fishermen's Association Ltd v States of Guernsey*** [2007] UKPC 30 at §60 in reading a provision concerning a 12 mile belt of waters as limited to the 3 mile belt within which the respondent had power to make the Ordinance under review.

82. Where possible therefore, an *intra vires* reading is preferred, so that the provision may be given force and have effect according to the Scottish Parliament's intention within its legislative competence.[73] That is how the courts have to date interpreted and applied section 101 and the equivalent Welsh provision:

(i) In ***Attorney-General v National Assembly of Wales Commission*** [2012] UKSC 53, [2013] 1 AC 792 (the ***Welsh Byelaws*** case), both Lord Hope (§84) and Lord Neuberger (§§62-64, the other members of the Court agreeing) concurred that the wide words of section 9 in the relevant Welsh bill had to be read by reference to section 154(2) of the 2006 Act as being circumscribed in their scope and therefore within competence.

(ii) In ***The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64, 2019 SC (UKSC) 13 at §77, this Court held that *"if it were necessary in order to avoid a breach of paragraph 4(1) of Schedule 4 to the Scotland Act, section 101(2) of the Scotland Act […] 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…".*

(iii) In ***Henderson v HM Advocate*** [2010] HCJAC 107, 2011 JC 96, the Advocate Depute and the Advocate General for Scotland agreed that the imposition by the sentencing court of an order for lifelong restriction on conviction of a firearms offence was not competent, the power to make such order resulting from the reserved Firearms Act 1968 having been modified by an ASP. The High Court of Justiciary accordingly had recourse to section 101(2), reading and giving effect to the relevant provision so that it

[73] While the general purpose of section 101 SA is described in the Explanatory Notes cited by the UK Law Officers, it should be recalled that those notes were prepared and published by the UK Scotland Office in 2004 and "have no more weight than any other post-enactment commentary as to the meaning of the statute": ***Imperial Tobacco Ltd v Lord Advocate*** 2013 SC (UKSC) 153 per Lord Hope of Craighead at §33.

did not extend to the offender's situation the requirement to make such an order: see §10. There was no question of the section being held to be "not law" in its totality, but only in its application to firearms offences, and it is still applied regularly in the Scottish courts today.

There is no suggestion in these cases that the application of section 101 depends on there being an ambiguity in the provision to be interpreted. Nor does section 3 HRA depend on the presence of any ambiguity. In any event, substantive "reading down" within the scope of an overbroad provision, is mandated by section 29 SA.

83. This understanding of the structural nature of the limits on the legislative competence of the Scottish Parliament has been reflected in the drafting of bills since 1999. Parliamentary counsel do not draft bills by writing out *ad longam* the limits on legislative competence found in the SA. Those limits apply as a matter of law.[74] This is analogous to the way in which enactments conferring functions on public authorities make no express mention of the various limits placed on such authorities by the HRA. By its use of the words "so far as" in section 29(1), and the provision made in section 101, Parliament has made clear that broad wording falls to be read subject to the limits on legislative competence. That may be an appropriate drafting technique to be deployed where the outer limit of legislative competence cannot at the outset be precisely defined for all possible circumstances in which a new provision may fall to be applied. It is

[74] See e.g. paragraph 124 of the Policy Memorandum for the UNCRC Bill. For an earlier example, see paragraph 3 of the Policy Memorandum for the Scottish Government's Welfare Reform (Further Provision) (Scotland) Bill, which was in due course enacted and came into force on 8 August 2012. Paragraph 3 of that memorandum states *inter alia*: *"To the extent that the text of the Bill's provisions, which bear a relationship to provision made by or under Parts 1 and 4 of the UK Act relating to the reserved matter of social security provision, could be read as being outwith competence, the Scottish Government considers that the operation of section 101 of the Scotland Act 1998 would ensure that the provisions could be read as narrowly as required for them to be within competence and for them to have effect accordingly."* Far more commonly, the roles of sections 29(1) and 101(2) SA in the interpretation and application of particular provisions in a bill are discussed in notes on legislative competence that are prepared by the Scottish Government for all government bills, and are provided, on a confidential basis, to Scottish Parliament lawyers and to the Office of the Advocate General for Scotland before a bill's formal introduction in the Parliament.

neither practical nor desirable for the draftsman to be required to write out and deal with all legislative constraints that might be triggered by the general wording necessary to enact a broad policy intention of the type in play here. The SA thus leaves room for the Scottish Parliament to make provision in the manner it considers would best enact its policy aims and purposes. In the case of the UNCRC Bill, the purpose is to recognise and protect the rights and obligations in the UNCRC and Optional Protocols to the maximum extent possible within the powers of the Scottish Parliament: see the Policy Memorandum at paragraphs 104-129.

84. With reference to the points made by the UK Law Officers at paragraphs 102-109 of their Written Case, the Lord Advocate makes the following additional observations:

(i) The nature of the ambiguity mentioned at paragraph 103 is that found in the ***Welsh Byelaws*** and ***Continuity Bill*** examples cited at paragraph 82 above. There are certainly limits to the scope of the interpretive provision in section 101, found in the word "possible". But the issue which arises here is one of reading down broad language to the extent that it would be capable of being applied in a manner which would be outside the legislative competence of the Parliament. That is possible, and is, indeed, mandated specifically by section 29 SA.

(ii) The Scottish Parliament should be presumed not to intend to legislate beyond the limits of its competence. That intention is clear from paragraphs 105 and 124 of the Policy Memorandum. And although not in any way binding upon the courts, this intention is supported by the statements on legislative competence that are required under section 31 SA and the Scottish Parliament's Standing Orders.[75] The present (12th) edition of Craies on Legislation describes the purpose of section 101(2) in the following way: *"In other words, the courts are required to apply the*

[75] See Tabs 1 and 5 in the UK Law Officers' Supporting Materials for the statements on legislative competence made in respect of the UNCRC Bill by the Presiding Officer and by the Deputy First Minister; and in respect of the ECLSG Bill by the Presiding Officer and the Member in charge of the bill, Andy Wightman MSP.

*presumption that the Scottish Parliament or executive intended to limit themselves to what they had power to do. Only if the words used defy any explanation or construction that would be within legislative competence are the courts to declare the legislation to be unlawful. If they can save the legislation by construing it in a way which, even if not the natural construction or that most likely to have been intended by the draftsman, they are to do so."*

(iii) The ***Christian Institute*** case concerned the application of section 3 HRA rather than section 101. The passing observation at paragraph 106, while no doubt valid, was not central to this Court's approach to the issues.

(iv) The Lord Advocate agrees that, for the reasons set out in ***DS v HM Advocate*** [2007] UKPC 36, 2007 SC (PC) 1, section 101(2) is not coterminous with section 3 HRA. It should be noted, however, that use of the phrase "if such a reading is possible" means that, as with section 3 HRA, a patent ambiguity is not required in order for the interpretive obligation in section 101 to be engaged. In any event, the substantive reading down of a broad provision so that it does not apply outwith competence is mandated by section 29 SA.

(v) Within the limits of its legislative competence, the Scottish Parliament is entitled to decide the manner in which legislation should deliver the policy purposes it has supported. The question of legal certainty is not a relevant consideration when this Court is considering a section 33 reference: cp. paragraphs 109 and 114 in the UNCRC Reference. In any event, the structure of the legal analysis which falls to be applied is clear. Any uncertainty as to the correct application of that analysis which might arise in particular circumstances would flow from the nature of the legal tests and standards prescribed in the SA itself. That the correct application of a legal test or standard may, in particular circumstances, be contestable does not make the law intrinsically uncertain.

85. In all these circumstances, it is submitted that where shown to be necessary, section 6 of the UNCRC Bill can and should be read narrowly so as to apply only within legislative competence.

**(D) Conclusions on UNCRC Bill**

86. For all the reasons given above, none of the impugned provisions of the UNCRC Bill is outside the legislative competence of the Scottish Parliament, and this Court should so find by answering "no" to the questions referred by paragraphs 54 and 55 of the UNCRC Reference.

**PART 4: GROUNDS OF REFERENCE: ECLSG BILL**

**(A) Introductory Comments**

87. The European Charter of Local Self-Government (the "**ECLSG**") seeks to "make good the lack of common European standards for measuring and safeguarding the rights of local authorities, which are closest to the citizen and give him the opportunity of participating effectively in the making of decisions affecting his everyday environment"[76]. It was opened to signature by member states of the Council of Europe on 15 October 1985, entered into force on 1 September 1988 and was ratified by the United Kingdom on 24 April 1998, subject to a declaration that: (i) in terms of Article 13, the United Kingdom intended to confine the scope of the ECLSG to certain specified categories of authority (in Scotland, local authorities constituted under section 2 of the Local Government etc. (Scotland) Act 1994); and (ii) in terms of Article 12, the United Kingdom considered itself bound by all the paragraphs of Part 1 of the ECLSG. The paragraphs of Part I comprise the entirety of the ECLSG's substantive provisions[77]. They entered into force in respect of the United Kingdom on 1 August 1998.

[76] Policy Memorandum at §12, citing the Explanatory Report to the European Charter of Local Self-Government, 1985, ETS 122, p.2-3.

[77] Parts II and III of the ECLSG relate to procedural matters regarding ratification.

88. The ten substantive articles comprising Part I of the ECLSG provide for the legal recognition of the principle of local self-government (Art. 2); the concept of local self-government (being declared to be "the right and ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population": Art. 3); the scope of local self-government, including local government powers (Art. 4); protection of boundaries (Art. 5); administrative structures and resources (Art. 6); conditions under which responsibilities are exercised (Art. 7); the limitation of administrative supervision (Art. 8); the adequacy and free disposal of financial resources (Art. 9); the right to cooperate and associate (Art. 10); and legal protection of local authorities, in the form of the right to a judicial remedy (Art. 11). In contrast to the UNCRC, all of the substantive provisions of the ECLSG have, by the ECLSG Bill, been incorporated into Scots law.

89. The ECLSG Bill was a Member's Bill, introduced by Andy Wightman MSP. Like the UNCRC Bill, on introduction the ECLSG Bill was accompanied by a Policy Memorandum, a Financial Memorandum, statements on legislative competence and Explanatory Notes. The Bill documents relative to the ECLSG Bill were, however, prepared by the Non-Governmental Bills Unit of the Scottish Parliament on the Member's behalf, rather than by the Scottish Government. The statements on legislative competence were made by the Presiding Officer and the Member himself. The aim of the ECLSG Bill is stated in the Policy Memorandum prepared on behalf of the Member to be to "strengthen the status and standing of local government" in Scotland by way of the incorporation of the ECLSG into domestic Scots law, and thus giving it legal effect in the courts[78]. Although the ECLSG Bill was a Member's Bill, it was supported by the Scottish Government at Stage 3. It adopts a similar, but not identical method of incorporation to the UNCRC Bill.

90. Section 1 of the ECLSG Bill makes provision in relation to the meaning of the "Charter Articles". Sections 2 and 3 impose duties on the Scottish Ministers to act compatibility with the Charter Articles in the exercise of their functions (s.2) and, read short, to promote

[78] Policy Memorandum at §§3 and 51. In its Stage 1 Report, the Local Government and Communities Committee of the Scottish Parliament supported the general principles of the Bill and in particular accepted and endorsed this policy aim: see §5 of the Report.

local self-government (s.3). Section 4 of the ECLSG Bill makes provision in relation to the interpretation of legislation. Section 5 provides for the making of a declaration of incompatibility in respect of a provision of legislation which is determined to be incompatible with the Charter Articles. Sections 6 and 6A make provision in relation to remedial action by the Scottish Ministers by way of regulations. Section 7 provides for the removal or limitation of the retrospective effect of decisions relative to a breach of duty under the Act or relevant incompatible legislation. Section 8 makes provision in relation to statements about the compatibility of Bills of the Scottish Parliament with the Charter Articles. Sections 9 to 11 make final provision including in relation to regulation-making powers and commencement. The Charter Articles (articles 2-11 of the ECLSG) are set out in full in the Schedule to the ECLSG Bill.

**(B) Sections 4(1A) and 5(1) of the ECLSG Bill**

91. At paragraph 48 of the ECLSG Reference, the UK Law Officers ask whether section 4(1A) of the ECLSG Bill is outside the legislative competence of the Scottish Parliament because: (a) insofar as it refers to Acts of the United Kingdom Parliament, it modifies section 28(7) SA and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) SA; and (b) the provision cannot be read down using section 101(2) SA so as to render it within competence.

92. Section 4 of the ECLSG Bill provides as follows (emphasis added):

> *"(1) So far as it is possible to do so, legislation mentioned in subsection (1A) must be read and given effect in a way which 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".*

93. At paragraph 48 of the ECLSG Reference, the UK Law Officers ask whether section 5(1) of the ECLSG Bill is outside the legislative competence of the Scottish Parliament because: (a) insofar as it refers to Acts of the United Kingdom Parliament, it modifies section 28(7) SA and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) SA; and (b) the provision cannot be read down using section 101(2) SA so as to render it within competence.

94. Section 5 of the ECLSG Bill provides as follows (emphasis added):

> "(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.
> (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".

95. As well as similarities, including in particular their common restriction to legislation that is within the legislative competence of the Scottish Parliament, there are important differences between the nature and scope of the two bills referred:

(i) The ECLSG Bill imposes duties only on the Scottish Ministers and not upon any other public authority: see sections 2 and 3.

(ii) The ECLSG concerns the relationship between different tiers of government. It does not concern individual rights: see paragraphs 10-23 in the Policy Memorandum for the ECLSG Bill.

(iii) The ECLSG Bill contains no remedial provisions other than the declaration of incompatibility in section 5.

96. The Lord Advocate agrees with the UK Law Officers that on their face the provisions under challenge can be read so as to extend to Acts of the UK Parliament. The challenge concerns whether these provisions modify section 28(7) SA. For all the reasons set out above in relation to the UNCRC Bill, the provisions in sections 4(1A) and 5(1) of the ECLSG Bill cannot and do not modify section 28(7) SA.

97. If, contrary to the Lord Advocate's submissions, this Court holds that these provisions do modify section 28(7) and are therefore to that extent outside legislative competence, section 101 SA can be applied and the provisions read narrowly so as to be given effect within the Scottish Parliament's legislative competence. The considerations raised by the UK Law Officers at paragraph 117 of their Case do not prevent a narrow reading of the provisions so as to ensure that within the legislative competence of the Scottish Parliament the policy intention of the legislation is secured.

**(C) Conclusions on ECLSG Bill**

98. For all the reasons given above, neither of the impugned provisions of the ECLSG Bill is outside the legislative competence of the Scottish Parliament, and this Court should so find by answering "no" to the questions referred by paragraphs 48 of the ECLSG Reference.

## PART 5: CONCLUDING OBSERVATIONS

99. The questions referred to this Court as regards sections 19(2)(a)(ii), 20(10(a)(ii) and 21(5)(b)(ii) of the UNCRC Bill, and sections 4(1A) and 5(1) of the ECLSG Bill, all fall to be answered in the negative for the following, among other, REASONS:

    (i) Section 19(2)(a)(ii) of the UNCRC Bill does not modify section 28(7) SA contrary to section 29(2)(c) and paragraph 4(1) of Schedule 4 SA.

    (ii) Section 20(10)(a)(ii) of the UNCRC Bill does not modify section 28(7) SA contrary to section 29(2)(c) and paragraph 4(1) of Schedule 4 SA.

    (iii) Section 21(5)(b)(ii) of the UNCRC Bill does not modify section 28(7) SA contrary to section 29(2)(c) and paragraph 4(1) of Schedule 4 SA.

    (iv) Section 4(1A) of the ECLSG Bill does not modify section 28(7) SA contrary to section 29(2)(c) and paragraph 4(1) of Schedule 4 SA.

    (v) Section 5(1) of the ECLSG Bill does not modify section 28(7) SA contrary to section 29(2)(c) and paragraph 4(1) of Schedule 4 SA.

100. As regards section 6 of the UNCRC Bill, the questions referred fall to be answered as follows:

    (i) Section 6 of the UNCRC Bill does not modify the law on reserved matters contrary to section 29(2)(c) and paragraph 2(1) of Schedule 4 SA.

    (ii) Section 6 of the UNCRC Bill does not "relate" to reserved matters contrary to section 29(2)(b) SA.

    (iii) Section 6 of the UNCRC Bill does not modify section 28(7) SA contrary to section 29(2)(c) and paragraph 4(1) of Schedule 4 SA.

(iv) In so far as it is necessary to do so, section 6 can be read down either in terms of section 29 SA or in terms of section 101 SA.

**JAMES MURE QC**

**PAUL REID, ADVOCATE**

**LESLEY IRVINE, ADVOCATE**