

## **The Advocate General for Scotland ("AGS")'s case**

1. The Lord Advocate purports to refer to the Court, under §§1(f) and 34 of Schedule 6 to the Scotland Act 1998 ("SA"), the question whether a Bill which has not even been introduced into the Scottish Parliament relates to reserved matters.
2. It has not even passed that stage because the Lord Advocate does not have '*the necessary degree of confidence*' to be able to advise Scottish Ministers that the Bill would be within legislative competence (§§3-4 of the Lord Advocate's Reference). As the Lord Advocate's reference correctly recognises, that fact is fatal to the introduction of a Bill into the Scottish Parliament because any such Bill must be accompanied by a statement by the Scottish Minister that "*in his view the provisions of the Bill would be within the legislative competence of the Parliament*" (s.31(1) of the SA).
3. The consequence of that lack of confidence means that neither the basic initial stage, nor any other stage contemplated by the SA as necessary before a Bill's competence could be referred to this Court, will occur. The Bill is not going to be introduced into the Scottish Parliament; no proceedings on the Bill are going to take place in the Parliament; no final text of the Bill will emerge from the Parliament to await Royal Assent; there will be no view from the Presiding Officer about competence (ss.31(2) and (2A) SA) etc.
4. The AGS seeks a determination from the Court on the issue of whether the Court can, or alternatively should, accept the purported LA reference.
5. It is submitted that that is properly to be dealt with as a preliminary issue before the Court entertains argument on the answer to the question referred – not least because it engages the Court's jurisdiction. That was the course adopted in two references made under the equivalent provision of the Northern Ireland Act 1998: *Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 (No 2) (Northern Ireland)* [2019] UKSC 1; and *A Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 (Northern Ireland)* [2020] UKSC 2.
6. Accordingly, the AGS invites the Court to make the following directions:
  - (1) For the AGS to file a written case on the question whether the Court can or should accept the reference within 28 days of the date of the directions.
  - (2) For the LA to file a written case on the question whether the Court should accept the reference within 28 days of the AGS filing his case.
7. The Court may be content to determine the issue on the papers. If, however, it considers that a hearing would be of assistance, the AGS invites the Court to list the reference for a preliminary hearing on the issue of jurisdiction to determine the reference. The AGS observes that there is no pressing need for expedition here.
8. In these circumstances, it would be premature to engage with the substantive question whether the proposed Bill (or something like it) would be within legislative competence. Suffice to note at this stage that the clear, established position of the UK Government is that a Bill legislating for a referendum on independence would be outside the legislative competence of the Scottish

Parliament. That is evidently also the view of the Scottish Government's own Law Officer, the Lord Advocate.