IN THE SUPREME COURT OF THE UNITED KINGDOM

IN THE MATTER OF

A REFERENCE BY THE LORD ADVOCATE

UNDER PARAGRAPH 34 OF SCHEDULE 6 TO THE SCOTLAND ACT 1998

IN RELATION TO

WHETHER THE QUESTION FOR A REFERENDUM ON SCOTTISH INDEPENDENCE CONTAINED IN THE PROPOSED BILL RELATES TO RESERVED MATTERS

THE LORD ADVOCATE'S WRITTEN CASE

INDEX TO THE WRITTEN CASE

PART 1: INTRODUCTION AND QUESTION REFERRED

1. On 28 June 2022 the Lord Advocate filed a Reference with this Court in terms of paras.1(f) and 34 of Schedule 6 to the Scotland Act 1998 ("**SA**").

2. The Reference concerns section 2 of the proposed Scottish Independence Referendum Bill and the question whether that provision "relates to reserved matters" within the meaning of s.29 SA.

3. Exercising the function conferred on her by para.34 of Schedule 6, the Lord Advocate seeks from this Court a determination of the following question:

> Does the provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be "Should Scotland be an independent country?" relate to reserved matters? In particular, does it relate to: (i) the Union of the Kingdoms of Scotland and England (para.1(b) of Schedule 5); and/or (ii) the Parliament of the United Kingdom (para.1(c) of Schedule 5)?

PART 2: JURISDICTION

(A) INTRODUCTION

4. This Court's jurisdiction is conferred by para.34 of Schedule 6 to the SA which provides:

> "*The Lord Advocate … may refer to the Supreme Court any devolution issue which is not the subject of proceedings.*"

5. The jurisdiction conferred by this provision has never before been invoked. Two references have been made under the equivalent provision of the Northern Ireland Act 1998 (Northern Ireland Act 1998, para.34 of Schedule 10: ***Reference by the Attorney General of Northern Ireland*** [2020] UKSC 2; [2020] NI 820 and ***Reference by the Attorney General of Northern Ireland (No.2)*** [2019] UKSC 1; [2020] NI 793). In the context of the second of those references, this Court explained:

> "*The role of the Supreme Court on a reference under paras 33 and 34 of Sch 10 to the NIA is to provide authoritative legal guidance on the questions of law which arise on the reference. It is central to the exercise of this function that the reference be made on a devolution issue.*" (***Reference by the Attorney General of Northern Ireland (No.2)*** [2019] UKSC 1; [2020] NI 793 at para.2 (Lord Kerr)).

6. As explained below, the Lord Advocate submits that the question referred raises a devolution issue (within the meaning of para.1(f) of Schedule 6) and accordingly that this Court is able to provide authoritative legal guidance on the issue.

(B) DEVOLUTION ISSUE

7. "Devolution issue" is defined in para.1 of Schedule 6. It provides, *inter alia*, that:

> "*In this Schedule 'devolution issue' means –*
>
> …
>
> *(f) any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and <u>any other question arising by virtue of this Act about reserved matters</u>.*"

8. In the present Reference, the Lord Advocate submits that the question referred falls within the words that have been underlined. In particular, it raises an issue about two reserved matters: (a) the Union of the Kingdoms of Scotland and England (para.1(b) of Schedule 5); and (b) the Parliament of the United Kingdom (para.1(c) of Schedule 5).

9. The question referred is not the subject of other proceedings and concerns the extent to which s.2 of the proposed Bill relates to reserved matters.

10. As para.1(f) concerns "reserved matters" it follows that issues arising in respect of s.29(2)(a), (c)-(e) (which do not relate to "reserved matters") cannot be raised in this Reference. The Lord Advocate does not in any event consider that she requires the Court's determination on such issues (including any issue concerning s.29(2)(c), Schedule 4, para.4 and s.28(7)).

(C) ARISING BY VIRTUE OF THIS ACT

11. The question referred arises "by virtue" of the SA because when introducing the Bill it would be necessary for the Minister introducing it to state that in his or her view such legislation would be within the legislative competence of the Scottish Parliament. That is a requirement of law. Section 31(1) provides that:

> "*A person in charge of a Bill shall, on or before introduction of the Bill in the Parliament, state that in his view the provisions of the Bill would be within the legislative competence of the Parliament.*"

The Scottish Ministerial Code, para.3.4 provides that any Bill must be accompanied by a statement, which has been cleared by the Law Officers, that the Bill is within the legislative competence of the Scottish Parliament."

12. An identical obligation is imposed by the Standing Orders of the Scottish Parliament (Rule 9.3(1A) of the Standing Orders). That requirement of law has been recognised as a "*safeguard*" and as part of the "*system of pre-enactment scrutiny of Bills*" (***The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill Reference*** [2021] UKSC 42; 2022 SC (UKSC) 1 ("***UNCRC Bill Reference***") at paras.12 and 73, respectively). It is therefore integral to the SA.

13. The Ministerial Code requires any Bill introduced by a Minister to have been cleared by the Lord Advocate (Scottish Ministerial Code, para.3.4: that requirement was

noticed by this Court in the ***UNCRC Bill Reference*** at para.12). That is consistent with the general requirement of the Ministerial Code which requires that the Scottish Ministers ensure that their decisions are informed by appropriate analysis of the legal considerations. The Ministerial Code also provides that it is part of the role of the Law Officers to ensure that the Scottish Government acts lawfully (Scottish Ministerial Code, para.2.30).

14. The requirement for a Minister to consult the Law Officers before making a statement under s.31(1) is, moreover, implicit. Where the person in charge of a Bill is one of the Scottish Ministers, they have to form a view on whether the Bill is within competence, under s.31(1). Such a view relates to a question of law.

15. The issue to which this Reference relates therefore "arises by virtue" of the terms and operation of the SA.

(D) ANY OTHER QUESTION

16. The Reference procedure in para.34 of Schedule 6 exists to allow certain Law Officers to obtain authoritative legal guidance from this Court on the operation of the devolution scheme where they consider it appropriate to seek such a definitive ruling.

17. Para.34 is clearly intended to allow guidance to be obtained in circumstances which could not otherwise be brought before the courts (hence the establishment of a specific statutory jurisdiction). The same, more practical, reason that persuaded Lord Bingham that the House of Lords should determine ***R (Jackson) v Attorney General*** [2005] UKSC 56; [2006] 1 AC 262 applies in the present circumstances (at para.27):

> "*My second reason is more practical. The appellants have raised a question of law which cannot, as such, be resolved by Parliament. But it would not be satisfactory, or consistent with the rule of law, if it could not be resolved at all. So it seems to me necessary that the courts should resolve it, and that to do so involves no breach of constitutional propriety.*"

18. The reference to "any other question" in para.1(f) of Schedule 6 is deliberately of the broadest amplitude. Its breadth is reflective of the fact that the circumstances in which it might be appropriate for a Law Officer to obtain such a ruling cannot be foreseen. It is intended to provide a residual category that is available to a Law Officer in an

appropriate case. Whether it is an appropriate case in which to make a Reference is an assessment to be made by the Law Officer.

(E) THE DECISION TO REFER

19. The right to invoke this Court's jurisdiction under para.34 of Schedule 6 is conferred upon specified Law Officers, including the Lord Advocate. The power to refer a matter to this Court pursuant to para.34 is a "*retained function*" of the Lord Advocate (s.52(6) SA). It is therefore a power conferred upon her (and not on the Scottish Ministers collectively) to exercise in accordance with her assessment of the public interest.

20. In the present circumstances, the Lord Advocate has determined that it is necessary and in the public interest that the question of whether a Bill providing for a referendum on Scottish independence would relate to a reserved matter should be referred for an authoritative determination by this Court.

21. It is a question of law which unless answered by this Court now, is unlikely to be resolved authoritatively at all. Given the nature of the legal question at issue, it would be highly unsatisfactory for the question not to be resolved authoritatively and, in the Lord Advocate's assessment, this would not be in the public interest.

22. The issue would be unlikely to reach the courts because although clearance by the Law Officers has not yet formally been sought, the Lord Advocate considers that she would be unlikely to have the necessary degree of confidence that the Bill does not relate to a reserved matter to "clear" the Bill. If the Bill is not introduced, there could be no pre-Royal Assent reference to this Court pursuant to s.33 SA. There is no other means by which the issue of legislative competence can be determined by the Court.

23. Such an outcome would be contrary to the public interest because:

    a. There is a genuine issue of law that is unresolved and which, if resolved, could permit the proposed Bill to be introduced, passed by the Scottish Parliament and enacted.

    b. The issue is one of exceptional public importance to the people of Scotland and the United Kingdom.

c. The issue is directly relevant to a central manifesto pledge that has been endorsed by the Scottish electorate.

24. Furthermore, opinion has long been divided on whether a Bill that provides for a referendum on Scottish independence would "*relate to*" reserved matters. The competing arguments that have been expressed are set out in Part 4, below. The debate has been described as a "*festering issue*" for Scotland (see para.51, below), with academic literature and comment on both sides of the debate[1].

(F) *KEATINGS V ADVOCATE GENERAL*

25. It is appropriate that the Lord Advocate says something about the decision in ***Keatings v Advocate General*** 2021 SC 329. That case was brought by a campaigner for Scottish independence who sought declarators, in advance of the then forthcoming Scottish parliamentary elections of May 2021, that the Scottish Parliament had the power to legislate for the holding of a referendum on the question of independence. In the Lord Advocate's submission, the observations of the Inner House in that case, do not preclude a Reference under para.34 of Schedule 6 in these circumstances.

[1] A number of academic commentators have expressed the view that the Scottish Parliament may not legislate for a referendum. Professor Brazier wrote in 1998 that whilst the Scottish Parliament could legislate for a referendum on devolved matters, it would be "*ultra vires its powers to legislate for a referendum on independence…*" (R Brazier, *The Constitution of the United Kingdom*, [2000] CLJ 96 and 107). Dr Cormac Mac Amlaigh has argued that the purpose of a Bill falls to be assessed in its "*broader political context*…" as an instrument to "*achieve a further goal, that of secession*" (C Mac Amlaigh, *...yes, but is it legal? The Scottish Independence Referendum and the Scotland Act 1998*, Con. Law Group, 12 January 2012). On the other hand, Professor Colin Munro wrote that there would be nothing to prevent the Scottish Parliament holding a purely advisory referendum in *The Scotsman*, 11 March 1998 and Professor Mark Walters expressed confidence in the argument that the Scottish Parliament has authority to hold an advisory referendum, which would "*not conflict with the policy of the Act so long as its purpose is to assist the Scottish Parliament in determining the democratic will of the electorate*" ((1999) MLR 62, 371 at 386-7). In January 2012, seven academics wrote a joint paper stating that *"the legality of a referendum Bill passed under the Scotland Act as it currently stands is a more open question than has been generally acknowledged"*. They set out a *"plausible case"* for an advisory referendum being within the devolved competence of the Scottish Parliament. Noting that advisory referendums are limited in both purpose and effect, they concluded that: "*In order to give effect to the purpose of the Scotland Act, it should therefore be read as requiring those challenging the competence of a Bill to show more than it merely "has something to do with" a reserved matter, in this case the Union*" (*The Independence Referendum, Legality and the Contested Constitution: Widening the Debate*, 31 January 2012, Gavin Anderson, Senior Lecturer University of Glasgow; Christine Bell, Professor of Constitutional Law, University of Edinburgh; Sarah Craig, Lecturer University of Glasgow; Aileen McHarg, Senior Lecturer, University of Glasgow; Tom Mullen, Professor of Law, University of Glasgow; Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh; Neil Walker, Regius Professor of Public law and the Law of Nature and Nations, University of Edinburgh).

26. At paras.51-56, the Lord President dealt with the issue of whether that action was, amongst other things, academic. He contrasted the action in ***Keatings*** with the application in ***Wightman v Advocate General*** 2019 SC 111. The latter, said the Lord President, was not academic because "*its consequences were a matter of considerable practical importance*" for parliamentarians at that time (para.54). That echoes the language used by the Lord President in ***Wightman*** at para.22: "*In a case where there are not petitory conclusions, the declarator must have a purpose. There has to be some dispute about the matter sought to be declared. The declarator must be designed to achieve some practical result*." (See also: ***Macnaughton v Macnaughton's Trustees*** 1953 SC 387 at 382 (Lord Justice Clerk Thomson)). A substantive decision in ***Keatings***, on the other hand, the Lord President explained, "*would serve no practical purpose*" (para.55). The Lord Advocate submits that distinction is correct. In relation to the present Reference, it is clearly in the ***Wightman*** territory. The issue is not academic because it would be of "*considerable practical importance*". This issue does not arise for the Lord Advocate in the abstract but is live. The answer to the question will determine whether, if formally asked to do so, she can give the necessary clearance to allow the Minister to make the necessary statement in terms of s.31 SA.

27. At paras.60-61, the Lord President explained why the Court could not be called upon to consider the competence of a Bill before it had passed through the parliamentary process. At para.60, the Lord President sets out what he calls the "*only method*" of considering legislative competence of a Bill prior to Royal Assent. So far as those observations apply to those who have no active part to play in the legislative process, the Lord Advocate agrees with them.

28. Those observations do not exclude a Reference such as the present one. ***Keatings*** concerned an action by a campaigner for Scottish independence in the Court of Session. The Court was not concerned with a Reference to this Court under a specific statutory jurisdiction, the right to invoke that jurisdiction having been conferred upon specified Law Officers by the SA. Since it was not relevant to the case, the Court of Session made no reference to the legal obligation imposed by s.31(1) SA, the meaning of "*devolution issue*" in terms of para.1(f) of Schedule 6 and the terms of para.34 of Schedule 6. The Lord President's comments in para.60 should not therefore be taken as expressing any view on the ability of the Lord Advocate to make a Reference in circumstances such as the present, under para.34 of Schedule 6.

29. The Lord President's discussion largely reflected the submissions made on behalf of both the Advocate General and the Lord Advocate. Those submissions were focused on the case then before the Court. No detailed submissions were made on the para.34 reference procedure and the meaning of "devolution issue" under para.1(f) was not mentioned. The Lord Advocate's submissions in the Inner House did state that a reference could not be made under paras.33 and 34 during the passage of a Bill as the conditions in para.1(a) of Schedule 6 would not be satisfied and implied that a pre-Assent reference was the only means by which a devolution issue could be raised in respect of a Bill or draft Bill. The present circumstances were not, however, addressed and the present Lord Advocate submits, if necessary differing from her predecessor, that a reference under para.34, read with para.1(f), is available to her in the present circumstances. As this Reference illustrates, reasons of constitutional propriety and considerations of the public interest (both being matters for the judgement of the Lord Advocate of the day), can result in the Lord Advocate being entitled to make a Reference to the Supreme Court before a statement in terms of s.31(1) SA is made. The reference procedure in para.34 of Schedule 6 is the mechanism by which the Lord Advocate can obtain "*authoritative legal guidance*" on questions of law that arise under the SA: ***Reference by the Attorney General of Northern Ireland (No.2)*** [2019] UKSC 1; [2020] NI 793 at para.2 (Lord Kerr).

30. That is the context in which the Lord President's observations at para.61 require to be read. The potential for conflict suggested in the opening sentence does not exist where the ability to seek an answer at the pre-legislative phase (and not, as was the Lord President's concern, during the passage of a Bill) rests only in the hands of specified Law Officers (rather than with the population at large) acting pursuant to their retained functions in the public interest.

31. Furthermore, if this Reference is answered in a way which allows the Bill to be introduced, and it is then passed unamended, then at the s.33 SA stage, the Law Officers may take the view that this Court has already expressed its view on the legislation. In the event the Bill is amended during its parliamentary passage, then the question of a s.33 SA reference could potentially arise. What this Reference seeks is an answer to a question about reserved matters that arises at the point before introduction of a Bill.

(G) CONCLUSION

32. For all the reasons given above, the jurisdiction established by para.34 of Schedule 6 is properly invoked by the question referred by the Lord Advocate.

PART 3: HISTORICAL AND CONSTITUTIONAL CONTEXT

(A) THE UNION

33. The Union of the Kingdoms of Scotland and England ("**the Union**") is a union into which the then separate Kingdoms of Scotland and England (already including Wales) entered in 1707 to create a new Kingdom of Great Britain. It would later become the United Kingdom of Great Britain and Ireland (1800) and then the United Kingdom of Great Britain and Northern Ireland (1922) (in relation to each, see generally: ***Earl of Antrim's Petition*** [1967] 1 AC 691 at pp.712-716 (Lord Reid)). Prior to 1707, there had been from 1603 a "*Union of the Crowns*", in the sense that the separate Kingdoms of Scotland and England shared the same sovereign, but this was in respect of two distinct Kingdoms.

34. Following negotiations between commissioners for Scotland and England, a Treaty of Union was signed on 22 July 1706. Article I of the Treaty of Union provided that the two Kingdoms of Scotland and England would in 1707 "*and forever after be United into One Kingdom by the Name of Great Britain*". The Treaty of Union required ratification and legislation in both parliaments. The Union with England Act 1707 was passed by the Scottish Parliament on 16 January 1707. The Union with Scotland Act 1706 was passed by the English Parliament on 6 March 1707. The discrepancy in the dates of the Acts is attributable to the English legal year that then ran from 25 March to 24 March: the passage of the English Act therefore fell within the 1706 legal year. A number of amendments have been made to the Acts of the Union by the UK Parliament, including to provisions referred to in the Treaty text as permanent or fundamental (see: C.R. Munro, *Studies in Constitutional Law*, 2nd ed., (OUP: Oxford, 1999) pp.138-139).

35. The Treaty of Union came into force on 1 May 1707. On that date the Scottish and English Parliaments were replaced by a single "*Parliament of Great Britain*" sitting at Westminster in London. The Parliament of Great Britain subsequently passed the Union with Scotland (Amendment) Act 1707, which united the privy councils of England and Scotland. The Kingdoms of Scotland and England ceased to exist following the Union and were replaced by the Kingdom of Great Britain. In ***Lord Gray's Motion*** [2002] 1 AC 124 Lord Slynn opined (at p.129) that:

"*For my part, I would accept that there was an international treaty between England and Scotland (as it has often been so called in the past), but since neither state has existed as such since 1707 there is no party to the treaty which could enforce it.*"

See also: the Joint Opinion of Professors Crawford and Boyle annexed to the UK Government's paper "*Scotland Analysis: Devolution and the Implications of Scottish Independence*" (Cmnd 8554, February 2013). The President of this Court (then Deputy President) has described the United Kingdom as "*composed of three ancient nations, and part of a fourth*" (*Scotland's Devolved Settlement and the Role of the Courts*, The Inaugural Dover House Lecture, London, 27 February 2019, p.2).

36. Notwithstanding the political union of the two Kingdoms and Parliaments, distinct legal and national institutions were retained in Scotland. These included, in particular, the separate Scottish legal and courts system, separate local government, a distinctive form of university and school governance, and the Church of Scotland. The Lord Advocate and Solicitor General for Scotland were retained as offices of State. The continuation of a separate Scottish jurisdiction was judicially recognised: see for example, Lord Campbell LC in ***Stuart v Moore*** (1861) 4 Macq 1, 49; quoted with approval by Lord Hope of Craighead in ***R v Manchester Stipendiary Magistrates, ex parte Granada Television*** [2001] 1 AC 300.

37. What has been described as "*administrative devolution*", in the form of the appointment of ministers and civil servants to discharge responsibilities in Scotland, developed from the late nineteenth century. A Secretary for Scotland was appointed in 1885, with the incumbent usually a member of the Cabinet. In 1926, the Office became one of a full Secretary of State (see generally: C.R. Munro, above at pp.37-44).

(B) DEVOLUTION AND THE 1979 REFERENDUM

38. In 1969 a Royal Commission was appointed to examine the constitution of the United Kingdom (chaired by Lord Crowther and, after his death, by Lord Kilbrandon). It reported in 1973 (*Report on the Royal Commission on the Constitution,* Cmnd 5460), recommending a directly elected assembly for Scotland with a single transferable system of voting. The Labour Governments elected in February and October 1974

brought forward proposals on devolution, publishing White Papers in 1974 ("*Democracy and Devolution: Proposals for Scotland and Wales*" (Cmnd 5732)) and 1975 (*"Our Changing Democracy: Devolution to Scotland and Wales*" (Cmnd 6348)). Following the collapse of a Scotland and Wales Bill in early 1977, separate Bills for each nation were introduced later that year. Both Bills passed, albeit both Bills were amended during their passage to insert provisions which required the Secretary of State to lay before the UK Parliament an Order in Council for the repeal of the relevant Act if it appeared that less than 40% of persons entitled to vote in the referendum had voted "yes": Scotland Act 1978, s.85(2); Wales Act 1978, s.80(2). At referendums held in 1979, a majority of those voting voted "Yes" in Scotland whilst in Wales a majority voted 'No'. However, the electorate threshold of 40% was not met in Scotland and both Acts were later repealed. In respect of Scotland that requirement was given effect by the Scotland Act 1978 (Repeal) Order 1979, SI 1979/928.

39. Notwithstanding the outcome of the 1979 referendum, support for devolution within Scotland grew in the period up to 1997. The Scottish Constitutional Convention ("**SCC**"), established in March 1989, published a number of documents, notably "*Scotland's Parliament: Scotland's Right*" (November 1995). That paper argued for a Scottish Parliament elected by the additional member voting system with wide-ranging legislative powers, including the power to vary income tax by up to 3 pence in the pound. Throughout that period, there was a general political consensus that Scotland had the right to determine its own future. For example, having left office, Baroness Thatcher noted that Scots "*have an undoubted right to national self-determination; thus far they have exercised that right by joining and remaining in the Union. Should they determine on independence no English party or politician should stand in their way.*" (M Thatcher, *The Downing Street Years*, (London: HarperCollins 1993), p.624)

(C) DEVOLUTION AND THE 1997 REFERENDUM

40. Following the 1997 UK general election, the newly elected Labour Government brought forward proposals for a Scottish Parliament on the basis proposed by the SCC in the White Paper "*Scotland's Parliament*" (Cmnd. 3658). Prior to introducing legislation to give effect to those proposals (as had been done in 1978), a referendum was held (to that end, the UK Parliament passed the Referendums (Scotland and Wales)

Act 1997). Donald Dewar, MP, the then Secretary of State for Scotland, explained the purpose of the referendum:

> "*The Bill* [that became the Referendums (Scotland and Wales) Act 1997] *will allow for a test of public opinion and is a matter of establishing consent. It is not a Second Reading aperitif for devolution in Scotland or Wales. There is, I would argue, a strong case for having a test of public opinion, but whether we should or should not is the question before us. If the Bill reaches the statute book and we move to the referendum, there will be a White Paper that will clearly set out the scheme and which will inform the public of the details – although I have to say that, in Scotland, Wales and other parts of the country, these issues are well understood. In any event, the White Paper will set out the scheme in some detail, and it is on that basis that the arguments will rage*."
>
> (Hansard, HC, 21 May 1997, Vol.294, Col. 716)

41. That referendum was held on 11 September 1997 on the proposals, the electorate being asked whether there should be a Scottish Parliament and whether such a Parliament should have tax-varying powers. Both questions were answered in the affirmative (74.3% of those voting supported the establishment of a Scottish Parliament and 63.5% of those voting supported giving the Parliament income tax varying powers). The Secretary of State for Scotland appointed a Consultative Steering Group in November 1997 to develop proposals for as to how the new Parliament would operate. The Group's report ("*Shaping Scotland's Parliament*", January 1999) was used as the blueprint for the Scottish Parliament's initial set of Standing Orders.

(D) THE SCOTLAND ACT 1998

42. The Scotland Bill was introduced in the House of Commons in December 1997 and received Royal Assent in November 1998.

43. The SA establishes the Scottish Parliament and makes provision for elections to the Scottish Parliament, and for proceedings of the Scottish Parliament, legislation and related matters (Part I, s.37 of which provides that "*The Union with Scotland Act 1706 and the Union with England Act 1707 have effect subject to this Act*"). It provides for the Scottish Administration, including the Scottish Government and for ministerial functions and the property and liabilities of the Scottish Ministers (Part II). Part 2A,

introduced by the Scotland Act 2016 (see paras. 63-66 below), provides for the permanence of the Scottish Parliament and the Scottish Government. Parts III and IV SA concern financial provisions and the tax-varying power respectively, with Part 4A (also introduced by the Scotland Act 2016) conferring a range of powers in respect of taxation. There are extensive miscellaneous and general (Part V) and supplementary (Part VI) provisions together with 9 Schedules, including Schedule 5 (setting out reserved matters) and Schedule 6 (making provision for the raising and determination of devolution issues).

44. The Scottish Parliament is a unicameral assembly with 129 Members elected by the additional member system of proportional representation (see: ss.5-8 SA).

45. The Scottish Parliament has the power to make laws, known as Acts of the Scottish Parliament, within its competence (s.28(1), SA). It is based on a "retained powers" model of devolution in terms of which the UK Parliament has conferred general legislative power on the Scottish Parliament which power is subject to limitations imposed by the SA. The Scottish Parliament has also debated "*a wide range of issues and matters of concern in Scotland, whether devolved or reserved*", as envisaged in *Scotland's Parliament* (Cmnd. 3658, para. 2.5). For example, it has debated the anticipated Iraq War (Scottish Parliament Official Report, 13 March 2003, Col. 16421 *et seq.*), provision of benefits for pensioners (Scottish Parliament Official Report, 4 November 2004, Col. 11497 *et seq.*), nuclear weapons (Scottish Parliament Official Report, 28 September 2006, Col. 28053 *et seq*.), UK Budgets (Scottish Parliament Official Report, 1 May 2008, Col 8198 *et seq*. and Scottish Parliament Official Report, 28 March 2012, Col. 7794 *et seq.*), Universal Credit (Scottish Parliament Official Report, 28 September 2021, Col. 32 *et seq*) and the Russian invasion of Ukraine (Scottish Parliament Official Report, 24 February 2022, Col. 10 *et seq*).

46. In addition to the election of members to the Scottish Parliament through a system of proportional representation, the SA also permits other forms of democratic engagement between Members of the Scottish Parliament, Scottish Ministers and the people of Scotland. The ability to hold referendums is within the powers of the Scottish Parliament (reflected in the Referendums (Scotland) Act 2020), and the Scottish Government and Scottish Parliament are also able to convene "Citizens Assemblies", both statutory and non-statutory (in respect of referendums, the reservation of elections

is limited and by necessary implication does not preclude referendums being authorised by the Scottish Parliament: para.B3(B)(a) of Schedule 5) .

47. The SA also contains mechanisms by which adjustments can be made to the legislative and executive powers respectively of the Scottish Parliament and the Scottish Ministers, with the agreement of both Houses of the UK Parliament and the Scottish Parliament itself (see ss. 30, 63, 108, 111 and Schedule 7). These powers can also be adjusted directly by primary legislation made by the UK Parliament. In those circumstances the Legislative Consent Convention applies: see s.28(8) SA and Devolution Guidance Note 10 Post-Devolution Primary Legislation affecting Scotland.

48. The question whether the Scottish Parliament would have the power to pass legislation providing for a referendum on Scottish independence was one to which the UK Parliament was alive.

49. Statements made during the passage of the Scotland Bill indicate that the UK Government did not intend the SA to confer power on the Scottish Parliament to legislate for a referendum on Scottish independence (although contrary views were expressed: see paras.50-51, below).

(i) The Secretary of State for Scotland (Donald Dewar, MP) stated:

> *"If one assumed that* [a referendum] *is a way of changing the constitution, no, it is not in the power of the Scottish Parliament to change the constitutional arrangements. […] A referendum that purported to pave the way for something that was ultra vires is itself ultra vires. That is a view that I take and one to which I will hold. But, as I said, the sovereignty of the Scottish people, which is often prayed in aid, is still there in the sense that, if they vote for a point of view, for change, and mean that they want that change by their vote, any elected politician in this country must very carefully take that into account. […] It is my view that matters relating to reserved matters are also reserved. It would not be competent for the Scottish Parliament to spend money on such a matter in those circumstances." (*Hansard, HC, Vol 312, Cols. 257-258)

(ii) Lord Sewel (in charge of the Bill in the Lords) stated:

"I wish the Committee to be in no doubt that as the Bill stands the Scottish parliament will not be able to legislate to hold a referendum on independence as the union of the kingdoms is already a reserved matter under Schedule 5. Explicit reference along the lines proposed by the noble Lord, Lord Rowallan, is just not needed.

In determining what relates to a reserved matter, the government amendments tabled to Clause 28 are of help here, because they indicate that we must look at the purpose of what is being done. If the parliament passed an Act to hold a referendum about whether the Union should continue, it would thus clearly be legislating in relation to the reserved matter of the Union. Any such Act would be about the continuation of the Union and it would therefore be beyond the parliament's competence and would not be law.

Perhaps I may go through the three steps that lead to that conclusion. First, the parliament cannot legislate if the provision relates to a reserved matter. That is Clause 28(2)(c). Secondly, the Union of the Kingdoms of Scotland and England is a reserved matter by virtue of paragraph 1(b) of Part I of Schedule 5. Finally, legislation for a referendum on independence would be legislation about whether the Union should be maintained and would therefore relate to the reserved matter of the Union, and so be beyond the competence of the parliament. That is brought in by the purpose test which we discussed earlier" (Hansard, HL, Vol 592, Cols. 854-855)

(iii) The Lord Advocate (Lord Hardie) stated:

"[T]he new clause makes it clear that any provisions in such legislation or in Bills which could be read widely as being outwith competence are to be read as narrowly as is required in order for them to be within legislative competence, but only so far as it is possible to do so.

An example might make this clearer. An Act of the Scottish parliament might make general provision enabling the Scottish ministers to hold a referendum on any matter. It would be possible to read that Act as enabling Scottish ministers to hold a referendum on some reserved matters such as independence or the monarchy. The Act would be ultra vires to that extent. However, in order to

preserve the validity of that Act, the new clause would require the courts to read the Act as narrowly as is required for it to be intra vires, so far as it is possible to do so. In other words, the courts will be required to read the Act of the Scottish parliament as enabling only the holding of referendums on matters within the competence of the parliament. In that way, the Act is not rendered ultra vires to any extent.

This is thought to be the normal rule of construction which the courts would apply in construing legislation from parliaments with limited powers. They would seek to give effect to that legislation rather than to invalidate it. This is called the principle of efficacy. However, if a provision can clearly only be read as making provision outwith competence—for example, an Act of the Scottish parliament providing only for a referendum on independence or the monarchy—the new clause will not enable or require it to be read as being within competence." (Hansard, HL, Vol 593, Col. 1953)

50. Contrary views were expressed, including by Lord Mackay of Drumadoon, then Shadow Lord Advocate:

"I believe that it would be perfectly possible to construct a respectable legal argument that it was within the legislative competence of the Scottish parliament to pass an Act of Parliament authorising the executive to hold a referendum on the issue of whether those who voted in Scotland wished Scotland to be separate from the UK. It would be perfectly possible to construct an argument that it would assist members of the Scottish parliament in the discharge of their devolved legislative and executive duties to be aware of the thinking of Scottish people on that very important issue." (Hansard, HL, Vol 592, Col. 852)

51. Presaging the events that have led the Lord Advocate to make this Reference, Lord Mackay (in support of proposed amendments to the Scotland Bill that were not ultimately moved) went on to say:

"Many noble Lords will be aware that Strathclyde Regional Council recently felt it appropriate to hold a poll on the question of whether water should be privatised in Scotland. Taking a slightly different tack, other local authorities

believed that it was appropriate to contribute to the work of the Scottish Constitutional Convention by making funds available to cover the costs that it incurred. When a decision to make such a payment by Grampian Regional Council was challenged by the Commission for Local Authority Accounts in Scotland it fell to the noble and learned Lord the Lord Advocate in a different guise to defend that council's decision. It was held by the court that it was well within the power of the local authority to support the work of the convention on the basis that in some way it might be in the interests of those who lived in the local authority area to have such work supported. Clearly, there was a different statutory framework in that situation, but I do not shrink from the suggestion that it would be perfectly possible for an Act of Parliament to be passed by the Scottish parliament authorising such a poll and for that to end up in the courts.

Throughout the debates on this Bill I have sought to make clear my belief that the courts should be involved in these matters as infrequently as possible. For that reason I have tabled Amendments Nos. 176 and 177 which are contradictory. I anticipate that when Amendment No. 176 is called I shall be told that if it is accepted by the Committee I shall be unable to move Amendment No. 177. My objective is to clarify the position. I have no wish to indicate whether it would be desirable to have such a referendum at an early date; there are arguments both ways. But I remain convinced that the law on this matter should be clarified. If it is not then the festering issue as to whether the Scottish parliament is competent to hold such a referendum will rumble on." (Hansard, HL, Vol 592, Cols. 852-853. The case to which Lord Mackay referred is ***Commission for Local Authority Accounts in Scotland v Grampian Regional Council*** 1994 SC 277.)

52. The Scottish Parliament was formally opened in July 1999. The first and second administrations (formed in 1999 and 2003 respectively) were coalitions between the Scottish Labour and Scottish Liberal Democrat parties. The SNP was elected for the first time in 2007 and formed a minority administration. It has remained in office since then (following the Scottish general elections of 2011, 2016 and 2021).

(E) THE SCOTLAND ACT 2012

53. Following its election in 2007, the Scottish Government published a White Paper on Scotland's constitutional arrangements, *Choosing Scotland's Future: A National Conversation: Independence and Responsibility in the Modern World*, which included options for further devolution and independence. The paper also contained an illustrative draft referendum bill, with a proposal to ask voters whether they agreed or disagreed with the proposition: "*The Scottish Government should negotiate a settlement with the Government of the United Kingdom so that Scotland becomes an independent state*".

54. The paper noted that (at p.35, emphasis in original):

> "*The competence of the Scottish Parliament to legislate for a referendum would depend on the precise proposition in the referendum Bill, or any adjustments made to the competence of the Parliament before the Bill is introduced. At present the constitution is reserved, but it is arguable that the scope of this reservation does not include the competence of the Scottish Government to embark on* ***negotiations*** *for independence with the United Kingdom Government. Legislative action at both Holyrood and Westminster would be required to effect independence for Scotland or to transfer substantive responsibility for reserved matters.*"

55. Following publication of *Choosing Scotland's Future* in August 2007, the Scottish Government held a "National Conversation" on Scotland's constitutional future, supported by further papers on constitutional change across a range of subjects such as energy, taxation and foreign affairs. A further White paper – *Your Scotland, Your Voice: A National Conversation* was published in November 2009. It considered four options for Scotland's constitutional arrangements. In February 2010, the Scottish Government published a consultation on a further draft referendum bill (*Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper*) which explored options for a multi-option referendum on extending the powers of the Scottish Parliament, including powers to achieve independence.

56. Separately, in December 2007 the Scottish Parliament passed a motion supporting the establishment of a commission, the remit of which should be "*To review the provisions*

of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament and continue to secure the position of Scotland within the United Kingdom." (Scottish Parliament Official Report, 6 December 2007, Col. 4268).

57. The Commission on Scottish Devolution (the "Calman Commission") was established in 2008. In its final report (*Serving Scotland better: Scotland and the United Kingdom in the 21st century: final report*, June 2009), the Commission recommended changes to the devolution settlement including the devolution of certain further powers and the reservation of others.

58. Following the UK general election of 2010, the new UK Government pledged to implement the proposals and introduced a Scotland Bill based on the Commission's work. The Bill was subject to the Legislative Consent Convention. Committees of the Scottish Parliament undertook inquiries on the Bill and published reports and negotiations took place between the Scottish and UK Governments on arrangements to operate the proposed taxation elements of the Bill. Ultimately the Scottish Parliament passed a Legislative Consent Motion (Scottish Parliament Official Report, 18 April 2012, Col. 8137) and the Scotland Act 2012 was then enacted.

(F) THE 2014 INDEPENDENCE REFERENDUM

59. In 2011, the SNP's election manifesto contained a commitment for a referendum on independence to be held in the following parliamentary session. In that election, the SNP won a majority of seats and formed a government. It was recognised by the UK Government that the Scottish Government had a mandate to hold a referendum on the question of independence. The UK and Scottish Governments entered into discussions as to how the question of the competence of the Parliament to legislate for a referendum could best be put beyond doubt and about certain matters relating to the conduct of the referendum. These discussions resulted in the conclusion of an *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland* ("**the Edinburgh Agreement**") in October 2012.

60. Following the Edinburgh Agreement, the UK and Scottish Governments promoted The Scotland Act 1998 (Modification of Schedule 5) Order 2013 ("**the Order**"). The Order,

made under section 30 of the SA (which requires to be made by the Type A procedure for subordinate legislation authorised by the SA: para.1 of Schedule 7 to the SA), was approved in the Parliament and in both Houses of the UK Parliament and became law on 13 February 2013. It provided that para.1 of Part 1 of Schedule 5 to the SA "*does not reserve a referendum on the independence of Scotland from the rest of the United Kingdom if* [prescribed requirements] *are met*". The prescribed requirements were that (a) the date of the poll was not to be the date of the poll at any other referendum held under provision made by the Parliament; (b) the date of the poll was to be no later than 31 December 2014 and (c) there was to be only one ballot paper and that ballot paper was to give voters a choice between only two responses.

61. The Scottish Parliament subsequently passed legislation setting out the arrangements for the referendum, including the question, the date and the franchise (Scottish Independence Referendum (Franchise) Act 2013). There was again a general political consensus that Scotland had the right to determine its own future (in other words, Scotland's right to self-determination was uncontroversial). On 5 August 2014, for example, the leaders of the Scottish Conservatives, Labour and Liberal Democrats signed a statement saying: "*Power lies with the Scottish people and we believe it is for the Scottish people to decide how Scotland is governed.*"

62. On 18 September 2014, a referendum was held in which the Scottish electorate was asked "*Should Scotland become an independent country*?" The result was that 2,001,926 votes were cast for 'No' (55.3%) and 1,617,989 for 'Yes' (44.7%).

(G) THE SCOTLAND ACT 2016

63. Towards the end of the 2014 referendum campaign, a pledge was made by the main parties supporting the pro-Union campaign to undertake a further review of the devolution settlement in the event of a 'No' note. Following the referendum, the Smith Commission (chaired by Lord Smith of Kelvin) was established to agree proposals for further devolution. The Commission's members were representatives of the five parties elected to the Scottish Parliament. The Scottish Government also published detailed proposals for further devolution in support of the Commission's work (see *More Powers for the Scottish Parliament: Scottish Government Proposals*). In its report of 27 November 2014 (*Report of the Smith Commission for further devolution of powers*

to the Scottish Parliament), the Commission made recommendations divided into three "pillars":

(i) Providing for a durable but responsive constitutional settlement for the governance of Scotland.

(ii) Delivering prosperity, a healthy economy, jobs, and social justice.

(iii) Strengthening the financial responsibility of the Scottish Parliament.

64. The Commission specifically stated, at para.18, that: "*It is agreed that nothing in this report prevents Scotland becoming an independent country in the future should the people of Scotland so choose.*"

65. A further Scotland Bill, based on these proposals, was introduced to the UK Parliament by the UK Government in 2015. There was again extensive scrutiny of the Bill in the Scottish Parliament, and negotiations between the Scottish Government and the UK Government on the financial arrangements. The latter resulted in an agreed "fiscal framework", following which the Scottish Government recommended that the Scottish Parliament consent to the Bill. The Scottish Parliament passed a Legislative Consent Motion on 16 March 2016 (Scottish Parliament Official Report, 16 March 2016, Col. 259) and the Scotland Act 2016 was then enacted.

66. The Scotland Act 2016 provided for the devolution of a range of further powers to the Scottish Parliament, notably in relation to social security, income tax, VAT, air passenger duty, borrowing powers and the destination of fines, forfeitures and fixed penalties. It also made changes to the devolution settlement by declaring the permanence of the Scottish Parliament and the Scottish Government and that those institutions are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum (now s.63A SA), by giving statutory recognition to the Legislative Consent Convention (s.28(8)) and by introducing super-majority requirements for Bills relating to a "protected subject matter" (ss. 30(4) and (5), 31A).

(H) SUBSEQUENT EVENTS

67. Following the election of the Conservative government in 2015, legislation was enacted by the UK Parliament to implement a manifesto commitment to hold a referendum on continued membership of the European Union ("**EU**"). The referendum was held on

23 June 2016. The result was that 17,410,742 (51.9%) people voted to leave and 16,141,241 (48.1%) to remain. In Scotland, 62% of those voting supported remaining in the EU, with a majority for "remain" in every Scottish council area.

68. The SNP's manifesto for the 2016 Scottish parliamentary election, which took place on 5 May 2016 (and therefore shortly before the EU referendum) stated that:

> "*We believe that the Scottish Parliament should have the right to hold another referendum if there is clear and sustained evidence that independence has become the preferred option of a majority of the Scottish people – or if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will.*"

69. On 28 March 2017, the Scottish Parliament passed a motion mandating the Scottish Government to take forward discussions with the UK Government in respect of a s.30 Order to ensure the Scottish Parliament could legislate for a further referendum on independence (Scottish Parliament Official Report, 28 March 2017, Cols.78-81). General elections for the UK Parliament took place on 8 June 2017 at which a majority of Scottish MPs were returned on a manifesto commitment to a second independence referendum.

70. In its paper "*Scotland's Right to Choose: Putting Scotland's Future in Scotland's Hands*" published in December 2019, the Scottish Government concluded that there had been a material change in circumstances since 2014. This material change of circumstance was based on "*the prospect of Scotland leaving the EU against its will*" and "*what EU exit has revealed about Scotland's position within the UK*" (p.11).

71. The 2019 paper also concluded that events since 2016 had reinforced the mandate the Scottish Government had from the people of Scotland; that votes since the EU referendum demonstrated the continued force and relevance of the mandate the Scottish Government received in the 2016 Scottish Parliamentary election; and that in the 2017 UK general election, held after the EU referendum, a majority of Scottish MPs were returned on a manifesto that explicitly referenced the mandate from 2016 (p.13).

72. The 2019 paper concluded by calling on the UK Government to enter discussions about the Scottish Government's mandate for giving the people of Scotland a choice, and to

agree legislation with the Scottish Government that would put beyond doubt the Scottish Parliament's right to legislate for a referendum on independence.

73. In the 2019 UK general election a majority of Scottish MPs were returned on a manifesto that supported a second independence referendum.

74. By letter to the First Minister dated 14 January 2020 (in response to her letter of 19 December 2019), the Prime Minister stated that he could not agree to any request for a transfer of power that would lead to further independence referendums. The Prime Minister restated that position by letter to the First Minister dated 6 July 2022 (in response to the First Minister's letter of 28 June 2022).

75. In March 2021 the Scottish Government published a draft Scottish Independence Referendum Bill and an accompanying paper.

76. The 2021 Scottish General Election returned a majority of MSPs who had stood on a manifesto commitment to a second referendum on independence.

77. On 28 June 2022 the First Minister announced to the Scottish Parliament that the Lord Advocate had made this Reference and the Scottish Government published the proposed Bill that is appended to the Reference and to this Case.

(I) REFERENDUMS IN THE UK

78. The referendum is now an established part of the constitutional arrangements of this country. Dicey was a strong advocate for the use of referendums, particularly in the context of Irish Home rule. There were, he said, some decisions that "*must be referred to a more august tribunal than the House of Commons, or even than Parliament.*": Dicey, *The Referendum* (1894) 23 *National Review* 65 at 71. See also: Dicey, *The Referendum and its Critics* (1910) 212 *Quarterly Review* 538. However, the modern history of national referendums in the United Kingdom starts in 1973, when a border poll was held in Northern Ireland (a poll that was largely boycotted by the Nationalist community and which saw 98.9% of those who participated voting in favour of remaining part of the United Kingdom). The first UK-wide referendum was held in 1975 on continued membership of the then European Economic Community. That was followed by referendums in Scotland and Wales in 1979 on devolution proposals (see para.38, above). No further referendums were held at national level (i.e. at a UK-wide

or devolved level but for this purpose local referendums are not included) until 1997 when Scotland and Wales were again asked to vote on devolution proposals (see paras. 40-41, above). In 2000, extensive provision was made for the conduct and regulation of referendums (Political Parties, Elections and Referendums Act 2000). Scottish-specific provision has also been made in Referendums (Scotland) Act 2020 (see para. 83, below). In addition to local and regional referendums, four referendums of national significance have been held since 2000.

79. First, in 2011 a referendum was held on a proposed change to the voting system for elections to the House of Commons. Secondly, and also in 2011, a referendum was held in Wales on the proposed transfer of legislative competence to the Welsh Assembly. Thirdly, in 2014, a referendum was held in Scotland on the question of Scottish independence. Finally, in 2016, a referendum was held on the United Kingdom's continued membership of the European Union. Whilst detailed legislative provision has been made for the conduct of referendums within the United Kingdom, there is little consistency in their use and no consistent practice in respect of their legal effect: see, generally, the conclusions of the House of Lords Constitution Committee in their 12th report of Session 2009-10, *Referendums in the United Kingdom* (HL Paper 99).

80. On occasion, the UK Parliament has made specific provision in respect of the consequences of particular outcomes of a referendum. For example, the Parliamentary Voting Systems and Constituencies Act 2011 required the Minister to either bring into force or repeal certain provisions of that Act depending upon the result of the referendum (s.8 of the 2011 Act). In that sense, the referendum provided for by the 2011 Act was "self-executing". The devolution referendums in 1979 were similarly self-executing (see para.38 above). More commonly, the UK Parliament has made no provision in respect of the consequences of particular outcomes of a referendum. Most recently the European Union Referendum Act 2015 was silent as to the consequences of either result. The same approach was taken by the Scottish Parliament to the 2014 Scottish independence referendum (Scottish Independence Referendum Act 2013) and is the approach taken in the proposed Bill. Such referendums are, as a matter of law, only advisory. That was made clear by this Court in ***Moohan v Lord Advocate*** [2014] UKSC 67; 2015 SC (UKSC) 1 ("***Moohan***") in respect of the 2014 referendum (at para.47):

> "*…while the main political parties had committed themselves to accept the result of the Referendum, a 'yes' vote would not of itself have triggered independence for Scotland. If there had been a 'yes' vote, Scotland would not have achieved independence unless and until the UK Parliament had voted in favour, and, whatever the main parties had promised, Members of Parliament would have been free, indeed constitutionally bound, to vote as they saw fit.*"

(The conditional perfect tense reflects the circumstances of the case in which the Court advised of the outcome before the referendum took place but gave reasons afterwards. The statement of the law is consistent with the UK Government's response to the House of Lords Constitution Committee 12th Report of Session 2009-2010, above, at 4th Report of Session 2010-2011 (HL Report 34) at p12). Accordingly, unless Parliament makes specific provision to the contrary, rendering the referendum self-executing, any referendum has no effect in law. That does not, however, mean that a result cannot have great political significance (***Miller v Secretary of State for Exiting the European Union*** [2017] UKSC 5; [2018] AC 61 ("***Miller***") at para.124 (Lord Neuberger)).

PART 4: WHETHER THE REFERRED PROVISIONS RELATE TO RESERVED MATTERS

(A) INTRODUCTION

81. The question referred to this Court asks whether s.2 of the proposed Scottish Independence Referendum Bill, in providing for the question "*Should Scotland be an independent country?*" to be asked in a referendum, relates to a reserved matter. That question gives rise to two sub-questions: (a) whether the Bill, to the extent that it makes provision for that question to be put in a referendum, "*relates to*" the reserved matter of the Union of the Kingdoms of Scotland and England": s.29(2)(b), s.30(1), Schedule 5 para.1(b); and (b) whether the Bill "*relates to*" the reserved matter of the Parliament of the United Kingdom: s.29(2)(b), s.30(1), Schedule 5 para. 1(c).

82. These are questions that the Lord Advocate is required to address in order to advise the Scottish Government, and in particular the Minister in charge of the Bill, on whether the statement required by s.31 SA can be made.

83. As noted above, holding a referendum is not a reserved matter (para.B3 of Schedule 5, (Elections) does not reserve the holding of referendums). Detailed, general, provision for the conduct and regulation of referendums has been made by the Scottish Parliament in the Referendums (Scotland) Act 2020. That having been done, the proposed Bill is relatively short.

84. It begins by narrating the purpose of the legislation as being *"to make provision for ascertaining the views of the people of Scotland on whether Scotland should be an independent country"* (s.1). Provision is then made for the question to be posed, the ballot paper and the date of the referendum (s.2) and the franchise (s.3). The 2020 Act is then applied (s.4), although any specific qualifications are yet to be identified, and standard final provisions are included (ss. 5-8). The form of the ballot paper is set out in the Schedule. No provision is made for the effect of any result of the referendum, i.e. the referendum is not self-executing.

85. The arguments both for and against the proposition that s.2 of the Bill relates to reserved matters are set out below. That is done by addressing each sub-question in turn. First, it may be helpful to set out the general legal framework within which those questions fall to be addressed.

(B) LEGAL FRAMEWORK

Introduction

86. There is now a well-established body of case law concerning the interpretation and application of some of the central aspects of the SA. It was summarised by this Court in the ***UNCRC Bill Reference***, at para.7, as follows:

> "*The Scottish Parliament is a democratically elected legislature with a mandate to make laws for Scotland. It has plenary powers within the limits of its legislative competence. But it does not enjoy the sovereignty of the Crown in Parliament: rules delimiting its legislative competence are found in section 29 of and Schedules 4 and 5 to the Scotland Act, to which the courts must give effect. And Parliament also has an unlimited power to makes laws for Scotland, a power which the legislation of the Scottish Parliament cannot affect: section 28(7) of the Scotland Act. The Scotland Act must be interpreted in the same way as any other statute. The courts have regard to its aim to achieve a constitutional settlement and therefore recognise the importance of giving the Scotland Act a consistent and predictable interpretation, so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its legislative power. That is achieved by interpreting the rules as to competence in the Scotland Act according to the ordinary meaning of the words used.*"

87. The SA introduced a fundamental change to the constitutional structure of the United Kingdom (***BH v Lord Advocate*** [2012] UKSC 24; 2012 SC (UKSC) 308 at para.30 (Lord Hope of Craighead)). It constituted the Scottish Parliament as a democratically elected legislature (SA, ss.1-12) 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 accountable (SA, ss.44-49). The Scottish Parliament has plenary powers and it is for the Scottish Parliament to determine its own policy goals and the political and other considerations which are relevant to the exercise of those powers (***AXA General Insurance Company v Lord Advocate*** [2011] UKSC 46; 2012 SC (UKSC) 122 ("***AXA***") at para.146 (Lord Reed)). Those plenary powers do not need to be exercised for any specific purpose (***AXA*** at para.147 (Lord Reed)).

Legislative Competence

88. The limits on the legislative competence of the Scottish Parliament are set out in section 29 SA (and while there are common law limits to the legislative competence of the Scottish Parliament: ***AXA*** at para.153 (Lord Reed), those limits are not relevant for present purposes). Section 29 provides, so far as relevant for present purposes:

> "*(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 legislative competence so far as any of the following paragraphs apply –*
>
> *…*
>
> *(b) it relates to reserved matters*
>
> *…*
>
> *(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,*
>
> *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).*"

89. The statutory concept of "*relates to*" is thus afforded a specific legal definition different from, and more restrictive than, its ordinary meaning.

90. Determining whether the restriction in s.29(2)(b) applies requires, first, an understanding of the scope of the matter which is reserved, before considering, second, whether those provisions "*relate to*" the reserved matter (***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** [2018] UKSC 64; 2019 SC (UKSC) 13 ("***Legal Continuity Bill***") at para.27, citing ***Imperial Tobacco v Lord Advocate*** [2012] UKSC 61; 2013 SC (UKSC) 153 ("***Imperial Tobacco***") at para.26 (Lord Hope of Craighead)).

91. Whether a provision "*relates to*" a reserved matter, is to be determined by reference to the purpose of that provision, having regard, among other things, to the effect of the provision in all the circumstances. The "*purpose*" of a provision may extend beyond its legal effect, but it is not necessarily the same thing as its political motivation (***Legal Continuity Bill*** at para.27).

92. This Court has also made observations as to the relevance of a provision's "*connection*" with a reserved matter in assessing whether that provision "*relates to*" the reserved matter in question. The Lord Advocate submits that those observations leave doubt as to (a) the relevance of "*connection*" to the statutory test set out in s.29(3) which refers solely to purpose and effect and (b) the nature of the connection that must exist before the possibility arises that a provision relates to a reserved matter.

93. In ***Martin v Most*** [2010] UKSC 10, 2010 SC (UKSC) 40 ("***Martin***"), Lord Walker referred to the difficulties of "*defining (necessarily in fairly general and abstract terms) permitted or prohibited areas of legislative activity*" and "*how different forms of words have come to be recognised as indicating a more or less proximate (or direct, or crucial) connection between a proposed enactment and an area of legislative activity*" (para.45, emphasis added). Lord Walker said that "*relates to*" suggests more than a loose and consequential connection and that the reference to purpose "reinforces" that. Here the word "*connection*" appears to be used as simply shorthand for (and not separate from or additional to) the statutory test of "*relates to*" imposed by the relevant devolution legislation. Lord Walker went on to differentiate the approach of the SA from that of earlier Northern Irish devolution legislation: *"in the Scotland Act Parliament has gone further, and has used more finely modulated language, in trying to explain its legislative purpose as regards 'reserved matters.'"* (para.46).

94. Later cases appear to have slightly altered this form of analysis by making clear that the "*purpose*" of a provision must "*relate to*" a reserved matter, meaning that it embodies more than a loose or consequential connection: *"It will, of course, be necessary to identify the purpose of the provision if the challenge is brought under sec 29(2)(b) on the ground that it relates to a reserved matter, bearing in mind that the phrase 'relates to' indicates something more than a loose or consequential connection (see Martin v Most, Lord Walker, para 49)" (**Imperial Tobacco*** at para.16 (Lord Hope of Craighead); see also para.45*) and "In order to 'relate to' a reserved matter, a provision of a Scottish Bill must have 'more than a loose or consequential connection' with it." (**Legal Continuity Bill*** at para. 27*).*

95. Moreover, in ***In Re Medical Costs for Asbestos Diseases (Wales) Bill*** [2015] UKSC 3, [2015] AC 1016 **("*Welsh Asbestos case*")** Lord Mance concluded, at para.27, that "*The mere purpose and effect of raising money which can or will be used to cover part of the costs of the Welsh NHS could not constitute a sufficiently close connection*", implying that "*connection*" is a test overlaid on purpose and effect (and indeed that purpose and effect are themselves separate tests whereas in terms of section 29(3) the test is purpose, assessed by reference to, among other things, effect).

96. As to the extent of the connection that should exist, there is tension in the case law. As noted above, in ***Legal Continuity Bill*** the connection said to be required was one that was more than "*loose or consequential*" (at para.27, citing ***Martin*** at para.49 (Lord Walker)).

97. However, this Court has also held that it is necessary that the provision have a "*direct*" and "*close*" connection to the reservation; an "*indirect*" connection is not sufficient to meet the "*relates to*" test. In the ***Welsh Asbestos case*** at para.27 (Lord Mance with whom Lord Neuberger and Lord Hodge agreed) a Bill to recover costs incurred in treating those suffering from asbestos-related disease was held not to "*relate to*" the organisation and funding of the health service as the connection to service provision was insufficiently close and direct. The statement of Lord Walker in ***Martin*** was modified to refer to "*an indirect, loose or consequential connection*.".

98. Similarly, this Court held in ***Legal Continuity Bill*** that for a provision to "*relate to*" the reserved matter of international relations, the provision would have to disrupt or interfere with the conduct of international relations by the UK Government. In that case,

considerable emphasis was placed on the need for there to be some form of legal or direct practical effect of law on the reserved matter before it could be said to "*relate to*" it (at paras.25-33).

Reserved matters

99. "Reserved matters" are defined in Schedule 5 (s.30(1) SA). For present purposes, the relevant reservations are found in para.1 of Schedule 5. So far as relevant, it provides:

> "*The following aspects of the constitution are reserved matters, that is –*
>
> *...*
>
> *(b) the Union of the Kingdoms of Scotland and England,*
>
> *(c) the Parliament of the United Kingdom,*
>
> *...*"

The relationship between those reservations and the Bill is discussed below. At this stage, the Lord Advocate notes that the constitution *simpliciter* is not a reserved matter; it is only specified *aspects* of it which are reserved.

100. As to the scope of these reservations, the Lord Advocate notes the language used in para.1(b) reserves "*the Union of the Kingdoms*" of Scotland and England. Notably that paragraph does not expressly refer to the continued existence or subsistence of that Union nor does it refer to the United Kingdom of Great Britain and Northern Ireland – which is the entity currently recognised as a state for the purposes of international law (a fact reflected in para.1(c) which reserves the Parliament of the *United Kingdom* which must be taken to refer to that Parliament as at the date of the Scotland Act 1998 and not to the Parliament created in 1707 in which Ireland and then Northern Ireland had no place).

101. Given the intervention of the Acts of Union of 1800 to create the United Kingdom of Great Britain and Ireland, and the secession of the Irish Free State in 1922, (resulting in the nomenclature of the United Kingdom of Great Britain and Northern Ireland) on one level it may be argued that the Union of the Kingdoms of Scotland and England has been superseded as a matter of law and exists only as an historical fact. The SA would therefore reserve something that no longer exists.

102. Nonetheless, despite this peculiarity, for present purposes the Lord Advocate accepts that a provision of an Act of the Scottish Parliament would relate to the reserved matter of the Union of the Kingdoms of Scotland and England if it purported to authorise (for example) Scotland's independence from the United Kingdom of Great Britain and Northern Ireland and/or to confer statehood on Scotland.

(C) WHETHER THE REFERRED PROVISIONS "RELATE TO" "THE UNION" (SCHEDULE 5, PARA.1(B))

Introduction

103. The Lord Advocate seeks a determination from this Court on the question that has been referred. She has referred that question in the public interest and, accordingly, now sets out the arguments for the proposition that s.2 relates to "*the Union*" before turning to the arguments against that proposition and for the alternative, i.e. that s.2 is within the legislative competence of the Scottish Parliament..

The case that the referred provisions relate to the Union

104. The argument that the referred provisions of the proposed Bill relate to the Union runs as follows.

105. First, the *subject matter* of the referendum question, asking whether Scotland should "be an independent country", concerns the Union of the Kingdoms of Scotland and England: the question asks voters to express their opinion on whether they want the Union to continue.

106. The purpose of the provisions in para.1 of Schedule 5 in reserving matters relating to certain aspects of "*The Constitution*" is that "*matters in which the United Kingdom as a whole has an interest should continue to be the responsibility of the UK Parliament at Westminster"*: ***Imperial Tobacco*** at para.29 (Lord Hope of Craighead, with whom the other members of the Court agreed). The point was repeated in ***Christian Institute v Lord Advocate*** [2016] UKSC 51; 2017 SC (UKSC) 29 at para.65 (Lord Reed). The 1997 White Paper, *Scotland's Parliament* (Cmnd 3658, at para 3.4) further supports this analysis. In that document, the UK Government stated in relation to reserved matters that, "*The Government believe that reserving power in these areas will*

safeguard the integrity of the UK." That aim points to measures that question the integrity of the United Kingdom being reserved.

107. Statements made during the passage of the Scotland Bill indicate that the UK Parliament did not intend the SA to confer power on the Scottish Parliament to legislate for a referendum on Scottish independence (see para. 49, above).

108. Secondly, as noted above, there have been a number of judicial statements in this Court to the effect that a provision will "*relate to*" a reserved matter where it has more than a "*loose and consequential*" connection to that matter (***Martin*** at para.49 (Lord Walker); ***Imperial Tobacco*** para.16 (Lord Hope of Craighead); ***Legal Continuity Bill*** at para. 27; see also paras. 92-96 above). A referendum on independence would have more than a loose and consequential connection to the reserved matter of the Union of the Kingdoms of Scotland and England.

109. Thirdly, as to the purpose of the provisions, this Court is entitled to infer that those provisions would be intended by MSPs promoting them as a step towards independence. Support for that inference may be drawn from statements made by the First Minister and other Scottish Government Ministers (see for example the First Minister's statement to the Scottish Parliament on 28 June 2022: Scottish Parliament Official Report, 28 June 2022, Cols.12-19). Although the immediate purpose of the proposed Bill is simply to ascertain the wishes of the Scottish electorate on the question of independence, a wide variety of background materials (which are admissible aids to identifying the purpose of a legal provision: ***Martin*** at para.25), indicate that the objective of the Scottish Government in introducing a Bill to hold a referendum would be to achieve independence from the United Kingdom. Thus:

    (1) The Bill is intended to fulfil a manifesto commitment of the Scottish Government which stated that the SNP was "*clear that the referendum must be capable of bringing about independence …*" (SNP, *Manifesto: Scotland's Future, Scotland's Choice* (2021), p.12)

    (2) The Scottish Government's Programme for Government 2021-22 likewise refers to the Scottish Government obtaining a "*democratic mandate from the people of Scotland*" to "*pursue the opportunity*" of

being an independent country (Programme for Government 2021-22, First Minister's Foreword).

110. Fourthly, as to effect, the proposed Bill would have the legal effect, among other things, of authorising election officials to administer a vote, and allocating resources to them to do so, on whether the Union should end.

111. Fifthly, although the referendum would have no legal effect on the Union, the practical effect of a vote would be politically significant. That point was recognised by the majority in ***Miller*** at para.124 (emphasis added): whilst the referendum on leaving the EU had no legal effects, "*that in no way means it is devoid of* ***effect***." On the contrary, it was said to be of "*great political significance*". Whilst the Government of the United Kingdom has given no undertaking to abide by the result of a "yes" vote, the outcome would support the Scottish Government's case for negotiating independence with the UK Government.

112. Moreover, in the event of a "yes" vote, there would be political pressure on the UK Government and UK Parliament to respect the result by agreeing to independence for Scotland. In the words of one commentator, a referendum "*in practice, if not formally, …denies the discretion afforded Parliament.*" (Norton, *Governing Britain – Parliament, Ministers and our ambiguous Constitution* (MUP 2020) p.77). The House of Lords Constitution Committee in its 12th Report (2009-10) *Referendums in the United Kingdom* (HL paper 99) stated that even where a referendum is advisory only, "*it would be difficult for Parliament to ignore a decisive expression of public opinion*." (para. 197). A "no" vote would also be politically significant in its impact.

113. To summarise the points made above:

(1) The subject matter of the proposed Bill relates to the subject matter of the Union of the Kingdoms of Scotland and England.

(2) The Union is a matter for which the UK Parliament retains constitutional responsibility. That Parliament did not intend, in passing the SA, to confer on the Scottish Parliament the power to legislate for a referendum on independence.

(3) A referendum on Scottish independence would have a close connection – and at least more than a loose or consequential connection – with the reserved matter of the Union.

(4) The purpose of such a referendum would include that of obtaining support for the creation of a Scottish state and the independence of Scotland from the United Kingdom.

(5) A referendum on Scottish independence will have significant political effects regardless of its outcome.

The case that the referred provisions do not relate to the Union

114. The argument that the referred provisions do not "*relate to*" the reserved matter of the Union is as follows.

115. First, the statutory test set out in s.29(3) is expressly directed to ascertaining whether the *purpose* of a provision, having regard in particular to its *effect*, relates to a reserved matter, the focus is not therefore on the *subject matter* of a question asked of the population.

116. Secondly, the referred provisions do not have the requisite degree of directness and closeness with the reservation. This Court has held that there must be a "*direct connection*" and "*sufficiently close connection*" between the purpose of a provision and a reserved matter: ***Welsh Asbestos case*** at para.27.

117. Furthermore, the reasoning of this Court in ***Legal Continuity Bill*** to the effect that a Bill of the Scottish Parliament would only "*relate to*" the reserved matter of international relations if by its terms it sought to disrupt or interfere with the conduct of international relations by the UK Government also suggests that the connection between an advisory referendum and a reserved matter would be insufficiently close and direct. The Court stated that there "*is relatively little scope for Scottish legislation to "relate to" international relations … unless such legislation were to purport to deal with the power of Ministers of the Crown to exercise its prerogative in foreign affairs, or to create a state of law in Scotland which affected the effectual exercise of that power*." (at para.32). This Court also held that the Scottish Bill did not "*purport to affect the way in which current negotiations between the UK and EU are conducted*." (at

para.33). The Court's reasoning emphasised the need for there to be some form of legal or direct practical effect of the law on the reserved matter for it to "*relate to*" that matter.

118. Thirdly, if the exercise of identifying the purpose of a provision for the purposes of s.29(3) is analogous to that adopted in the familiar process of statutory construction, that suggests a narrower rather than a wider purpose is the legally relevant purpose (see ***R (Quintavalle) v Secretary of State for Health*** [2003] UKHL 13, [2003] 2 AC 687 at para.8: "*The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose.*" (Lord Bingham)). Orthodox principles of statutory construction hold that:

(1) The purpose of a law is in the first instance to be derived from an examination of the words used, including any clause that expressly refers to its purpose (***Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs*** [2011] UKSC 25, [2011] 1 WLR 1546, at paras. 10-11 (Lord Mance with whom Lord Walker, Baroness Hale, and Lord Collins agreed)).

(2) The meaning attributed to the words of an instrument is an objective question and not to be equated with *"subjective intention of the Minister or other persons who promoted the legislation"* nor equated with, *"individual members or even a majority of members"* of a legislature (***R v Secretary of State for the Environment, Transport and the Regions ex p Spath Holme Ltd*** [2001] 2 AC 349 at 386F-397A). As noted above (para.91 by reference to ***Legal Continuity Bill***), in the context of reserved matters, the "*purpose*" of a provision may extend beyond its legal effect, but it is not necessarily the same thing as its political motivation.

119. These principles point to the legally relevant purpose of the proposed Bill being the holding of a referendum to ascertain the views of the people of Scotland on the issue of independence, and not the motivations and wider aspirations of individual parliamentarians or members of the Scottish Government:

(1) Section 1 states that it is a Bill "*to make provision for ascertaining the views of the people of Scotland*…". No wider purpose is identified.

(2) The question to be posed is neutral between a "yes" and "no" vote. The terms of the proposed Bill are therefore neutral as to whether Scotland should be independent and the proposed Bill is not directed at any particular outcome. Such a Bill could be supported by parliamentarians and others who want the Scottish voters to reject independence. In any event, in terms of s.2(5) of the Referendums (Scotland) Act 2020, the Electoral Commission would be required to consider the wording of the question and publish a statement as to its intelligibility as soon as practicable after the Bill is introduced. In respect of the 2014 referendum, the same question was acceptable to the Electoral Commission.

(3) The motivations and wider ambitions of the Scottish Government represent a "*subjective intention*" which is not to be equated with the objective purpose of the Bill.

120. Fourthly, s.29(3) requires particular attention to the effect of a provision. The limited legal and practical effect of a Bill to hold an advisory referendum can be said to support the view that the "*purpose*" of such an instrument is to ascertain the views of the people of Scotland and that relates to the Union in only an indirect or consequential way.

121. The legal effects of the Bill would be limited to facilitating the holding of a referendum vote, identifying those eligible to vote, the timing of the vote and affirming that the Referendums (Scotland) Act 2020 would apply. The Bill would not purport to alter or impede any legal rule constituting or affecting the Union of the Kingdoms of Scotland and England either directly or indirectly. The referendum would have no prescribed legal consequences arising from its result. It is not, unlike some other referendums, self-executing (see para.80 above).

122. Beyond the immediate effect of ascertaining the will of the people of Scotland, the practical effects of an advisory referendum are speculative. The court ought not to engage in such speculation because it is not equipped to do so. Lord Reed, in ***Imperial Tobacco***, emphasised that the Courts are not equipped to speculate on what consequences will follow the enactment of laws, beyond those that they prescribe. He stated, at para.133, that "*the court is not equipped to predict the ultimate long-term effects of the provision*".

123. Furthermore, it would also not be constitutionally appropriate for this Court to take into account the possibility of future legislation of the UK Parliament. In ***Yalland & Ors v Secretary of State for Exiting the European Union*** [2017] EWHC 630 (Admin); [2017] ACD 50 at para.19 (Lloyd Jones LJ and Lewis J) the Divisional Court emphasised that that Courts should not seek to second-guess whether legislation will be passed by the UK Parliament: "*whether any legislation is to be introduced and the form that any legislation should take is a matter for Parliament itself and not a matter for the courts*." To similar effect, see Sir John Donaldson, MR in ***R v Her Majesty's Treasury, ex parte Smedley*** [1985] QB 657 at 668C-D: "*it behoves the courts to be ever sensitive to the paramount need to refrain from trespassing on the province of Parliament…*". Likewise, this Court cannot second-guess the UK's Parliaments' responses if a referendum returned a result in favour of independence.

124. Therefore, in referring to the "*effect*" of a provision in s.29(3), the UK Parliament should be presumed to have meant the direct effects prescribed by the terms of the legislation, and in any event not effects that are contingent or dependent on future legislation enacted by the UK Parliament.

125. The following further points can be made about the wider effects of the proposed Bill,

(1) The consequences attendant on the outcome of the referendum would be political. The Government of the United Kingdom has given no assurance or undertaking as to how it would act if the referendum returned a yes vote.

(2) Even if a majority of voters voted in favour of independence, then the practical realisation of independence would be dependent on political decisions and actions of a number of independent parties and bodies, in particular the Scottish Government, the Scottish Parliament, the UK Government and the UK Parliament.

(3) In ***Moohan***, above, Lord Neuberger explained, at para.47, that if the issue came before the UK Parliament following a Scottish vote for independence, Members of the UK Parliament would be free, indeed "*constitutionally bound"*, to vote as they saw fit.

126. Fifthly, the objection that the aim of Schedule 5 is to reserve to the UK Parliament matters of concern to the entire United Kingdom, and the comments made by the UK

Government in the 1997 White Paper concerning the integrity of the United Kingdom, can be answered in much the same way: the holding of a purely advisory referendum does not take the question of the Union out of the hands of the UK Parliament or purport to do so. The 1997 White Paper did not address the question of referendums and it cannot be taken as suggesting that the Scottish Government is precluded from ascertaining the views of the population of Scotland on any subject matter reserved to the UK Parliament.

127. Sixthly, other features of the SA, support the argument in favour of an advisory referendum being within competence:

(1) It is a necessary implication of the scheme of devolution established by the SA that the Scottish Government may negotiate with the UK Government about reserved matters. It is integral to s.30 SA, by which modifications can be made to *inter alia* Schedule 5 by Order in Council approved by both Houses of the United Kingdom Parliament and by the Scottish Parliament, that the Scottish Government may have regard to and discuss adjustments to Schedule 5. Given that s.30 has been used to modify, for example, reservations relating to the Export Credits Guarantee Department (The Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999, SI 1999/1749), interception of communications and surveillance (*ibid*) and insolvency law (The Scotland Act 1998 (Modification of Schedule 5) Order 2001, SI 2001/1456) and that such modifications were approved by the Scottish Parliament, it is self-evident that the Scottish Government must be empowered to discuss proposed modifications.

(2) The Scottish Ministers are likewise entitled to have regard to the views of their electorate and their party's policies on reserved matters in exercising their functions.

(3) Reflecting these features of the devolution settlement, political parties can and do campaign in Scottish general elections on policies relating to reserved matters, testing the views of the electorate in general elections on such matters and taking office on the basis of policies relating to such matters — most obviously, of course, Scottish independence, but it

might relate to any of a large number of reserved matters. There are various examples of the Scottish Parliament debating and passing motions in respect of reserved matters, as was envisaged from the outset of devolution (see para.45, above).

(4) Significantly, the scheme of devolution created by the SA allows for forms of democratic participation beyond the exercise of the franchise in general elections (or ad hoc constituency elections) as means for testing the views of the people of Scotland. By way of example, the Citizens' Assembly of Scotland, convened in 2019-20 and the Citizens' Assembly on Climate Change in 2020-21 (convened under section 32A of the Climate Change (Scotland) Act 2009, added by section 9 of the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019) were both exercises in deliberative democracy. In addition, and as already explained, the Scottish Parliament can hold referendums to ascertain the views of the people of Scotland on particular issues and it has regulated the process for holding referendums in the Referendums (Scotland) Act 2020. The devolution settlements thus reflect a mixture of principles of representative, deliberative and direct democracy, also reflected in the fact that the devolution settlements for Scotland and Wales now declare that the devolved institutions can only be abolished on the basis of a referendum of the people of those countries: s.63A(3) SA; Government of Wales Act 2006 s. A1(3). The Northern Ireland Act 1998, in implementation of international legal obligations under the Belfast / Good Friday Agreement, includes a referendum requirement in respect of Northern Ireland's place in the UK: s.1.

(5) Given these features of the SA and the manner in which the devolution settlement operates, there are reasons for concluding that the Scottish Parliament is not constrained when ascertaining the will of the Scottish people, and that it can do so even where the question is concerned with the subject matter of a reserved matter. Notably, both of the Citizens' Assemblies referred to above produced recommendations concerning reserved matters. Such matters, merely by dint of being reserved matters, are not as such no-go areas for the Scottish Parliament or the Scottish

Ministers and they are entitled to ascertain the views of the population on them. If they could not do so, the Scottish Ministers would be precluded from consulting the people of Scotland on a wide variety of issues (whether by referendum or other form of consultation exercise), e.g. casinos or daylight saving time (paras. B9 and L5 of Schedule 5).

128. To summarise the points made above,

(1) The words and provisions of the Bill indicate that the legally relevant purpose is to ascertain the wishes of the people of Scotland on their future.

(2) The wider motivations and aspirations of the Scottish Government and other political parties are not legally relevant.

(3) The legal consequences of the Bill are, relevantly, nil.

(4) Any practical effects beyond ascertaining the views of the people of Scotland are speculative, consequential and indirect and should not properly be taken into account.

129. It can therefore be argued that the purpose of an advisory referendum such as prescribed in the Scottish Independence Referendum Bill has "*at best an indirect, … or consequential connection*" (***Welsh Asbestos case*** at para.27) to the Union; and it does not have the "*direct*" (*ibid.*) or "*short term*" (***Imperial Tobacco v Lord Advocate*** 2012 SC 297 (IH) at para.133)) connection, involving some practical impediment or other effect, necessary for it to be outside competence. Even if the criteria are limited to whether the purpose has a "loose" or "consequential" connection to the Union, ascertaining the wishes of the Scottish people, with its purely indirect, contingent and speculative consequences for the Union, would be insufficient to satisfy the test.

Conclusions on the reservation of the Union

130. Whether the referred provisions "*relate to*" the reservation of the Union depends to a significant extent on how broad a meaning is given to the effect of any referendum within the terms of s.29(3). If its effect, for the purposes of determining whether it relates to the reservation of the Union, embraces the political consequences of any "yes" vote, then it may be beyond the competence of the Scottish Parliament. If, however, its effect is determined by its legal consequences and immediate effect (obtaining the

views of the Scottish people on the subject of a reserved matter), then it may not "*relate to*" the reservation and thus would be within the competence of the Scottish Parliament.

(D) WHETHER THE REFERRED PROVISIONS "RELATE TO" "THE PARLIAMENT OF THE UNITED KINGDOM" (SCHEDULE 5, PARA 1(C))

131. Para.1(c) of Schedule 5 identifies that "*The Parliament of the United Kingdom*" is a reserved matter. In ***Legal Continuity Bill***, it was held that the reservation encompasses the sovereignty of Parliament (at para.61).

The case that the referred provisions relate to the Parliament of the United Kingdom

132. The argument that the referred provisions "*relate to*" the reserved matter of the Parliament of the United Kingdom is as follows.

133. If Scotland became independent this would involve a reduction in the scope of the UK Parliament's powers: ***Moohan*** at paras. 17, 71, 91 and 102. Indeed, if Scotland became an independent country, Members would no longer be returned to the UK Parliament from Scotland and it would become a Parliament of England, Wales and Northern Ireland.

134. The purpose of holding a referendum on independence, even though it is advisory in nature, would be a purpose that relates to such diminution in the power of the UK Parliament for essentially the same reasons set out in paras. 106-109, above.

The case that the referred provisions do not relate to the Parliament of the United Kingdom

135. The argument that the referred provisions do not "relate to" the reserved matter of the Parliament of the United Kingdom is as follows.

136. In ***Legal Continuity Bill*** this Court made clear that the reservation of the Parliament of the United Kingdom is not infringed in circumstances where the authority of Parliament to change the law is not affected. It therefore dismissed a submission that s.17 of the UK Withdrawal from the EU (Legal Continuity) (Scotland) Bill, which would have made specified delegated EU legislation dependent on the consent of the Scottish Ministers before it could take effect in Scotland, "*related to*" the Parliament of the United Kingdom. This Court, at para.63, held (emphasis added):

> *"Nor are we persuaded that section 17 impinges upon the sovereignty of parliament. Section 17 does not purport to alter the fundamental constitutional principle that the Crown in Parliament is the ultimate source of legal authority; nor would it have that effect. Parliament would remain sovereign even if section 17 became law,"*

The Court preferred to analyse any practical impacts on the ability of the UK Parliament to realise its policy goals by reference to s.28(7), by means of Schedule 4 (at para.64), but that provision does not arise on this Reference.

137. Since the proposed Bill would establish only an advisory referendum, it would not purport to restrict the powers, authority or jurisdiction of the UK Parliament. It would not be analogous to the UK Withdrawal from the EU (Legal Continuity) (Scotland) Bill, in having direct legal and practical effects on UK legislation.

138. Changes to certain of the Articles of Union can only be effected by the UK Parliament (para. 1(2), Schedule 4, SA), and the UK Parliament's constitutional role is entirely unrestricted by an advisory referendum. In the words of this Court in ***Legal Continuity Bill***: the proposed Bill does not purport to alter this fundamental principle, nor would it have this effect.

(E) THE RELEVANCE OF THE 2013 SECTION 30 ORDER

139. The use in 2013 of an Order in Council made under s.30 SA 1998 to make provision for the passing of an Act of the Scottish Parliament concerning the holding of a referendum on Scottish independence might be thought to have a bearing on the foregoing analysis.

140. The Scotland Act 1998 (Modification of Schedule 5) Order 2013/242 added para.5A to Schedule 5 to the SA. It provided:

> *"(1) Paragraph 1 does not reserve a referendum on the independence of Scotland from the rest of the United Kingdom if the following requirements are met.*
>
> *(2) The date of the poll at the referendum must not be the date of the poll at any other referendum held under provision made by the Parliament.*

(3) The date of the poll at the referendum must be no later than 31st December 2014.

(4) There must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses."

141. Para.5A was repealed by s.10(5) of the Scotland Act 2016 and was by the time of its repeal, in any event, spent.

142. There are three reasons why, it is submitted, the enactment of para.5A does not affect the question referred to this Court.

143. First, the amendment was effected by delegated legislation, which although approved by the UK and Scottish Parliaments is an executive instrument (***Bank Mellat v HM Treasury*** [2013] UKSC 39, [2014] AC 700 at para.43 (Lord Sumption, with whom Baroness Hale, Lord Kerr, Lord Clarke agreed)). It also post-dates the SA. It therefore cannot affect the proper interpretation of that Act: ***Forde and McHugh Ltd v Revenue and Customs Commissioners*** [2014] ICR 403 at para.13: "*It is not appropriate to interpret an Act of Parliament by reference to subordinate legislation which was made years after the primary legislation*" (Lord Hodge).

144. Secondly, the context of that measure was considerable public debate about the extent of the Scottish Parliament's competence to legislate for the holding of a referendum. It was agreed between the United Kingdom and Scottish Governments in the Edinburgh Agreement that an Order should be made.

145. The Edinburgh Agreement contains no assertion or concession, express or implied, that absent the making of the Order it would be outside the Scottish Parliament's legislative competence to pass an Act providing for the holding of a referendum. The Agreement simply states that: "*The Order will put it beyond doubt that the Scottish Parliament can legislate for that referendum*." The Order was therefore putting beyond doubt the power of the Scottish Parliament to hold a referendum.

146. Thirdly, para.5A of Schedule 5 did not carry with it the heading "exception" as is the format adopted in many of the specific reservations for which provision is made in Schedule 5. Rather, the language of "*does not reserve*" is properly to be read as clarificatory where a reservation might otherwise be *"open to interpretation"* (***Imperial***

Tobacco Ltd v Lord Advocate 2012 SC 297 (IH) at para.8 (Lord President (Hamilton)). Such a clarificatory purpose does not however assist with the task of construing the reservation on its own terms: see for example ***Imperial Tobacco*** at para. 30; ***Imperial Tobacco*** 2012 SC 297 (IH) at para. 9.

PART 5: CONCLUDING OBSERVATIONS

147. Since 2007, at four successive Scottish parliamentary elections, the Scottish electorate has returned governments committed to giving the people of Scotland the choice of Scottish independence. Separately, at each UK General Election since 2015, a majority of MPs from Scottish constituencies have been elected on the same manifesto commitment. Against that background, and long-standing consensus that Scotland has the right to self-determination, to what extent, if at all, the holding of a referendum relates to a "reserved matter" is a question of fundamental constitutional and public importance. Despite the highly charged political context, it is a question of law. It is therefore a question that can only be authoritatively determined by this Court. The Lord Advocate believes it is in the public interest that clarity be brought to the scope of the Scottish Parliament's powers in respect of the issue. Accordingly, the Lord Advocate has invoked, for the first time, her right under the SA to refer to this Court a devolution issue which is not currently the subject of litigation. She does so for the benefit of the Scottish Parliament, the Scottish Government and the people of Scotland (indeed, people throughout the United Kingdom).

[redacted]

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[redacted]

PAUL REID, ADVOCATE

12 JULY 2022

Annex B

Section 38(1)(b) – applicant has asked for personal data of a third party

An exemption under section 38(1)(b) of FOISA (personal information) applies to a small amount of the information requested because it is personal data of a third party, and disclosing it would contravene the data protection principles in Article 5(1) of the General Data Protection Regulation and in section 34(1) of the Data Protection Act 2018. This exemption is not subject to the 'public interest test', so we are not required to consider if the public interest in disclosing the information outweighs the public interest in applying the exemption.