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Joan McAlpine MSP  
Convener  
Culture, Tourism Europe & External Relations Committee

By email

29 November 2016

*Dear Convener*

I refer to my letter of 8 November intimating that I was applying for leave to intervene in this case, which is pending before the UK Supreme Court. I now write to advise you that the Court granted my leave to intervene.

I attach a copy of my written Case, which has been lodged with the Court. The hearing will take place on 5-8 December, inclusive.

*Yours sincerely  
W. James Wolffe*

**W. JAMES WOLFFE QC**



INVESTOR IN PEOPLE  
**The Scottish Government**

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

**ON APPEAL FROM THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION (DIVISIONAL COURT)**

**Divisional Court Case Nos: CO/3809/2016 and CO/3821/2016**

**Neutral Citation of Judgement appealed against : [2016] EWHC 2768 (Admin)**

**BETWEEN**

**THE QUEEN**

**on the application of**

**(1) GINA MILLER**

**(2) DEIR TOZETTI DOS SANTOS**

**Claimants/Respondents**

**-and-**

**SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION**

**Defendant/Appellant**

**-and-**

**VARIOUS INTERESTED PARTIES AND INTERVENERS**

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**WRITTEN CASE OF LORD ADVOCATE**

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**A. BACKGROUND TO THIS INTERVENTION**

1. On 1 January 1973, the UK joined the European Communities. In doing so, the UK acceded to the constitutional order of the Communities – now the European Union. The institutions of the EU are now an established part of the constitutional arrangements of the UK, including Scotland. EU law constrains the powers of all public authorities within the UK. It is also a source of rights and obligations which prevail over domestic legislation, and are directly enforceable within the jurisdictions of the UK and of other Member States.

2. On 19 November 1998, the Scotland Act 1998 received Royal Assent. That Act established the Scottish Parliament and the Scottish Executive (now the Scottish Government). In the same year, the UK Parliament enacted the Northern Ireland Act 1998 and the Government of Wales Act 1998 (and see, now, the Government of Wales Act 2006). The Scottish Parliament and Scottish Government are now acknowledged by statute to be permanent features of the constitution of the UK. The exercise of legislative competence and executive power by each of the devolved legislatures and administrations is an established feature of the constitution of the United Kingdom.
  
3. Withdrawal from the European Union would have a significant impact on the constitution of the United Kingdom – inter alia by depriving the EU institutions of jurisdiction as regards the UK and by reason of the effect on the devolved institutions. Membership of the EU is assumed in each of the devolution settlements. The Scottish Parliament and the Scottish Government have the power and function of observing and implementing EU law, EU law constrains the legislative and executive competence of the devolved institutions, and membership of the EU affects substantial areas of policy which are within the competence of the Scottish Parliament and the Scottish Government.
  
4. Article 50(1) TEU (8) states:

“Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.”

The question before the Court is whether, on a proper understanding of the constitutional requirements of the United Kingdom, the decision to withdraw from the European Union may be made, and notification of that decision given, by an exercise of the Royal prerogative alone.

5. The Lord Advocate’s submission is that, under the constitution of the UK, that step requires an Act of Parliament. Further, withdrawal from the EU would: (i) change the competence of the Scottish Parliament and the Scottish Government; and (ii) change the law within devolved competence. In these

circumstances, a Bill brought before the UK Parliament to withdraw the UK from the EU would engage the constitutional convention (“the Legislative Consent Convention”) in terms of which that Parliament does not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

6. The factual background to this case can be set out briefly. On 23 June 2016 a referendum took place under the European Union Referendum Act 2015. The question asked in that referendum was “Should the United Kingdom remain a member of the European Union or leave the European Union?” The result of the referendum across the UK as a whole produced a majority (52% to 48%) in favour of leaving the EU. The UK Government has made clear its intention to initiate the process under Article 50 TEU, in reliance on the Royal prerogative, without further authority from the Parliament of the United Kingdom. In Scotland, a majority of those voting (62% to 38%) favoured the UK remaining in the EU. In every local authority area in Scotland, a majority of those voting favoured the UK remaining in the EU.
  
7. The Lord Advocate is the senior Scottish Law Officer. He is, by virtue of his office, a member of the Scottish Government: Scotland Act 1998, s. 44(1)(c) (227). The Lord Advocate sought leave to intervene in this Court by reason of the constitutional significance of the issues in the case and, in particular, its implications for the Scottish Parliament and the Scottish Government. Conscious that the Court will also receive submissions from the Counsel General for Wales, the Attorney General for Northern Ireland and other parties from Northern Ireland, the Lord Advocate focuses his submissions, in respect of the impact of withdrawal from the EU on the devolution settlement, on the Scotland Act 1998.

## **B. THE LORD ADVOCATE'S CASE IN SUMMARY**

8. The Lord Advocate invites this Court to uphold the Divisional Court's decision for the reasons given by that Court; and for the additional reasons set out in this Case, which supplement and support the decision of the Divisional Court.

(1) The decision to withdraw the UK from the EU, and in consequence to notify the Council must be made in accordance with the UK's constitutional requirements. The UK's constitutional requirements include both legal requirements and relevant constitutional conventions.

(2) It is a matter of constitutional principle that laws cannot be amended or repealed by an exercise of the royal prerogative alone. This principle is reflected in the Claim of Right Act 1689 and in Article XVIII of the Acts of Union of 1706 and 1707.

(3) Withdrawal from the EU would effect a fundamental alteration in the constitution of the UK. This constitutional change cannot, in terms of Article 50 TEU and the constitutional requirements of the UK, lawfully be effected by an act of the Crown, exercising the prerogative, without the authority of an Act of Parliament.

(4) Withdrawal from the EU would inter alia: (i) change the legislative competence of the Scottish Parliament and the executive and legislative competence of the Scottish Government; (ii) disapply or disable laws which currently apply within Scotland, namely the corpus of directly effective EU law, including directly effective EU law in policy fields which are not reserved to the UK; and (iii) disapply or disable domestic laws (including laws within the legislative competence of the Scottish Parliament) which depend for their effect on membership of the EU. These are not changes which can lawfully be effected by an exercise of the prerogative, without the authority of an Act of Parliament.

(5) In particular, changes to the legislative competence of the Scottish Parliament and/or the executive or legislative competence of the Scottish

Government may not be effected by an act of the executive alone. The Scotland Act 1998 contains statutory mechanisms for altering legislative and executive competence, by an Order in Council, approved by both Houses of Parliament and by the Scottish Parliament. Consistently with those statutory provisions, the UK Parliament would not normally, by Act of Parliament, change the legislative competence of the Scottish Parliament, or the executive competence of the Scottish Government, without the consent of the Scottish Parliament.

- (6) The effects of withdrawal from the EU on devolved matters are such as to engage the Legislative Consent Convention under which the UK Parliament will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. The constitutional requirements, according to which any decision to withdraw from the EU must be taken, accordingly include both: (i) the legal requirement for an Act of the UK Parliament; and (ii) the Legislative Consent Convention.

9. The intervener sets out his Case under the following Chapters:

Article 50 TEU – paras. 10 to 22

The Constitution of the United Kingdom – paras. 23 to 34

The Constitutional Effects of Withdrawal from the EU – paras 35 to 42

Effects of Withdrawal from the EU on the Law of the Land – paras 43 to 49

The Law of the Prerogative – paras 50 to 68

The Role of the Scottish Parliament – paras. 69 to 87

Conclusion – paras. 88 to 89

## C. ARTICLE 50 TEU

### *(a) The correct focus: the decision to withdraw*

10. The legal issues which arise in this case fall to be determined by reference to Article 50 TEU. Article 50(1) permits a Member State to make a decision to withdraw from the EU “in accordance with its constitutional requirements”. A Member State which decides to withdraw is required to notify the Council of its intention under Article 50(2). The constitutional requirements of the UK fall to be ascertained according to the constitutional law of the various jurisdictions of the United Kingdom: *cp Re Ratification of the Treaty of Lisbon* [2010] 3 CMLR 13 ( ), paras. 305-6; *Shindler v. Chancellor of the Duchy of Lancaster* [2016] 3 WLR 1196 (18).
11. This is a legal question which concerns the correct procedure, under the UK’s constitutional requirements, for a decision to be taken under Article 50 TEU to withdraw from the EU. The UK Parliament enacted the European Union Referendum Act 2015, the referendum has been held, and the majority of those voting across the UK as a whole voted to leave the EU. However, the UK Government, correctly, acknowledges (*Appellant’s Case*, para. 34) that the referendum did not provide for its result to be self-executing or make statutory provision for the steps which would require to be taken in the event of a “leave” vote. In that sense, the EU referendum may be described as “advisory”.
12. The UK Government states (*Appellant’s Case*, para 62d) that the decision to leave the EU has already been taken, by the UK Government accepting the outcome of the referendum. That contention begs the question, as to the constitutional requirements of the United Kingdom for taking such a decision. If the decision to withdraw requires an Act of Parliament, and a motion seeking the consent of the Scottish Parliament and of the Welsh and Northern Ireland Assemblies, it would follow that the decision to withdraw has not yet been taken in accordance with the requirements of Article 50(1).

13. The UK Government contends (Appellant's Case, para. 14d) that the Divisional Court's analysis would have the "surprising consequence" that, if the outcome of the referendum is to be implemented, Parliament must decide to authorise the Government to make the decision pursuant to Article 50(1) and to give notification under Article 50(2). Far from being surprising, that consequence reflects: (a) a correct understanding of the object and effect of a decision to withdraw from the EU; (b) a correct understanding of the respective roles, in relation to changes to the constitutional and legal order of the United Kingdom, of the Crown, the UK Parliament, and, indeed, of the devolved legislatures; and (c) the correct legal analysis of the position.

14. It is the UK Government's position which would generate a surprising result. If the UK Government's position were to be correct in law, it would follow that – notwithstanding the profound constitutional and legal consequences of withdrawal from the EU within the constitutional and legal order of the UK – the Crown could, lawfully, have taken a decision under Article 50(1) TEU, and in consequence served the notice under Article 50(2), at any time – without any process of Parliamentary approval, or, indeed, any referendum. Such a proposition would be both wrong in law, and contrary to fundamental constitutional principle.

*(b) Revocability of the Article 50 Notice*

15. The Divisional Court proceeded on the basis that, once given, a notification under Article 50(2) could not be withdrawn: para. 10. Article 50(3) TEU makes clear that, except by agreement between the European Council and the Member State concerned, the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in Article 50(2).

16. The intervener agrees with the UK Government (Appellant's Case, para. 17) that the question of whether a notification under Article 50 is revocable does not affect the legal analysis of the issues before the Court. A decision to withdraw from the EU, and to notify the Council under Article 50(2), would have the object of withdrawing the UK from the EU. Given the terms of Article



50(3), such a notification would inevitably have that effect, in the absence of any supervening step aborting the process. The contingent defeasibility of such a decision (assuming that the decision can, lawfully, be reversed) would not affect the legal question which arises in the present case – namely, identification of the constitutional requirements of the United Kingdom for taking a decision under Article 50(1) to withdraw the UK from the EU and to serve a notice under Article 50(2). The question of what are the UK's constitutional requirements falls to be tested on the basis that the decision has its intended effect – namely withdrawal from the EU.

17. It is possible that Parliament may choose to legislate – in the form of a “Great Repeal Bill” or otherwise – in the period between the giving of notice under Article 50(2) and the point at which the UK leaves the EU. But on the UK Government's currently announced plans (and subject to the outcome of this appeal) that would take place after the UK has given notice of its decision to withdraw from the EU. The possibility that such legislation might be enacted does not affect the prior question: who, under the UK's constitutional requirements, has the power to make the decision, in law, for the purposes of Article 50, that the UK should withdraw from the EU? That question falls to be answered on the assumption that the decision would achieve its object and effect.

*(c) “Constitutional requirements”*

18. Provision for decisions to be taken in accordance with the Member State's constitutional requirements is made in a number of other contexts in the TEU and TFEU. In particular:

- (1) in the TEU: Article 42(2) (adoption of a decision on a common defence policy) **(414)**; Article 48(4) (ratification of Treaty amendments under ordinary revision procedure) **(8)**; Article 48(6) (approval of decision of European Council to amend Part III TFEU under simplified revision procedure); Article 49 (ratification of agreement between Member States and State applying for admission to EU) **(151)**; and Article 54 (ratification of the TEU itself) **(311)**;

(2) in the TFEU: Article 25 (approval of the adoption of provisions strengthening or adding to citizenship rights) ( ); Article 218(8) approval of agreement on accession of Union to ECHR) (137); Article 223(1) (approval of provisions for election of members of European Parliament) ( ); Article 311 (approval of decisions of Council changing categories of own resources of the Union) ( ); Article 357 (ratification of the TFEU itself) ( ).

19. The Treaties envisage that the constitutional requirements of the Member States may differ. Further, it is implicit in the contrast between Article 50 and the provisions which provide for Member States to act through the executive alone (e.g. Article 16(2) TEU) that the Treaties envisage that the decision under Article 50 may – depending on the constitutional requirements of the Member State - require something more than an executive act. What is required depends, unsurprisingly, on the constitution of the Member State: cp *In re Ratification of the Treaty of Lisbon* [2010] 3 CMLR 13 ( ), paras 305-6; *Shindler v. Chancellor of the Duchy of Lancaster* [2016] 3 WLR 1196 (18), paras. 6-20 per Lord Dyson MR.

20. Under the uncodified UK constitution, “constitutional requirements” may properly include both rules of law and constitutional conventions. A. V. Dicey (*An Introduction to the Law of the Constitution*, (8<sup>th</sup> ed., 1915), pp. 23-4) described conventions as

“The other set of rules consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the Courts. This portion of constitutional law may, for the sake of distinction, be termed the “conventions of the constitution,” or constitutional morality.”

The description of conventions as “regulating... conduct” and as constituting a “portion of constitutional law” (emphasis added) is consistent with KC Wheare’s definition of a convention (*Modern Constitutions*, 1951 (419)) as:

“...a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the constitution...”

21. Thus, conventions are included as a “source” of constitutional law in leading textbooks: eg Bradley, Ewing & Knight, *Constitutional & Administrative Law*, 16<sup>th</sup> edn (2015), Ch. 2. As Galligan and Brenton (*Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges*, 2015 (417)) put it:

“Conventions are often defined negatively.... We contend that conventions occupy a more fundamental realm: government and the rules for forming government precede law and make law-making possible. In other words, conventions are more fundamental than laws; they govern the formation and basic function of government overall and in its key parts, and governments set up the law-making institutions that make, interpret and enforce laws.... While for the most part conventions are not formally codified as laws are, they are broadly accepted as binding by government actors and citizens. They shape government practice albeit with flexibility that allows for development and change.

As a crucial part of Westminster-derived constitutional systems, conventions govern the institutions and operation of most aspects of parliament and responsible government...Convention are crucially important in countries with ‘unwritten’ constitutions like those of the United Kingdom and New Zealand and defined the executive parts of partly written constitutions such as those of Canada and Australia.”

According to Sir Ivor Jennings (*The Law and the Constitution*, 1959 (418)):

“...the short explanation of the constitutional conventions is that they provide the flesh that clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas...”

22. Fundamental requirements of the constitution may be found in conventions. As the Supreme Court of Canada observed in *Re: Resolution to amend the Constitution* [1981] 1 SCR 753 (305), 877-8 (underlining added):

“...many Canadians would perhaps be surprised to learn that important parts of the constitution of Canada, with which they are the most familiar because they are directly involved when they exercise their right to vote at federal and provincial elections, are nowhere to be found in the law of the constitution. For instance it is a fundamental requirement of the constitution that if the opposition obtains the majority at the polls, the government must tender its resignation forthwith. But fundamental as it is, this requirement of the constitution does not form part of the law of the constitution.”

## D. THE CONSTITUTION OF THE UNITED KINGDOM

### *(a) General*

23. The constitution of the United Kingdom reflects, inter alia, the following process of historical development:

- (1) the Revolution Settlement of 1688-9, articulated for England & Wales in the Bill of Rights 1688 and, for Scotland, in the Claim of Right Act 1689;
- (2) the Union between England & Wales and Scotland effected by the Acts of Union 1706 and 1707;
- (3) the Union between Great Britain and Ireland effected by the Union with Ireland Act 1801; and the subsequent establishment of the Irish Free State and then the Republic of Ireland;
- (4) accession to the European Union, given effect within the domestic legal order by the European Communities Act 1972; and
- (5) the establishment in 1998 of the Scottish Parliament and the Scottish Government and the devolved legislatures and governments in Northern Ireland and Wales.

### *(b) The Revolution Settlement*

24. The Revolution Settlement established, in both Scotland and in England & Wales, the constitutional principle that the Crown does not have power, by an act of the prerogative, to alter the law of the land. The preamble to the Claim of Right Act 1689 (211) indicated the mischief to which it was directed:

**"Wheras King James the Seventh... Did By the advyce of wicked and evill Counsellers Invade the fundamentall Constitution of this Kingdome And altered it from a legall limited monarchy to ane Arbitrary Despotick power and in a publick proclamation asserted ane absolute power to cass annull and dissable all the lawes particularly arrainging the lawes Establishing the protestant religion and did Exerce that power to the subversion of the**

protestant Religion and to the violation of the lawes and liberties of the Kingdome” (Emphasis added.)

The relevant operative provision was:

“...That all Proclamations asserting an absolute power to Cass<sup>1</sup> annul and Dissable lawes... are Contrair to Law”.

The constitutional principle derived from the Claim of Right and the Bill of Rights in England & Wales that the Crown does not have power, by an act of the prerogative, to amend or repeal the law is, as the Divisional Court observed (para. 29), well-settled: *The Zamora* [1916] 2 AC 77 (87), 90; cp *Grieve v. Edinburgh Water Trs* 1918 SC 700 (259). As Lord Browne-Wilkinson observed in *R v. Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513 (15), 552:

“It is for Parliament, not the executive, to repeal legislation. The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body.”

(c) *The Acts of Union*

25. The Acts of Union of 1706 and 1707 (107) established a single Crown and a single Parliament for the new United Kingdom of Great Britain: see generally *Lord Gray’s Motion* 2000 SC (HL) 46 (413). Article XVIII of the (English) Union with Scotland Act 1706 and Article XVIII the (Scottish) Union with England Act 1707 each provide (underlining added):

“That the Laws concerning Regulation of Trade, Customs, and such Excises, to which Scotland is, by virtue of this Treaty, to be liable, be the same in Scotland, from and after the Union, as in England; and that all other laws in use, within the Kingdom of Scotland, do, after the Union, and notwithstanding thereof, remain in the same Force as before, (except such as are contrary to, or inconsistent with this Treaty) but alterable by the Parliament of Great-Britain, with this Difference betwixt the Laws concerning public Right, Polity, and Civil Government, and those which concern private Right; that the Laws which concern public Right, Polity, and Civil Government, may be made the same throughout the whole

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<sup>1</sup> “To make void, annul, quash”: *Oxford English Dictionary*.

united Kingdom; but that no Alteration be made in Laws which concern private Right, except for evident Utility of the Subjects within Scotland.”

26. Thus, the Acts of Union conferred power upon the Parliament of the newly constituted United Kingdom to alter the pre-existing laws of Scotland. In light of the principles set out in the Claim of Right (and the parallel principle in the English Bill of Rights 1689), it is unsurprising that the Scottish and English Parliaments determined, when establishing the new state, to confer power on its Parliament to alter Scots law, and not on the Crown. Today, of course, there are two Parliaments which have power to change the law of Scotland: section 37 of the Scotland Act 1998 (227) makes clear that the two Acts of Union have effect subject to the Scotland Act itself. But that does not affect the basic point that, at the foundation of the United Kingdom, it was Parliament (and those authorised by Parliament), and not the Crown, which was given power to change the law of Scotland.

*(d) Accession to the European Communities*

27. The enactment of the European Communities Act 1972 and the UK's accession to the European Communities effected fundamental changes to the constitution of the UK. By virtue of its membership of the EU, the UK is part of a constitutional and legal order established by the Treaties and having the characteristics articulated in Case 26/62 *Van Gend en Loos* [1963] ECR 2 (24), 12 and Case 6/64 *Costa v. ENEL* [1964] ECR 587 (96), 593. By virtue of the UK's participation in that constitutional and legal order:

- (1) the institutions of the EU exercise legislative, executive and judicial powers and functions which have effect within, and as regards, the UK and its component jurisdictions;
- (2) the United Kingdom, and Members of the European Parliament elected from the UK, participate in the decision making and law making processes of the EU;

- (3) all UK public authorities operate within the framework of EU law; EU law, indeed, constrains, the freedom of action of the UK Parliament and the UK Government, as, in terms of the Scotland Act 1998, it constrains the Scottish Parliament and the Scottish Government; and
- (4) individuals and businesses in the UK enjoy rights under EU law which are directly enforceable in the courts of the various jurisdictions of the UK and of other Member States.

Upon withdrawal from the EU, the UK would cease to be part of that constitutional and legal order.

*(e) The Devolution Settlement: Scotland*

28. The Scotland Act 1998 Act likewise made fundamental changes to the constitution of the United Kingdom. As amended by the Scotland Act 2016, the 1998 Act states that the Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements: section 63A (124). The characterisation of the Scotland Act 1998 as a constitutional statute (e.g. *BH v. Lord Advocate* 2012 SC (UKSC) 308 (248), para. 13 per Lord Hope of Craighead) is plainly correct.
29. The Scottish Parliament is a representative legislature, comprising members elected under a democratic franchise, and with wide legislative competence. As Lord Hope observed in *Axa General Insurance Ltd, Petitioners* 2012 SC (UKSC) 122 (31), para. 46:

“The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority. The United Kingdom Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence.”

The Scottish Government is accountable to the Scottish Parliament. It exercises executive and legislative functions transferred to it on devolution

(Scotland Act 1998, s. 53 (227)) and subsequently (Scotland Act 1998, s. 63 (227)), as well as functions conferred on it directly by Acts of the UK Parliament and by Acts of the Scottish Parliament.

30. The constitutional consequences for the United Kingdom of the creation of the Scottish Parliament, and of the other devolved legislatures, were, and are, profound. In *R (Jackson) v. Attorney General* [2006] 1 AC 262 (60), Lord Hope observed: “The sovereignty of the UK Parliament is no longer, if it ever was, absolute”. Lord Cooper’s dictum that “the principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law” (*MacCormick v. Lord Advocate* 1953 SC 396 (45), 411-412) is reflected in the reality of the constitutional settlement of the United Kingdom today, when the freedom of the UK Parliament is constrained (as a result of its own voluntary acts) both by EU law and by the constitutional conventions which apply when Parliament legislates with regard to devolved matters.
31. The Scotland Act 1998 assumes that the United Kingdom, including Scotland, is a member of the European Union. This is reflected, positively, in the powers of the Scottish Parliament and the Scottish Government to observe and implement obligations under EU law within devolved competence – powers which are protected from reservation by paragraph 7(2)(a) of Schedule 5 to the Scotland Act (124) – and also in the constraints placed on the powers of the Scottish Parliament and the Scottish Government by reference to EU law: sections 29(2)(d), 54, 57(2) (124). These provisions secure the implementation of EU law within the legislative competence of the Scottish Parliament and the executive and legislative competence of the Scottish Government.
32. The Scottish Parliament may enact legislation, insofar as otherwise within its legislative competence, with a view to observing and implementing EU law; in a recent example, the Victims and Witnesses (Scotland) Act 2014 inter alia implemented the Victims Rights Directive. The Scottish Government may, likewise, make provision, in the exercise of the powers under section 2(2) of the European Communities Act 1972) (2), for the purpose of implementing any EU



obligation: cp Case C-428/07 R (*Horvath*) v. *Secretary of State for the Environment, Food and Rural Affairs* (297), paras. 47-58. This is a power which has been frequently exercised. Significant areas of policy which are within the legislative competence of the Scottish Parliament (such as agriculture, environment and justice) are affected by EU law, and the Scottish Government also exercises executive functions involving the administration of EU law, within devolved competence – for example, the Scottish Government is responsible within Scotland, for the administration of the Common Agricultural Policy.

33. The legitimate interests of the devolved administrations in relation to EU policy are recognised in the Memorandum of Understanding and Concordats entered into between the UK Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee (346). The Memorandum of Understanding states:

“18. As a matter of law, international relations and relations with the European Union remain the responsibility of the United Kingdom Government and the UK Parliament. However the UK Government recognises that the devolved administrations will have an interest in international and European policy making in relation to devolved matters, notably where implementing action by the devolved administrations may be required. They will have a particular interest in those many aspects of European Union business which affect devolved areas, and a significant role to play in them.

...

20. The UK Government will involve the devolved administrations as fully as possible in discussions about the formulation of the UK’s policy position on all EU and international issues which touch on devolved matters. ....”

34. The Concordat on Co-ordination of European Union Policy Issues (346) states (para. B1.5):

“As all foreign policy issues are non-devolved, relations with the European Union are the responsibility of the Parliament and Government of the United Kingdom, as Member State. However, the UK Government wishes to involve the Scottish Ministers as directly and fully as possible in decision making on EU matters which touch on devolved areas (including non-devolved matters which impact on devolved areas and non-devolved matters which will have a distinctive impact of importance in Scotland).”

## **E. THE CONSTITUTIONAL EFFECTS OF WITHDRAWAL FROM THE EU**

### ***(a) General***

35. Withdrawal from the EU would effect a fundamental change in the constitution of the United Kingdom, including Scotland.

- (1) The legislative, executive and judicial institutions of the EU would cease to exercise powers or jurisdiction in or as regards the UK, including Scotland.
- (2) The various legislatures of the UK, and UK public authorities, would no longer operate within the framework of, and constrained by, EU law.
- (3) Withdrawal would alter the legislative competence of the Scottish Parliament and the executive competence of the Scottish Government.
- (4) Individuals and businesses who currently enjoy rights under EU law (including rights which prevail over legislation passed by any of the UK's legislatures), and who may apply to the courts of the various jurisdictions of the UK to enforce those rights would lose such rights, and the power of the courts of the various jurisdictions of the UK to adjudicate on those rights would be affected.

The question of whether a decision under Article 50(1) can be taken by an exercise of the prerogative alone can be analysed by reference to: (i) whether withdrawal from the EU consequent on such an act would effectively repeal the European Communities Act 1972; (ii) whether the European Communities Act 1972 has displaced the prerogative in these respects; and (iii) whether withdrawal would alter rights currently enjoyed in the UK and by UK citizens, residents and businesses (cp, generally, *R v. Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513 (15); *Laker Airways Ltd v. Department of Trade* [1977] QB 643 (12)). On any of these approaches,

the appeal would fall to be dismissed. But the intervener invites the Court to consider the issue from a broader perspective. The changes in the constitution of the UK which would be effected by withdrawal from the EU cannot, consistently with a proper appreciation of the respective roles and responsibilities within the UK constitution of the Crown and Parliament, be effected by an act of the prerogative alone. If the Crown cannot, lawfully, claim to “cass, annul or disable” the laws of the land, far less can it claim to take a step, without the authority of an Act of Parliament, which would result in a fundamental change in the constitution of the Kingdom.

*(b) Effect on the EU institutions*

36. At present, the legislative, executive and judicial organs of the EU exercise powers, functions and/or jurisdiction in and as regards the UK, including Scotland. Those powers are significant features of the constitutional order of which the UK, including Scotland, is a part. Withdrawal from the EU would self-evidently deprive those institutions of those powers, functions and jurisdiction as regards the UK, including Scotland.

*(c) Effect as regards legislatures and public authorities generally*

37. It is a feature of the current constitutional settlement that all public authorities within the UK operate within the framework of EU law. Parliament, when it enacted the European Communities Act 1972, voluntarily accepted the constraint which membership of the EU places on its own legislative freedom, by creating rights which prevail against primary legislation: *cp R v. Secretary of State for Transport ex parte Factortame Ltd (No. 2)* [1991] 1 AC 603 (80). Withdrawal from the EU would remove all the UK's legislatures, governments and public authorities from the framework of European law, within which all such bodies have operated since the enactment of the European Communities Act 1972 and accession to the Communities.

*(d) Effect on the legislative competence of the Scottish Parliament and executive and legislative competence of the Scottish Government*

38. Under the devolution settlement:

(1) a provision in an Act of the Scottish Parliament is not law insofar as it is incompatible with EU law: section 29(2)(d) (124); and

(2) a member of the Scottish Government has no power to make any subordinate legislation or to do any other act, so far as the legislation or act is incompatible with EU law: section 57(2) (124).

EU law is defined in s. 126(9) (124) as:

“(a) all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties, and

(b) all those remedies and procedures from time to time provided for by or under the EU Treaties”

The expression “the EU Treaties” has the meaning prescribed by the European Communities Act 1972: Interpretation Act 1978, Schedule 1 (409). That meaning is prescribed in section 1(2) of the 1972 Act (2).

39. Upon withdrawal from the EU, the UK would cease to be bound by obligations or restrictions imposed by the EU Treaties. It follows that, thereafter, if the Scottish Parliament or the Scottish Government were to do something that would previously have contravened the Treaties, this would not breach any “obligations or restrictions from time to time created or arising by or under the EU Treaties”. Upon withdrawal from the EU, the restrictions on legislative and executive competence imposed by section 29(2)(d) and 57(2) of the Scotland Act 1998 (124) would, accordingly, cease to have any content<sup>2</sup>. The effect of withdrawal from the EU would be to “cass, annul or disable” these provisions -

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<sup>2</sup> Section 34 of the Scotland Act 1998, which provides for reconsideration of Bills where a reference has been made to the CJEU, would also plainly cease to have effect.

a step which may not, compatibly with the Claim of Right Act 1689, be effected by an act of the prerogative alone.

40. The Scotland Act 1998 contains express provisions under which changes may be made, by Order in Council, to the legislative competence of the Scottish Parliament and the executive competence of the Scottish Government: sections 30 (124), 63 (227). Such an Order in Council requires prior approval by both Houses of Parliament and by the Scottish Parliament itself: Schedule 7 (227). The executive may not, by an act of the prerogative, bypass this express statutory scheme for altering the devolution settlement. The UK Parliament could, of course, effect such a change by Act of Parliament – indeed, the UK Parliament often legislates to grant powers and functions to the Scottish Government, and has legislated to alter the legislative competence of the Scottish Parliament – but, consistently with the statutory procedure laid down in the Scotland Act itself, has only done so with the consent of the Scottish Parliament.
  
41. In *McCord* (267), Maguire J rejected the contention that the prerogative had been displaced by the Northern Ireland Act 1998. Maguire J proceeded on the basis that, unless the prerogative had been displaced by statute, the government's reliance upon it to give notice under Article 50 would be unobjectionable: para. 67. Properly analysed, the effect of the European Communities Act 1972 does displace any purported use of the prerogative to withdraw the UK from the EU. But, in any event, the issue which falls to be determined is whether, on a proper understanding of the respective roles of the Crown and Parliament, the Crown can, by an exercise of the foreign affairs prerogative: (i) effect a fundamental change in the constitution of the United Kingdom, including, but not limited to, changes in the devolution settlements of Scotland, Northern Ireland and Wales; and (ii) displace or disable the law of the land, including, as it happens, significant provisions in the devolution statutes. The Lord Advocate, accordingly, submits that the judgment of Maguire J does not assist in the determination of this appeal.

*(e) Effect on rights*

42. UK citizens, including UK citizens resident in Scotland, and UK businesses, including businesses located in Scotland would, upon withdrawal from the EU, lose rights and freedoms, currently enforceable in the courts of the various jurisdictions of the United Kingdom and of other Member States. EU citizens from other Member States resident in the UK, including in Scotland, would lose their entitlement, by virtue of their citizenship of another EU member state, to work and study within the UK, including Scotland. UK businesses, including businesses located in Scotland, would lose significant rights and freedoms – including the right to establish in other EU Member States.

**F. EFFECTS OF WITHDRAWAL FROM THE EU ON THE LAW OF THE LAND**

43. Upon withdrawal from the EU, EU legislation having direct effect, including EU legislation in areas of policy which fall within devolved competence, would cease to apply by virtue of the UK's membership of the EU. The effect of withdrawal would be to "cass, annul or disable" this corpus of law, and this too is something which cannot, compatibly with the Claim of Right Act 1689 (211), be effected by an act of the prerogative alone. Reference to the effect of withdrawal from the EU on that body of law reinforces the constitutional point made above, and illustrates the significant impact which withdrawal from the EU would have on the interests of the Scottish Parliament and the Scottish Government.
44. The UK Parliament, or, insofar as the legislation in question is within its legislative competence, the Scottish Parliament, could, insofar as it is possible to do so, enact equivalent rules to apply post-withdrawal or so as to continue existing laws in effect. Even if framed in identical terms, such rules would have a different constitutional status from their status as directly effective EU law. There are, in any event, provisions which either could not be re-enacted in identical terms, or which, if they were re-enacted in identical terms, would be practically ineffectual – for example: (i) where the implementation of the

legislation depends upon co-operation with, or receipt of information from, another Member State, another Member State's competent authorities, or an EU institution; (ii) where the legislation provides for decision making by, or other involvement of, an EU institution; (iii) where the legislation is based on funding from the EU or an EU institution; and (iv) where the legislation presupposes membership of an EU agency. The effect of withdrawal would be to "cass, annul or disable" this body of law.

45. The agricultural support regime illustrates the point. Regulation EU 1305/2013, Regulation EU 1306/2013, Regulation EU 1307/2013 and Regulation EU 1308/2013, provide for agricultural support under the Common Agricultural Policy. As directly effective EU legislation, these Regulations would cease to apply on withdrawal from the EU in the absence of transitional provisions. But, regardless of any transitional arrangements, the regime would be practically ineffective if the UK were not a member of the EU, because the support schemes are funded or co-funded by the EU and the audit and control functions currently undertaken by the European Commission and the European Court of Auditors would cease to apply. If the relevant EU Regulations no longer applied, provisions in the domestic implementing legislation, made by the Scottish Government - e.g. the Common Agricultural Policy (Direct Payments etc)(Scotland) Regulations 2015 (SSI 2015/58) and the Rural Development (Scotland) Regulations 2015 (SSI 2015/192) - would, equally be ineffectual.. Quite apart from the legal effect of withdrawal from the EU in annulling or disabling these laws, the practical impact would be significant: CAP support payments account for almost three quarters of total income from farming in Scotland; and Scottish farmers receive around 16.5% of total UK CAP receipts.
46. The agricultural support regime is not the only EU funded regime which operates in an area within the legislative competence of the Scottish Parliament or the devolved competence of the Scottish Government.
  - (1) The Scottish Government is the managing authority for the European Regional Development Fund and European Social Fund programmes in Scotland. These Funds operate under the Common Provisions Regulation

EC 1303/2013, the ERD Fund Regulation EC 1301/2013 and the European Social Fund Regulation EC 1304/2013.

- (2) The European Maritime and Fisheries Fund, established under Regulation EU 508/2014, provides financial support for the Common Fisheries Policy for the conservation of marine biological resources, for the management of fisheries and fleets exploiting those resources, for fresh water biological resources and aquaculture. The activities supported by the EMFF are generally within the legislative competence of the Scottish Parliament, and responsibility for administering EMFF support in Scotland lies with the Scottish Government.

47. Likewise, the Scottish Government and other Scottish public authorities benefit from participation in EU agencies. On withdrawal from the EU, UK authorities, including relevant Scottish authorities, would cease to be entitled to participate in the work of these agencies by virtue of the UK's membership of the EU. For example:

- (1) The European Fisheries Control Agency, established under Regulation EC 768/2005 co-ordinates national control and inspection activities as regards fisheries by Member States of the EU. Enforcement of the rules of the Common Fisheries Policy in relation to Scottish vessels and in relation to fishing activities within the Scottish zone fall within the competence of Scottish Government.
- (2) Policing is, generally, within the legislative competence of the Scottish Parliament. Police Scotland currently benefits from the UK's membership of Europol. Although the UK Government has intimated its intention to opt into the new Europol Regulation, upon withdrawal from the EU, the UK would cease to be entitled to participate by virtue of its membership of the EU, in the work of Europol.
- (3) The European Union's Judicial Co-operation Unit (Eurojust), formally established by Council Decision 2002/187/JHA (as amended) seeks to



improve judicial cooperation between member states, in particular in combating forms of serious crime by transnational organisations.

States which are not Member States of the EU may be involved in the work of these agencies; however, upon withdrawal, any continued involvement on the part of the UK generally and/or Scotland in particular, would require agreement to that effect.

48. In the field of civil justice, the Scottish Government exercises functions as a Central Authority in relation to: (a) the Brussels IIbis Regulation (Council Regulation 2201/2003) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and parental responsibility; and (b) family maintenance obligations (Council Regulation 4/2009). On withdrawal from the EU, these Regulations would cease to apply by virtue of the UK's membership of the EU. No doubt domestic legislation could continue them in effect, but insofar as these regimes depend on co-operation from the authorities of other Member States, they could not be replicated unilaterally by the UK Parliament or the Scottish Parliament. A similar observation may be made about other directly effective EU civil justice measures which presuppose mutual co-operation: Regulation (EC) 1393/2007 on service of judicial and extrajudicial documents; Regulation (EC) 1206/2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters; the European Enforcement Order (Regulation (EC) 805/2004); the European Order for Payment Procedure (Regulation (EC) 1896/2006); the Small Claims Regulation (Regulation 861/2007); Regulation (EU) 1215/2012 ('Brussels 1 Recast') on jurisdiction and the recognition and enforcement of judgments; and Regulation 606/2013 on the mutual recognition of protection measures in civil matters.
49. In addition to its impact on EU law having direct effect, withdrawal from the EU would also, in the absence of domestic legislation making appropriate transitional or other arrangements (to the extent that such arrangements are possible), "cass annul or disable" provisions in legislation enacted by the Scottish Parliament or the Scottish Government which depend on the

continuing application of EU law or on membership of the EU. This too cannot, consistently with the Claim of Right Act 1689, be effected an act of the prerogative alone. Examples include provisions in the following legislation: (i) the Public Contracts (Scotland) Regulations 2015 (giving effect to EU law in the field of public procurement); (ii) the Education (Fees) (Scotland) Regulations 2011 (SSI 2011/389) which make provision for the fees which may be charged to EU and EEA nationals (amongst others) who are undertaking a relevant programme of education in Scotland; (iii) the Food Hygiene (Scotland) Regulations 2006 (SSI 2006/3) (as amended) which: (a) designate Food Standards Scotland as the 'competent authority' for the purposes of specified Community Regulations concerning food safety; and (b) prescribe the relevant enforcement authority (whether Food Standards Scotland or a local authority) for different types of 'food business operator' by reference to the particular Community Regulations that apply to the individual food business operators; (iv) the Cattle Identification (Scotland) Regulations 2007 (SSI 2007/174); (v) the Trade in Animals and Related Products (Scotland) Regulations 2012 (SSI 2012/177) which makes provision for movement of animals and genetic material between member states and involves designation by the European Commission of border inspection posts for animals and products; and the Sea Fishing (EU Control Measures)(Scotland) Order 2015 (SSI 2015/320).

## **G. THE LAW AS REGARDS THE PREROGATIVE**

### *(a) General*

50. The essential issue of law which arises in this case is whether or not the Crown in right of Her Majesty's Government of the United Kingdom may take the decision to withdraw the United Kingdom from the European Union, and notify the Council of that decision, under Article 50 TEU, in reliance on the prerogative. The UK Government relies on the foreign affairs prerogative, and equiparates the decision to withdraw the United Kingdom from the European Union with any other decision in the field of foreign affairs, including decisions to withdraw from an international treaty.

*(b) Scots law and the prerogative: general background*

51. It should not be assumed that Scots law as regards the prerogative is the same as the law of England & Wales: see *King's Printers v. Buchan* (1826) 4S (NS) 567 (293), 571 per Lord President Hope; *British Medical Association v. Greater Glasgow Health Board* 1989 SC (HL) 65 (412), 94 per Lord Jauncey. The common law of Scotland was less sympathetic than the law of England & Wales to claims by the Crown to special treatment – although, in certain respects, the law has been equated as a result of statute or by judicial decision: see generally JT Cameron, "Crown exemption from statute and tax in Scots law" 1962 Jur. Rev. 191 (327); JDB Mitchell, "The Royal Prerogative in Modern Scots Law" 1957 PL 304 (348); WJ Wolffe, "Crown immunity from legislative obligations" 1990 PL 14 (350); WJ Wolffe, "Crown and Prerogative in Scots Law" in Finnie et al (eds), *Edinburgh Essays in Public Law*, 1991 (420), p. 357; A. Tomkins, "The Crown in Scots Law", in McHarg and Mullan (eds), *Public Law in Scotland* ( ).

Devolution has effected a separation between the Crown in right of Her Majesty's Government of the United Kingdom and the Crown in right of the Scottish Administration: Scotland Act 1998, s. 99 (410). The Scottish Government has power to exercise the prerogative within devolved competence: s. 53(2)(a) (227). And, having regard to the legislative competence of the Scottish Parliament, the prerogative powers of the Crown are now subject to the over-riding powers of the two democratically elected legislatures which have power to change the law of Scotland: cp *R v. Secretary of State ex parte Fire Brigades Union* [1995] 2 AC 513 (15), 552 per Lord Browne-Wilkinson.

*(c) The foreign affairs prerogative*

52. The powers of the Crown to enter into treaties, and otherwise to conduct foreign affairs, by exercise of the prerogative may properly be said to be an incident of the capacity and powers of the Crown in right of Her Majesty's Government of the United Kingdom, as such, in its relations with foreign states. The 1707 Union created a single Crown for the United Kingdom, and

the capacity of the Crown vis-a-vis foreign states, when engaging in international relations on behalf of the United Kingdom, cannot sensibly be regarded as being affected by differences between the laws of the three jurisdictions of the United Kingdom.

53. The effect *within* each of the jurisdictions of the UK of an act of the Crown in the exercise of the foreign affairs prerogative is however, as a matter of principle, a matter for the law of each jurisdiction. It is, for example, conceptually possible to imagine that the different jurisdictions in the UK might take a different approach to the effect within domestic law of treaty obligations. However that is not the current position: Scots law, like English law, adopts the dualist theory. As Lord Hodge observed in *Moohan v. Lord Advocate* 2015 SC (HL)1 (270), para. 29:

“The UK Parliament and the Scottish Parliament make laws; the executive branch of the UK government makes international treaties; but unless those treaties are incorporated into law, they do not affect domestic rights. In *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* (p 500B–C) Lord Oliver of Aylmerton stated:

[A]s a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing.”

(see also *Whaley v. Lord Advocate* 2008 SC (HL) 107 (295), para. 8 per Lord Hope of Craighead). As JDB Mitchell put it (*Constitutional Law*, 1968, p. 179 ( )): “So far as treaties are concerned the Crown has, by virtue of the prerogative, a power to enter into any treaty, but where a treaty requires any alteration of domestic law to become effective that must be done by Parliament.” This simply reflects the constitutional principle established at the Revolution Settlement, which is presupposed by Article XVIII of the Acts of Union (107).

54. Withdrawal from the EU is not like withdrawal from another international treaty because of the constitutional and legal effects which membership of the EU has within the various jurisdictions of the UK, and the consequences within the domestic legal order of withdrawal.

(1) Withdrawal would effect fundamental changes in the constitution of the UK. To allow this to be done by an act under the prerogative would be inconsistent with the constitutional principles set out above.

(2) Withdrawal would, in particular, “cass annul or disable” sections 29(2)(d) and 57(2) of the Scotland Act 1998 (124), and a body of law which currently applies in Scotland, contrary to the Claim of Right Act 1689 (211).

(3) Withdrawal would also “cass annul or disable” legislation which currently applies in Scotland – both the corpus of directly effective EU legislation and Scottish legislation which depends for its effectiveness on the UK’s membership of the EU.

55. Were the decision to withdraw to be capable of being taken by an act of the prerogative, Parliament would be consigned to the ancillary role, of tidying up the statute book in light of that decision. The UK Government’s position implies that not only may one constitutional statute, the European Communities Act 1972, be deprived of any practical effect or content as a result of a prerogative act, but important provisions of another constitutional statute, the Scotland Act 1998, may be effectively displaced. This does not reflect the correct position in law and is contrary to constitutional principle, for the reasons set out above.

*(d) The UK Government’s Case*

56. The UK Government’s Case makes two new arguments not advanced, or not developed, before the Divisional Court:

- a. The Appellant contends that in the field of foreign affairs, the legitimate exercise of the prerogative can have both a direct and an indirect effect on the content of domestic law and on the extent of individual rights and obligations in domestic law (Appellant’s Case, para. 40). It is said that the Divisional Court was wrong to identify a constitutional principle that, absent Parliamentary authorisation, the prerogative cannot be

used to vary the law of the land, or to deprive individuals of rights (Appellant's Case, paras. 54-56).

b. The Appellant also contends that, under the incorporation model used in s. 2(1) ECA (1/2) (the "ambulatory" model), the legal rights and obligations arising from international law and given effect in domestic law "have no existence independent of the international legal rules from which they derive", so "the availability of those rights and obligations was always conditional upon the existence of the underlying international rights and obligations" (Appellant's Case §50).

(e) *The constitutional principle that the prerogative cannot be used to vary the law of the land*

57. The Divisional Court was correct to identify a "constitutional principle" that "unless Parliament legislates to the contrary, the Crown does not have power to vary the law of the land by the exercise of its prerogative powers" (DC judgment, para. 84). The cases cited by the UK Government (Appellant's Case, para. 56) as counter-examples are not, in truth, counter-examples at all.

58. The true scope of the principle identified by the Divisional Court at para. 84 of its judgment should be appreciated. It is that the Crown has no prerogative power to vary "the law of the land" – a term which is shorthand for a number of expressions used in the authorities to which the Court referred: "any part of the common law, or statute law, or the customs of the Realm" (the *Case of Proclamations* (1610) 12 Co. Rep. 74 (9), per Sir Edward Coke, cited by the DC at para. 27); "the law to be administered in Courts of law in this country" (*The Zamora* [1916] 2 AC 77 (87), per Lord Parker at 90, cited by the DC at para. 29).

59. Understood in this sense, the principle that the prerogative cannot be used to vary the law of the land is consistent with the principle articulated by the Bill of Rights that there was no prerogative power of "suspending" or "dispensing with" "laws or the execution of laws" (cited by the DC at para. 28) and with the

equivalent principle given effect by the Scottish Parliament in the Claim of Right Act 1689 (211), that “all Proclamations asserting an absolute power to Cass annull and Dissable laws” were “Contraire to law”.

60. But the Divisional Court did not say, and could not properly have said, that the exercise of the Crown’s prerogative can have no legal effects on persons in the UK. The exercise of the prerogative can - and often does - have such effects. For example, the exercise of the Crown’s power to grant a free pardon is liable to have a substantial effect on the legal position of the individual pardoned: cp *R v. Secretary of State for the Home Department ex parte Bentley* [1994] QB 349 (286). Likewise, the exercise of the Crown’s prerogative to take private property necessary for the defence of the Realm (before that power was abrogated by statute) was liable to affect the legal position of the property owner (even where compensation was given): *Attorney General v. De Keyser’s Royal Hotel* [1920] AC 508 (10). In neither case did the exercise of the prerogative vary the law of the land. In both, the prerogative was *part of* the “law of the land” (ie the common law)<sup>3</sup>; that law recognised certain powers in the Crown; and the exercise of these powers could affect the legal position of other persons.

61. Taking the cases cited in the Appellant’s Case at para. 56 in turn:

- a. The *GCHQ* case (*Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 (36)) illustrates the difference between an exercise of the prerogative having effects on the legal position of a party (which is orthodox) and an exercise of the prerogative having an effect on the “law of the land” (which would be contrary to constitutional principle). The case concerned a decision to change the terms of service of civil servants at GCHQ so as to deny them the right to be members of a union. The reason why the prerogative could be used to achieve that effect was given by Lord Diplock at 412:

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<sup>3</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, per Lord Scarman at 407: “I would observe that the royal prerogative has always been regarded as part of the common law.”

“The rule of terminability of employment in the civil service without notice, of which the existence is beyond doubt, must in any event have the consequence that the continued enjoyment by a civil servant in the future of a right under a particular term of his employment cannot be the subject of any right enforceable by him in private law; at most it can only be a legitimate expectation.”

So the exercise of the prerogative in that case did not infringe any common law or other private right. It was subject only to public law control. There is nothing in the GCHQ case that undermines the principle that no exercise of the prerogative may vary the law of the land.

- b. In *De Keyser (10)*, before statute had occupied the field, the common law property right of the hotel owner had been, as a matter of law, subject to the Crown’s prerogative to take that property where necessary for the defence of the Realm. That did not mean that an exercise of the prerogative could vary the property rights of the owner. It meant, simply, that the common law gave the property owner no right against the Crown in circumstances where the taking was necessary for the defence of the Realm.
- c. Exactly the same analysis is applicable to the question addressed in *Burmah Oil Co. v Lord Advocate* 1964 SC (HL) 117 (34). The question there was whether, in Scots law, the Crown prerogative to take and destroy property in defence of the Realm was subject to a duty to compensate. The answer was ‘yes’. Of course, even with compensation, the exercise of the prerogative had an effect on the legal position of the owner, but again, not because the Crown could vary the law; rather, because under the existing law the Crown had the legal power to take and destroy the property (and the rights of property-owners were subject to that power)
- d. The recent decision of the Divisional Court in *R (XH) v Secretary of State for the Home Department* [2016] EWHC 1898 (Admin) (66) establishes that the Crown retains a general prerogative power to withdraw passports, notwithstanding the conferral of statutory powers



to withdraw passports in certain specific circumstances. Again, nothing in *XH* shows that the exercise of the power does or could vary the legal rights of the citizen. The reason why a passport can be withdrawn under prerogative powers is that:

“There is no entitlement to a passport and no statutory right to have access to a passport. The decision to issue, withdraw, or refuse a British passport is at the discretion of the Secretary of State for the Home Department (the Home Secretary) under the Royal Prerogative.”

(See the extract from the Written Ministerial Statement quoted by the DC at para. 24(4) of its judgment.) The exercise of the prerogative power did not interfere with any existing common law or statutory right to a passport, because there is no such right.

62. Nor do the UK Government's examples of the exercise of the prerogative in the field of foreign affairs (Appellant's Case, para. 40) suggest that the prerogative can be used to vary the law of the land.

- a. In *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 (51), the question was whether a particular site was within the territorial waters of the UK. If so, the Wireless Telegraphy Act 1949 required a licence to transmit from that site. The site in question had not been part of the territorial waters of the UK when the Act had been passed but later came to be. The *ratio* of the case (see per Diplock LJ at 753-4) is that:

“when any Act of Parliament refers to the United Kingdom or to the territorial waters adjacent thereto those expressions must *prima facie* be construed as referring to such area of land or sea as may from time to time be formally declared by the Crown to be subject to its sovereignty and jurisdiction as part of the United Kingdom or the territorial waters of the United Kingdom, and not as confined to the precise geographical area of the United Kingdom or its territorial waters at the precise moment at which the Act received the Royal Assent”.

So the case turned on a point of statutory construction. Parliament intended to extend the licensing obligation to any site that was, for the time being, claimed by the Crown as part of the UK's territorial waters.

This is not an example of “the prerogative altering the scope of domestic law”. On the contrary, it shows Parliament legislating cognisant of, and intending to maintain, the existing legal position that the limits of territorial sovereignty may be altered by the Crown.

- b. In the same way, when Parliament enacted the Diplomatic Privileges Act 1964 (DPA) (214), the omission from the Schedule of Articles 4 and 9 of the Vienna Convention on Diplomatic Relations (315), and the express words of section 4, indicate a clear intention that the question of whom to accredit as a diplomat (and whom to make *persona non grata*) should remain, as it had always been, governed (and exclusively governed) by the prerogative. In other words, Parliament intended to extend the privileges set out in the Act to those (and only those) who were recognised by the Crown as diplomats. By making a diplomat *persona non grata*, the Crown does not “alter and remove” rights recognised in domestic law. That is because the rights conferred by the DPA were plainly intended by Parliament to subsist only during the period of the individual’s continued recognition as a diplomat by the Crown.
- c. The example of rights arising under bilateral investment treaties is inapposite and irrelevant for the reason given by the UK Government itself (Appellant’s Case, para. 40(c)): they give rise to “treaty rights, which are not actionable in UK courts and do not form part of the law of the land”. So the act of entering into, or withdrawing from, such a treaty can – in principle – have no effect whatsoever on the law of the land.<sup>4</sup>
- d. Finally, the doctrine that the courts should, so far as they are free to do so, interpret statutes and develop the common law so as to achieve consistency between domestic law and the UK’s international obligations (e.g. *McGeoch v. Lord President of the Council* 2014 SC

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<sup>4</sup> It may be added that the orthodox view is that such treaties create rights between States on the international plane but do not give rise to rights in individuals: see eg the decision of the German Constitutional Court of 8 May 2007: 2 BvM 1-5/03, 1, 2/06 (301), §54 (translation at [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2007/05/ms20070508\\_2bvm000103en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2007/05/ms20070508_2bvm000103en.html))

(UKSC) 25 ( ), para. 121 per Lord Sumption; *Moohan v. Lord Advocate* 2015 SC (UKSC) 1 (270), para. 33 per Lord Hodge) is not a counter-example to the principle that the prerogative cannot be used to vary the law of the land: it is only a presumption, applicable alongside other presumptions where the law requires interpretation. Where, as in *Assange v Swedish Prosecution Authority* [2012] 2 AC 471 (29), legislation is interpreted in accordance with an international instrument that it was intended to implement, the courts are applying an orthodox canon of statutory construction. This no more represents an exception to the rule that the prerogative cannot vary the law of the land than does construing a statute by reference to a White Paper published by the Government. In both cases, the courts are simply looking at something that Parliament itself had before it when legislating and, in the absence of indications to the contrary, inferring that it intended to legislate accordingly.

*(f) The “ambulatory model” for incorporating international obligations*

63. When it enacted s. 2(1) ECA (1), Parliament envisaged that the content of the “rights, powers liabilities, obligations and restrictions from time to time created or arising under the Treaties”, as well as the “remedies and procedures from time to time provided for by or under the Treaties” would vary over time by virtue of the legislative processes and mechanisms provided for by the Treaties. In this sense, it is appropriate to describe the model selected by Parliament to incorporate EU law as “ambulatory”.

64. Such a model had to be adopted because, by the time the ECA was enacted, it was already plain that the law of the Communities (as they then were) constituted “a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only members states but also their nationals”: Case 6/64 *Costa v ENEL* [1964] ECR 858 (96). When Parliament enacted the ECA (1) “to make provision in connection with the enlargement of the European Communities to include the United Kingdom” its intention was to

incorporate this “new legal order” into the domestic law of Scotland, England & Wales and Northern Ireland – in other words to make EU law part of the law of the land. In doing so, it deliberately incorporated into the UK’s constitutional structures the distinctive EU legislative processes in which the Crown, but not Parliament, would be a participant.

65. Parliament thus plainly envisaged that some acts would be done by the Crown by way of participation in the “new legal order” (for example, the act of voting for legislative measures in the Council of Ministers). EU legislation enacted through a process in which the UK Government would participate would, without more, augment or reduce the rights and obligations to which s. 2(1) gave effect in domestic law. Whether the acts of the UK Government, in participating in the legislative and other procedures of the EU are properly seen as exercises of the prerogative or as acts within the EU legal order may not matter. What matters is that Parliament, by enacting the ECA, expressly or impliedly provided that Community law (as varied from time to time) would have effect without further authorisation by Parliament.

66. Having altered the UK’s constitutional arrangements for law-making in this way, Parliament went on to make equally fundamental constitutional changes in the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006. In each of these statutes the new legal order constituted by (now) EU law was further embedded in the law of each jurisdiction – not only do the devolved legislatures and administrations have the function of observing and implementing EU law within their respective competences, but their powers are explicitly constrained by reference to EU law. This simply reflected the fact that, by the time that the devolution statutes were enacted, EU law had become the law of the land in each of the UK’s jurisdictions.

67. Against this background, it simply does not follow that, because the Crown can augment or reduce rights by voting for legislation in the Council of Ministers, it can also give notification under Article 50 TEU and thereby nullify all the rights, obligations powers and functions currently existing under EU law.

- a. In the first place, EU law itself makes clear in Article 16(2) TEU ( ) that “[t]he Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote”<sup>5</sup>. By contrast, Article 50 TEU contemplates that Member States may have different “constitutional requirements” for deciding to withdraw from the Union.
- b. The submission that the rights, obligations and powers derived from EU law have “no existence independent of the international legal rules from which they derive” (Appellant’s Case, para. 50) misses the point. It is true that the content of these rights, obligations and powers is “contingent” on the continued existence of the treaties from which they are derived. It is also true that, if one or more other Member States chose (for example) to withdraw from those treaties, the rights enjoyed by nationals of that State in domestic law (and indeed the rights enjoyed by others with respect to that State) would be affected (ibid. para. 51). But that is because the EU’s “new legal order” would have been altered by the decision of another Member State, taken in accordance with its “constitutional requirements”. It does not follow that a similar decision within by the UK to withdraw can be made, or notified, by the Crown without authorisation by Parliament. The question of whether it can may be answered by considering the effects of withdrawal on the existing law of the land. Once the question is understood in this way, there can – it is submitted – be only one answer: a decision to withdraw from the EU would change the law of the land in a manner which may only be effected by an Act of Parliament.

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<sup>5</sup> From the beginning, the Council consisted of “representatives of the Member States”. For this purpose each government was to delegate to the Council one of its members: Treaty of Rome, Article 146.

## H. THE ROLE OF THE SCOTTISH PARLIAMENT; THE LEGISLATIVE CONSENT CONVENTION

### *(a) The Legislative Consent Convention: general*

68. The UK Parliament has expressly retained power, under the Scotland Act 1998, to legislate for Scotland: Scotland Act 1998, section 28(7) (124). However, it is a constitutional convention, now recognised explicitly by the UK Parliament itself in section 28(8) of the 1998 Act, that the UK Parliament does not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. This convention – the Legislative Consent Convention (sometimes known as the “Sewel” Convention) has proved, in practice, to be an important mechanism through which the correct constitutional relationship between the two Parliaments is maintained. In this section of the Case, the intervener: (i) describes the constitutional convention; and (ii) explains why the Convention would be engaged were a Bill laid before Parliament determining to withdraw the UK from the EU and to authorise notification of the Council under Article 50(2) TEU.

### *(b) The Legislative Consent Convention: Practice*

69. During the passage of the Scotland Act 1998, Lord Sewel (then Minister of State in the Scottish Office) made clear that he “would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament”. That convention was reflected in the Memorandum of Understanding between the UK Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee (October 2013) (346) in the following terms:

“14. The United Kingdom Parliament retains authority to legislate on an issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved

administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.”

70. The Convention is further described in the UK Government’s Devolution Guidance Note No. 10 (342) (first published in 1999, and still published by the UK Government as its guidance to UK Government departments on handling legislation affecting Scotland). The DGN states in para. 1 that:

“The convention applies when legislation makes provisions specifically for a devolved purpose ...; it does not bite when legislation deals with devolved matters only incidentally to, or consequentially upon, provision made in relation to a reserved matter.”

That document identifies as Bills which are subject to the convention, those which contain “provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers”: paras. 4, 6. The DGN states that: “The note does not extend to legislation which deals with emergencies or is similarly exceptional”: para. 1.

71. The mechanics for obtaining the consent of the Scottish Parliament under the Legislative Consent Convention are provided for in Chapter 9B of the Standing Orders of the Scottish Parliament (399). The Standing Orders apply to a relevant provision in a relevant Bill, namely “a Bill under consideration in the UK Parliament which makes provision (“relevant provision”) applying to Scotland for any purpose within the legislative competence of the Parliament, or which alters the legislative competence or the executive competence of the Scottish Ministers”: para. 1.

72. In evidence to the Procedures Committee of the Scottish Parliament in 2005 (408) the UK Government stated that the “Sewel Convention applies to provisions in UK Bills which:

- **Make provision for a devolved purpose** i.e. on a matter which, if contained in a bill before the Scottish Parliament in the same context and for the same purpose, would be within the legislative competence of the Scottish Parliament. It does not apply to alterations to devolved law which are incidental or consequential on provisions made for reserved purposes,

although as a matter of good practice UK Government departments consult the Scottish Executive on any such changes.

- **Provisions which vary the legislative competence of the Scottish Parliament** i.e. which amend Schedule 5 to the Scotland Act. The Act provides an alternative method of making such variations through an order making power under section 30(2). This provides for modifications to Schedule 5 through an Order in Council, subject to the agreement of the UK and Scottish Parliaments. There is a presumption that any such modifications will be made using the powers available under section 30(2). However, there may be times when the UK and Scottish Parliaments agree that it is appropriate to include such provisions in a UK Bill. Policy on the use of section 30(2) orders is set out in a devolution guidance note, Use of Scotland Act Section 30(2) Orders (DGN 14), published on the website of the Department for Constitutional Affairs.
- **Provisions which vary the executive competence of the Scottish Ministers, usually in reserved areas.** This is frequently referred to as executive devolution. Section 63 of the Scotland Act provides an alternative method for such variations of executive competence through an order making power whereby, inter alia, functions in reserved areas may be executively devolved to the Scottish Ministers subject to the agreement of the UK and Scottish Parliaments. Variations of the executive competence of the Scottish Ministers in UK bills can also relate to provisions in devolved areas. **Executive devolution of functions in reserved areas relates to matters on which the Scottish Parliament is not competent to legislate. It is often a way of giving powers or functions to Scottish Ministers which they could not otherwise have carried out under the Scotland Act. After the executive devolution of functions in reserved areas to the Scottish Ministers the UK Parliament remains the sole body able to legislate in relation to those matters. If the Scottish Parliament withheld its consent in such cases the bill would be amended so that the functions in Scotland would be carried out by the Secretary of State."**

73. In its 2005 evidence (408), the UK Government went on to state as follows:

"7. The UK Government considers the Convention an important part of the devolution settlement. As a sovereign body, the UK Parliament still has the right to legislate on all matters in Scotland. This is explicitly stated in section 28(7) of the Scotland Act. However, the UK Parliament has exercised its sovereignty by devolving legislative competence in certain areas to the Scottish Parliament. The Convention is therefore a means of recognising the sovereignty of the UK Parliament after devolution while respecting the competence of the Scottish Parliament to legislate in matters devolved to it by the Scotland Act. Adherence to the Convention is a way of avoiding the risk of the UK and Scottish Parliaments legislating on the same matter in different ways or against the other. It is thus a



means of maintaining the stability of the devolution settlement. The UK Parliament has not knowingly legislated in relation to a matter subject to the Convention since the establishment of the Scottish Parliament without the consent of the Parliament.

8. The UK Government therefore consider that the continuation of the Convention is vital to the success of devolution. It enables pragmatic solutions to be reached in a timely fashion while simultaneously respecting the competence of the Scottish Parliament. Above all the Convention is concerned with ensuring good government. It enables the law to maintain its coherence and reliability. It also enables the benefits of legislation to apply to Scotland in devolved areas, if it is the wish of the Scottish Parliament that it should do so. This is good for Scotland and good for the United Kingdom as a whole.”

To similar effect, the UK Government, in *Scotland analysis: Devolution and the implications of Scottish independence*, February 2013 (355), stated:

“1.39. While many of the processes underpinning devolution are not set out in legislation, they all enable Scotland’s two governments to work closely together to respond to changing circumstances and to serve the needs of people in Scotland.

1.40. The Sewel Convention is one of the most important. It is widely used and acknowledged as being effective. It essentially means that, although the UK Parliament has the power, it will not normally legislate in relation to devolved matters except with the consent of the Scottish Parliament. It is more than a decade into the life of the Scottish Parliament and the Sewel Convention has consistently been adhered to.”

*(b) The Legislative Consent Convention in practice*

74. The consistent practice of both Governments and Parliaments has been to seek Legislative Consent Motions (“LCMs”) in relation to Bills in each of the three types set out in DGN 10 and elaborated by the UK Government in the passage from its 2005 evidence quoted above. So far as the Scottish Government is aware, the Convention, as so understood, has never knowingly been breached. Annex 1 lists LCMs since devolution, and identifies into which of the DGN 10 types, in the view of the Scottish Government, the relative provisions of the Bill fell. It also identifies Bills before the UK Parliament in relation to which, in the view of the Scottish Government, a LCM would have been required, and explains why no LCM was lodged.

75. The care with which this is approached may be illustrated by reference to the Children and Families Bill 2013. A LCM was sought and obtained. The Explanatory Notes to the Bill (404) state (paras. 30 – 32, 42):

“30. Clause 6 and Schedule 1 amend sections 125 to 131 of the Adoption and Children Act 2002, which provide for the establishment of the Adoption and Children Act Register (“the register”). The register contains information about children who are suitable for adoption and for whom the local authority are considering adoption and prospective adopters who are suitable to adopt a child. This clause removes Wales and Scotland from the scope of these sections and provides for the establishment of a register that applies in relation to England only. The Scottish Government intends to seek a legislative consent motion in relation to this clause.

31. Part 5 of the Bill (clauses 77 to 86) amends Part 1 of the Children Act 2004 to reform the office of Children’s Commissioner. Part 1 of that Act extends to the whole of the UK. The changes made by Part 5 will apply to the Commissioner’s role in promoting and protecting the rights of children in Scotland, but only in relation to non-devolved matters.

32. Parts 6, 7 and 8 of the Bill (clauses 87 to 104) make provision for statutory rights to leave and pay and flexible working. The clauses relate to non-devolved matters and so extend to Scotland.

...

42. For the reasons set out above, this Bill contains provisions (namely clause 6 and 15) which trigger the need for legislative consent motions in Wales and Scotland. Westminster will not normally legislate with regard to devolved matters without the consent of the devolved administrations. If there are any amendments to the Bill relating to devolved matters in Scotland, Wales or Northern Ireland which trigger a legislative consent motion then consent will be sought for them from the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly respectively.”

During the passage of the Bill through the House of Lords, an amendment was introduced giving enabling powers to the UK Secretary of State to make regulations for plain packaging. This prompted a Supplementary LCM in the Scottish Parliament (391), which stated:

“11. Enabling powers for the UK Secretary of State to make regulations for plain packaging in Scotland in an Act of the United Kingdom needs a Legislative Consent Memorandum because measures to protect public health fall within devolved competence. The amendment will therefore require the legislative consent of the Scottish Parliament.

12. Provision is also made in the Bill to ensure that the Secretary of State must seek the consent of Scottish Ministers (and similar provision made for Wales and Northern Ireland) for any regulations which would be within the legislative competence of the Scottish Parliament. This adjustment to the executive functions of the Scottish Ministers will also require the legislative consent of the Scottish Parliament.”

The Supplementary LCM was passed by the Scottish Parliament on 28 January 2014. The Bill was at that time at its Report stage in the House of Lords. On 29 January, the last day of the Report, the UK Government moved the amendment which had been the subject of the Supplementary LCM on the previous day. The Parliamentary Under-Secretary of State, in moving the amendment, specifically assured the House that a LCM had been secured (Hansard HL Deb 29 January 2014 (392)):

“These provisions will apply on a UK-wide basis, provided that legislative consent Motions are passed by the Parliament or Assemblies of the devolved Administrations. The Governments in Wales and Scotland have already obtained the necessary Motions, and Ministers in Northern Ireland are progressing this.”

This example illustrates: (i) the acknowledgment in the Explanatory Notes of the need for LCMs; (ii) the care taken where an amendment is put down which was not covered by the initial LCM, to secure a further LCM; (iii) the co-ordinated working and choreography which takes place between the respective Governments to secure LCMs, where those are required; and (iv) the care taken by the UK Government to assure the UK Parliament that the necessary procedures are in place or being addressed.

76. In particular, it has been recognised, from the outset, that LCMs are required in relation to Bills brought before the UK Parliament which would have the effect of altering the legislative competence of the Scottish Parliament or the executive competence of the Scottish Government. Annex 1 identifies Bills which contained provisions falling into one or other of those two categories. Sometimes, the Explanatory Notes make the reason for seeking a LCM clear, for example:

(1) In 1999, the Education and Training (Scotland) Bill introduced a system of grants known as “learning accounts”. As part of the system

related to the reserved matter of financial instruments, provision was made in the UK Parliament's Learning and Skills Bill to give Scottish Ministers the necessary powers, and a legislative consent motion passed by the Scottish Parliament. The Explanatory Notes to the Learning and Skills Bill ( ) explained inter alia: "Making provision directly in this Act [for Scottish Ministers to exercise the necessary powers] accelerates a process which would in normal circumstances (via the executive devolution order under section 63 of the Scotland Act 1998) take at least six months."

- (2) A LCM was sought and obtained in relation to the Scotland Act 2012. The Explanatory Notes to the Act (405) state (para. 8): "The Act contains provisions which trigger the Sewel Convention. As the Act changes the devolution settlement for Scotland, the Act contains provisions which alter the legislative competence of the Scottish Parliament ... and provisions which alter the executive competence of the Scottish Ministers ... The Scottish Parliament gave its consent to the provisions in the Act that trigger the Sewel Convention on 18 April 2012."
- (3) A LCM was sought and obtained in relation to the Prisons (Wireless Telegraphy) Act 2012. The Explanatory Notes to the Bill (415) (para. 11) stated: "The Bill extends to England, Wales and Scotland. In relation to Wales the provisions relate to non-devolved matters. In relation to Scotland wireless telegraphy is a reserved matter. However, clauses 1 and 2 affect the executive competence of Scottish Ministers in relation to the operation of prisons. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. Insofar as the provisions in the Bill confer powers on the Scottish Ministers, the Scottish Government is seeking the necessary Legislative Consent Motion. If amendments are made to the Bill that trigger a requirement for a Legislative Consent Motion, the consent of the Scottish Parliament will be sought for them".

(4) A LCM was sought and obtained in relation to the Scotland Act 2016. The Explanatory Notes to the Act (395) state (para. 9): "This Act ... required a Legislative Consent Motion from the Scottish Parliament on the basis that it contains provisions applying to Scotland which alter the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers. A Legislative Consent Motion, sponsored by the Scottish Government, was passed by the Scottish Parliament on 16 March 2016."

77. The Legislative Consent Convention has been applied where a UK Bill addressing the reserved matters of foreign affairs and international relations nevertheless touch upon devolved matters. An example is the International Organisations Bill. The UK Government's evidence to the Scottish Parliament Procedures Committee (408) stated (para. 12):

"... the International Organisations Bill is a short technical Bill stemming from the reserved matters of foreign affairs and international relations and will enable the UK to fulfil its international obligations. This touches upon devolved matters in the very limited devolved areas of immunity from suit and legal process and relief from local taxation. While it would be within the competence of the Scottish Parliament to legislate on these very narrow issues in order to fulfil UK international obligations, it is a matter of convenience and good government to cover them in a UK Bill."

78. The Legislative Consent Convention has also been applied where different views might be taken on whether UK legislation affects devolved matters. For example, the Armed Forces Bill 2000 contained provisions on the functions of the Ministry of Defence Police in assisting domestic police forces. These provisions could be seen as related to the reserved matters of defence, or to the devolved matter of detention and prevention of crime. The inclusion of the provisions in Westminster legislation meant that there could be no issues about competence, but the Scottish Ministers were given power to commence them, and it was accepted that this required consent of the Scottish Parliament under the Legislative Consent Convention<sup>6</sup>.

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<sup>6</sup> These provisions eventually became sections 98 and 99 of the Anti-Terrorism, Crime and Security Act 2001

79. The application of the Legislative Consent Convention to Bills which alter the legislative competence of the Scottish Parliament and/or the executive competence of the Scottish Government, as well as to Bills which change the law in ways which would be within the legislative competence of the Scottish Parliament, reflects sound constitutional principle. It is also consistent with the express statutory procedures contained in the Scotland Act 1998 for alterations to competence. The Scottish Parliament and the Scottish Government are a permanent part of the UK's constitutional arrangements: Scotland Act 1998, section 63A(1) (124). The Scottish Parliament is a self-standing democratically elected legislature with its own democratic mandate: *Axa, supra., loc. cit.* The constitutional values of mutual respect and co-operation which underpin the Legislative Consent Convention apply a fortiori to proposals to change the legislative competence of the Scottish Parliament, or the executive or legislative competence of the Scottish Government which is accountable to that Parliament. And adjustments to the legislative competence of the Parliament or the executive competence of the Government are liable to have practical implications – including implications for resources – such that the Scottish Parliament's consent should be obtained if the UK Parliament proposes to make such changes.

*(c) Section 28(8) Scotland Act 1998*

80. In section 28(8) of the Scotland Act 1998 (124), the UK Parliament recognises explicitly, in legislative form, that it will not normally legislate “with regard to devolved matters” without the consent of the Scottish Parliament. The phrase “with regard to devolved matters” does not use the conceptual language used elsewhere in the Scotland Act to define the powers reserved to the UK Parliament, or to define powers exercised by the Scottish Parliament or the Scottish Government. Against the background of the consistent practice described above, the phrase falls to be construed to encompass, at least, the three classes of legislative provisions to which LC Convention has, in the

practice of the two Governments and Parliaments been applied<sup>7</sup>. If, contrary to the intervener's primary contention, section 28(8) does not encompass all three aspects of the LC Convention as it has been applied in practice, the section would not, in fact, be exhaustive of the relevant constitutional convention<sup>8</sup>.

*(d) Application of the Convention*

81. For the reasons set out above, the decision to withdraw the UK from the EU requires an Act of the UK Parliament. The question of whether a Legislative Consent Motion would be required by any particular Bill would fall to be assessed under reference to the provisions of the Bill. However, it is evident that withdrawal from the EU would:-

- a. change the legislative competence of the Scottish Parliament and the executive competence of the Scottish Government by disabling the references to EU law in sections 29 and 57 of the Scotland Act 1998 (124); and
- b. alter the law applicable in Scotland in policy areas within the legislative competence of the Parliament<sup>9</sup>.

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<sup>7</sup> During the passage of the Bill, the provision was criticised on the basis that it could be understood to apply only to provisions in Bills which could have been included in an Act of the Scottish Parliament and not to changes to legislative or executive competence. The Scottish Government proposed an amendment to make clear that the provision did encompass all three devolved aspects covered by DGN 10: letter from the Deputy First Minister to the Convenor of the Devolution (Further Powers) Committee, 7 June 2015 (397). Lord Hope of Craighead put down an amendment to the same effect which, in the event was not moved. The matter was discussed in Parliament, including at HL Deb, 8 December 2015 ( ), cols. 1487-1510, HL Deb 24 February 2016 (394), cols. 286-319 and HL Deb, 21 March 2016 (396), cols 2070-9.

<sup>8</sup> The UK Government White Paper which preceded the 2016 Act stated that "it is expected that the practice developed under [DGN 10] will continue": *Scotland in the United Kingdom: an Enduring Settlement*, Cm 8990, January 2015 (357), para. 1.2.2. It was on the basis that DGN 10 "remains the statement of the Sewel Convention in practice" that the Scottish Government recommended that the Scottish Parliament consent to the Scotland Bill 2016: LCM(S4)37.2, Session 4 (2016) (395), para. 32.

<sup>9</sup> It should be noted, further, that only certain sections of the European Communities Act 1972 are protected by paragraph 1 of Schedule 4 to the Scotland Act 1998 ( ) from modification by an Act the Scottish Parliament.

It is further evident that withdrawal would have very significant effects on and for functions exercised by the Scottish Government. It follows that all three elements of the Legislative Consent Convention, as it has been articulated above, would be engaged were a Bill to be laid before the UK Parliament authorising the withdrawal of the UK from the EU and notification of the European Council to that effect.

82. In *McCord (267)*, Maguire J took a different view: paras. 119-122. His view should be rejected for the following reasons:

(1) Maguire J construed the convention, as it applies in Northern Ireland, to apply only to legislation “within the transferred field”. Inter alia, he proceeded on the basis that the broader view of the convention did “not reflect consistent practice and usage”: para. 119. The true scope of the convention, at least as it has been applied in Scotland, is as set out above.

83. Maguire J relied on the distribution of legislative competence in the Northern Ireland Act 1998: para. 121. He took the view that any legislation for the purposes of notification would be legislation relating to an excepted matter (relations with the EU) and would not be legislation “with regards to devolved matters”. This proceeds from the silent premise (which is a false one) that a Bill which is directed to a reserved matter cannot also have effects with regard to devolved matters, such as to require a Legislative Consent Motion. Any system where legislative powers are distributed between two legislatures, requires to deal with the potential for an enactment before one legislature to have effects as regards the competences of another legislature. Within the UK constitution, the Legislative Consent Convention is an important mechanism in that regard, and it is commonplace that a Bill before the UK Parliament which deals with a reserved matter (and which could not, accordingly, have been laid before the Scottish Parliament) may contain particular provisions which engage the Legislative Consent Convention for one of the reasons outlined above. So, for example, a Bill altering the legislative competence of the Scottish Parliament would not be within the competence of the Scottish Parliament, but would engage the Legislative Consent Convention. The



present case is similar. A single clause Bill authorising withdrawal from the EU would not be within the legislative competence of the Scottish Parliament because it would relate to the reserved matter of relations with the EU. But withdrawal from the EU would, for the reasons explained above: (i) alter the competences of the Scottish Parliament and Scottish Government; and (ii) alter laws within devolved competence. Were the hypothetical Bill to set out, in separate clauses, the various consequences which withdrawal from the EU would have in that regard, it would be evident that a LCM would be required in relation to those provisions. A Bill that has those effects, whether or not they are stated explicitly on the face of the Bill, would accordingly engage the Legislative Consent Convention: the requirement for a LCM depends on an analysis of what the Bill does with regard to devolved matters, regardless of the form in which it is expressed.

84. There is no bar to a court considering the existence or scope of a constitutional convention insofar as those matters are relevant to an issue which is properly in dispute between the parties: cp *Khaira v. Shergill* [2015] AC 359 (21), paras. 42-43. For example, in the Crossman Diaries case, the court relied on the existence of a convention, and reached conclusions about its scope and effect, in articulating the limits of the legal doctrine of confidence: *Attorney General v. Jonathan Cape Ltd* [1976] QB 752 (245). More recently, in *R (States of Guernsey) v. Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 1847 (282), at para. 13, reliance was placed on conventions governing the relationship between the United Kingdom and Jersey.

85. For these reasons, the Lord Advocate submits that:

- a. Withdrawal of the UK from the EU would alter the competence of the Scottish Parliament and Government, and the law applicable in Scotland within devolved competence. A Bill to authorise withdrawal from the EU and service of notice under Article 50(2) would accordingly engage the Legislative Consent Convention.

- b. The “constitutional requirements”, according to which a decision to withdraw from the EU must be taken, accordingly include (i) the legal requirement for an Act of the UK Parliament; and (ii) the Legislative Consent Convention.

86. If the UK Parliament were to choose to pass an Act of Parliament without the consent of the Scottish Parliament, the courts could not decline to recognise the validity of the resulting Act of Parliament. Sections 28(7) and (8) of the Scotland Act 1998 (124), read together, do not displace the rule that the courts will not inquire into the procedure by which an enrolled Act has been enacted<sup>10</sup>. But it would not involve an impermissible interference with proceedings in Parliament for the Court, in this case, to fulfil its proper function of identifying the constitutional requirements for the purposes of Article 50(1) TEU in the context of determining whether or not the UK Government may, by unilateral exercise of the prerogative, lawfully decide to withdraw from the EU and serve notice on the European Council.

## I. CONCLUSIONS

87. The purported giving of a notification under Article 50 TEU by unilateral act of the Crown in right of the Government of the United Kingdom would be unlawful because it would:

- (1) be contrary to the Claim of Right Act 1689 and to Article XVIII of the Acts of Union 1706 and 1707;
- (2) result in a fundamental alteration of the constitutional arrangements of the United Kingdom, including the constitutional arrangements applicable to Scotland, by removing the UK from the EU and by effecting a significant change in the devolution settlement;

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<sup>10</sup> *Edinburgh and Dalkeith Railway Co v. Wauchope* (1842) 8 ER 279; *British Railways Board v. Pickin* [1974] AC 765; see also *R (South Buckinghamshire CC) v. Secretary of State for Transport* [2014] 1 WLR 324, para. 78 per Lord Reed, paras. 204-7 per Lord Mance.

- (3) result in the people of Scotland (including UK citizens resident in Scotland and EU citizens from other Member States resident in Scotland) and Scottish businesses losing rights and freedoms which they currently enjoy;
- (4) result in changes to the powers and functions of the Scottish Parliament and Scottish Government and changes to the laws applicable in Scotland, including laws within devolved competence; and
- (5) circumvent the requirement for the UK and Scottish Parliaments to address whether, under established constitutional convention, the consent of the Scottish Parliament should be sought for such changes.

88. For these and the following reasons, as well as the reasons given by the Divisional Court, the Court should dismiss the appeal and adhere to the decision of the Divisional Court:

BECAUSE the decision to withdraw from the EU and notify that decision to the Council cannot lawfully be made by an exercise of the prerogative alone; and

BECAUSE the constitutional requirements of the UK for taking such a decision include: (a) an Act of Parliament; and (b) the Legislative Consent Convention.

**Rt. Hon. W. JAMES WOLFFE QC, Lord Advocate**



**MARTIN CHAMBERLAIN QC**

**DOUGLAS ROSS QC**

**DUNCAN HAMILTON, Advocate**

**CHRISTINE O'NEILL, Solicitor-Advocate**

**EMILY MACKENZIE, Barrister**

## ANNEX 1: LEGISLATIVE CONSENT MOTIONS SINCE DEVOLUTION

| Parliamentary session 1 (1999-2003) |   |        |        |        |
|-------------------------------------|---|--------|--------|--------|
|                                     | Bill Name   | Type 1 | Type 2 | Type 3 |
| 1                                   | <a href="#">Food Standards Bill</a>   | ✓      |        |        |
| 2                                   | <a href="#">Financial Services and Markets Bill</a><br><a href="#">Electronic Communications Bill</a><br><a href="#">Limited Liability Partnerships</a> | ✓      |        |        |
| 3                                   | <a href="#">Sea Fishing Grants (Charges) Bill</a>   | ✓      |        |        |
| 4                                   | <a href="#">Representation of the People Bill</a>   | ✓      |        |        |
| 5                                   | <a href="#">Sexual Offences (Amendment) Bill</a>  | ✓      |        |        |
| 6                                   | <a href="#">Political Parties, Elections and Referendums Bill</a>   | ✓      |        |        |
| 7                                   | <a href="#">Regulation of Investigatory Powers Bill</a>   | ✓      |        |        |
| 8                                   | <a href="#">Learning and Skills Bill</a>  |        |        | ✓      |
| 9                                   | <a href="#">Race Relations (Amendment) Bill</a>   | ✓      |        |        |
| 10                                  | <a href="#">Insolvency Bill</a>   | ✓      |        | ✓      |
| 11                                  | <a href="#">Care Standards Bill</a>   | ✓      |        | ✓      |
| 12                                  | <a href="#">Government Resources and Accounts Bill</a>  |        |        | ✓      |
| 13                                  | <a href="#">Political Parties, Elections and Referendums Bill</a>   | ✓      |        |        |
| 14                                  | <a href="#">Criminal Justice and Court Services Bill</a>  | ✓      |        |        |
| 15                                  | <a href="#">Tobacco Advertising and Promotion Bill</a>  | ✓      |        |        |
| 16                                  | <a href="#">Health and Social Care Bill</a>   | ✓      |        | ✓      |
| 17                                  | <a href="#">International Criminal Court Bill</a>   | ✓      |        | ✓      |
| 18                                  | <a href="#">Outworking Bill</a>   | ✓      |        |        |
| 19                                  | <a href="#">Culture and Recreation Bill</a>   | ✓      |        |        |
| 20                                  | <a href="#">Criminal Justice and Police Bill</a>  | ✓      |        |        |
| 21                                  | <a href="#">International Development Bill</a>  |        |        | ✓      |
| 22                                  | <a href="#">Armed Forces Bill</a>   | ✓      |        | ✓      |
| 23                                  | <a href="#">Adoption and Children Bill</a>  | ✓      |        |        |
| 24                                  | <a href="#">Adoption and Children Bill (2)</a>  | ✓      |        | ✓      |
| 25                                  | <a href="#">Proceeds of Crime Bill</a>  | ✓      |        |        |
| 26                                  | <a href="#">Proceeds of Crime Bill (Supplementary)</a>  | ✓      |        |        |
| 27                                  | <a href="#">Anti-Terrorism, Crime and Security Bill</a>   | ✓      |        | ✓      |
| 28                                  | <a href="#">NHS Reform and Health Care Profession Bill</a><br>(+ 1 Supplementary)   |        |        | ✓      |
| 29                                  | <a href="#">Adoption and Children Bill (3)</a>  | ✓      |        | ✓      |
| 30                                  | <a href="#">Police Reform Bill</a>  | ✓      |        | ✓      |
| 31                                  | <a href="#">Enterprise Bill</a>   | ✓      |        |        |
| 32                                  | <a href="#">Police Reform Bill (2)</a>  | ✓      |        |        |
| 33                                  | <a href="#">Private Hire Vehicles (Carriage of Guide Dogs etc.) Bill</a>  |        |        | ✓      |
| 34                                  | <a href="#">Extradition Bill</a>  |        |        | ✓      |
| 35                                  | <a href="#">Waste and Emissions Trading Bill</a>  | ✓      |        |        |
| 36                                  | <a href="#">Crime (International Co-operation) Bill</a>   | ✓      |        | ✓      |
| 37                                  | <a href="#">Criminal Justice Bill</a>   | ✓      |        |        |

|  |  |        |        |        |
|--|--|--------|--------|--------|
| 38   | <a href="#">Local Government Bill</a>  |        |        | ✓      |
| 39   | <a href="#">Sexual Offences Bill</a>   | ✓      |        |        |
| 40   | <a href="#">Railways and Transport Safety Bill</a>                                     | ✓      |        |        |
|  |  |        |        |        |
| <b>Parliamentary session 2 (2003-2007)</b> |  |        |        |        |
|  | Bill Name  | Type 1 | Type 2 | Type 3 |
| 41   | <a href="#">Health and Social Care (Community Health and Standards) Bill</a>           | ✓      |        |        |
| 42   | <a href="#">Fireworks Bill</a>   | ✓      |        |        |
| 43   | <a href="#">Legal Deposit Libraries Bill</a>   | ✓      |        |        |
| 44   | <a href="#">Criminal Justice Bill (2)</a>  | ✓      |        |        |
| 45   | <a href="#">Planning and Compulsory Purchase Bill</a>                                  | ✓      | ✓      | ✓      |
| 46   | <a href="#">Health Protection Agency Bill</a>  | ✓      |        | ✓      |
| 47   | <a href="#">Energy Bill</a>  | ✓      |        | ✓      |
| 48   | <a href="#">Gender Recognition Bill</a>  | ✓      |        |        |
| 49   | <a href="#">Higher Education Bill</a>  | ✓      |        |        |
| 50   | <a href="#">Asylum and Immigration (Treatment of Claimants, etc.) Bill</a>             | ✓      |        |        |
| 51   | <a href="#">Civil Contingencies Bill</a>   | ✓      |        | ✓      |
| 52   | <a href="#">Companies (Audit, Investigations and Community Enterprise) Bill</a>        | ✓      |        |        |
| 53   | <a href="#">Justice (Northern Ireland) Bill</a>  | ✓      |        |        |
| 54   | <a href="#">Civil Partnership Bill</a>   | ✓      |        |        |
| 55   | <a href="#">Constitutional Reform Bill</a>   | ✓      |        | ✓      |
| 56   | <a href="#">Railways Bill</a>  | ✓      |        | ✓      |
| 57   | <a href="#">National Lottery Bill</a>  |        |        | ✓      |
| 58   | <a href="#">Disability Discrimination Bill</a>   | ✓      |        | ✓      |
| 59   | <a href="#">Gambling Bill</a>  |        |        | ✓      |
| 60   | <a href="#">Inquiries Bill</a>   | ✓      |        | ✓      |
| 61   | <a href="#">Serious Organised Crime and Police Bill (+2 Supplementary w/o Motions)</a> | ✓      |        | ✓      |
| 62   | <a href="#">International Organisations Bill</a>                                       | ✓      |        |        |
| 63   | <a href="#">Natural Environment and Rural Communities Bill</a>                         | ✓      |        | ✓      |
| 64   | <a href="#">Civil Aviation Bill</a>  |        |        | ✓      |
| 65   | <a href="#">Equality Bill</a>  | ✓      |        |        |
| 66   | <a href="#">London Olympics Bill</a>   | ✓      |        |        |
| 67   | <a href="#">Animal Welfare Bill</a>  | ✓      |        |        |
| 68   | <a href="#">Company Law Reform Bill</a>  | ✓      |        | ✓      |
| 69   | <a href="#">Compensation Bill</a>  | ✓      |        |        |
| 70   | <a href="#">Housing Corporation (Delegation) etc Bill</a>                              | ✓      |        |        |
| 71   | <a href="#">Health Bill</a>  | ✓      |        | ✓      |
| 72   | <a href="#">Legislative and Regulatory Reform Bill (+ supplementary)</a>               | ✓      |        | ✓      |
| 73*  | <a href="#">Lighter Evenings (Experiment) Bill</a>                                     |        | ✓      |        |
| 74*  | <a href="#">Northern Ireland (Miscellaneous Provisions) Bill</a>                       | ✓      |        |        |

|  |   |               |               |               |
|--|---|---------------|---------------|---------------|
| 75   | <a href="#">Police and Justice Bill</a>                                     | ✓             |               | ✓             |
| 76   | <a href="#">Consumers, Estate Agents and Redress Bill</a>                   | ✓             |               |               |
| 77   | <a href="#">Further Education and Training Bill</a>                         | ✓             |               | ✓             |
| 78   | <a href="#">Serious Crime Bill</a>  | ✓             |               |               |
| 79   | <a href="#">Statistics and Registration Service Bill</a>                    | ✓             |               | ✓             |
| 80   | <a href="#">Tribunals, Courts and Enforcement Bill</a>                      | ✓             |               |               |
| 81*  | <a href="#">UK Borders Bill</a>   | ✓             |               |               |
| 82*  | <a href="#">Victims of Overseas Terrorism Bill</a>                          | ✓             |               |               |
| <b>Parliamentary session 3 (2007-2011)</b> |   |               |               |               |
|  | <b>Bill Name</b>  | <b>Type 1</b> | <b>Type 2</b> | <b>Type 3</b> |
| 83   | <a href="#">Climate Change Bill</a>   | ✓             |               | ✓             |
| 84   | <a href="#">Criminal Justice and Immigration Bill</a>                       | ✓             |               |               |
| 85   | <a href="#">Dormant Bank and Building Society Accounts Bill</a>             |               |               | ✓             |
| 86   | <a href="#">Education and Skills Bill</a>                                   | ✓             |               | ✓             |
| 87   | <a href="#">Energy Bill</a>   | ✓             |               | ✓             |
| 88*  | <a href="#">Football Spectators and Sports Grounds Bill</a>                 | ✓             |               |               |
| 89   | <a href="#">Health and Social Care Bill</a>                                 | ✓             |               |               |
| 90   | <a href="#">Housing and Regeneration Bill</a>                               |               |               | ✓             |
| 91   | <a href="#">Pensions Bill</a>   | ✓             |               | ✓             |
| 92   | <a href="#">Statute Law (Repeals) Bill</a>                                  | ✓             |               |               |
| 93   | <a href="#">Apprenticeships, Skills, Children and Learning Bill</a>         | ✓             |               | ✓             |
| 94   | <a href="#">Borders, Citizenship and Immigration Bill</a>                   | ✓             |               |               |
| 95   | <a href="#">Child Poverty Bill</a>  | ✓             |               | ✓             |
| 96   | <a href="#">Constitutional Reform and Governance Bill</a>                   |               |               | ✓             |
| 97   | <a href="#">Coroners and Justice Bill</a>                                   | ✓             |               | ✓             |
| 98   | <a href="#">Equality Bill</a>   |               |               | ✓             |
| 99   | <a href="#">Holocaust (Return of Cultural Objects) Bill</a>                 | ✓             |               | ✓             |
| 100  | <a href="#">Local Democracy, Economic Development and Construction Bill</a> | ✓             |               | ✓             |
| 101  | <a href="#">Marine and Coastal Access Bill</a>                              | ✓             |               | ✓             |
| 102  | <a href="#">Policing and Crime Bill</a>                                     | ✓             |               | ✓             |
| 103  | <a href="#">Welfare Reform Bill</a>   | ✓             |               | ✓             |
| 104  | <a href="#">Bribery Bill</a>  | ✓             |               |               |
| 105  | <a href="#">Crime and Security Bill</a>                                     | ✓             |               | ✓             |
| 106  | <a href="#">Energy Bill (2)</a>   | ✓             |               | ✓             |
| 107  | <a href="#">Equality Bill (2)</a>   | ✓             |               | ✓             |
| 108  | <a href="#">Financial Services Bill</a>                                     | ✓             |               |               |
| 109  | <a href="#">Flood and Water Management Bill</a>                             | ✓             |               |               |
| 110*                                       | <a href="#">Powers of Entry etc. Bill</a>                                   | ✓             |               |               |
| 111*                                       | <a href="#">Rehabilitation of Offenders Bill</a>                            | ✓             |               |               |
| 112  | <a href="#">Education Bill</a>  |               |               | ✓             |
| 113  | <a href="#">Energy Bill (3)</a>   | ✓             |               | ✓             |
| 114  | <a href="#">Health and Social Care Bill</a>                                 | ✓             |               | ✓             |
| 115  | <a href="#">Public Bodies Bill</a>  | ✓             |               | ✓             |

|  |  |        |        |        |
|--|--|--------|--------|--------|
| 116*                                       | <a href="#">Serious Crime Bill (2)</a>                                     | ✓      |        |        |
| 117*                                       | <a href="#">Welfare Reform Bill (2)</a>                                    | ✓      |        | ✓      |
| 118  | <a href="#">Energy Bill (4)</a>  | ✓      |        | ✓      |
| <b>Parliamentary session 4 (2011-2016)</b> |  |        |        |        |
|  | Bill Name  | Type 1 | Type 2 | Type 3 |
| 119*                                       | <a href="#">Devolution (Time) Bill</a>                                     |        | ✓      |        |
| 120  | <a href="#">Finance (No.3) Bill</a>  | ✓      |        |        |
| 121  | <a href="#">Finance (No.4) Bill</a>  |        |        | ✓      |
| 122  | <a href="#">Financial Services Bill</a>                                    | ✓      |        |        |
| 123  | <a href="#">Legal Aid, Sentencing and Punishment of Offenders Bill</a>     | ✓      |        |        |
| 124  | <a href="#">London Olympic Games and Paralympic Games (Amendment) Bill</a> | ✓      |        |        |
| 125  | <a href="#">Scotland Bill 2010-12</a>                                      |        | ✓      | ✓      |
| 126  | <a href="#">Terrorism Prevention and Investigation Measures Bill</a>       | ✓      |        | ✓      |
| 127  | <a href="#">Welfare Reform Bill</a>  | ✓      |        | ✓      |
| 128  | <a href="#">Children and Families Bill</a>                                 | ✓      |        | ✓      |
| 129  | <a href="#">Crime and Courts Bill</a>                                      | ✓      |        | ✓      |
| 130  | <a href="#">Defamation Bill</a>  | ✓      |        |        |
| 131  | <a href="#">Electoral Registration and Administration Bill</a>             | ✓      |        |        |
| 132  | <a href="#">Energy Bill</a>  |        |        | ✓      |
| 133  | <a href="#">Enterprise and Regulatory Reform Bill</a>                      | ✓      |        |        |
| 134  | <a href="#">Growth and Infrastructure Bill</a>                             |        |        | ✓      |
| 135  | <a href="#">Local Government Finance Bill</a>                              |        |        | ✓      |
| 136  | <a href="#">Marine Navigation (No. 2) Bill</a>                             | ✓      |        |        |
| 137  | <a href="#">Prisons (Interference with Wireless Telegraphy) Bill</a>       |        |        | ✓      |
| 138*                                       | <a href="#">Public Service Pensions Bill</a>                               | ✓      |        |        |
| 139  | <a href="#">Statute Law (Repeals) Bill</a>                                 | ✓      |        |        |
| 140  | <a href="#">Anti-social Behaviour, Crime and Policing Bill</a>             | ✓      |        | ✓      |
| 141  | <a href="#">Care Bill</a>  | ✓      |        | ✓      |
| 142  | <a href="#">Deep Sea Mining Bill</a>                                       | ✓      |        | ✓      |
| 143  | <a href="#">Deregulation Bill</a>  | ✓      |        |        |
| 144  | <a href="#">High Speed Rail (London - West Midlands) Bill</a>              |        |        | ✓      |
| 145  | <a href="#">High Speed Rail (Preparation) Bill</a>                         | ✓      |        |        |
| 146  | <a href="#">Marriage (Same Sex Couples) Bill</a>                           | ✓      |        | ✓      |
| 147  | <a href="#">Offender Rehabilitation Bill</a>                               | ✓      |        |        |
| 148  | <a href="#">Water Bill</a>   | ✓      |        | ✓      |
| 149  | <a href="#">Criminal Justice and Courts Bill</a>                           | ✓      |        | ✓      |
| 150  | <a href="#">Health and Social Care (Safety and Quality) Bill</a>           | ✓      |        |        |
| 151  | <a href="#">Infrastructure Bill</a>  | ✓      |        |        |
| 152  | <a href="#">Modern Slavery Bill</a>  | ✓      |        | ✓      |
| 153  | <a href="#">Serious Crime Bill</a>   | ✓      |        | ✓      |
| 154  | <a href="#">Small Business, Enterprise and Employment Bill</a>             | ✓      |        |        |
| 155  | <a href="#">Armed Forces Bill</a>  | ✓      |        |        |



|  |  |        |        |        |
|--|--|--------|--------|--------|
| 156  | <a href="#">Enterprise Bill</a>                              | ✓      |        | ✓      |
| 157  | <a href="#">Scotland Bill 2015-16</a>                        |        | ✓      | ✓      |
| 158  | <a href="#">Welfare Reform and Work Bill</a>                 | ✓      |        | ✓      |
| <b>Parliamentary session 5 (2016-2021)</b> |  |        |        |        |
|  | Bill Name  | Type 1 | Type 2 | Type 3 |
| 159  | <a href="#">Cultural Property (Armed Conflicts) Bill</a>     | ✓      |        |        |
| 160  | <a href="#">Higher Education and Research Bill</a>           | ✓      |        | ✓      |
| 161  | <a href="#">Investigatory Powers Bill</a>                    | ✓      |        | ✓      |
| 162  | <a href="#">Policing and Crime Bill</a>                      | ✓      |        | ✓      |
| 163  | <a href="#">Health Service Medical Supplies (Costs) Bill</a> | ✓      |        |        |
| 164  | <a href="#">Criminal Finances Bill</a>                       | ✓      |        | ✓      |

\* - LCM not lodged

The 3 types refer to those in set out in Paragraph 4.III of the UK Government's Devolution Guidance Note 10: provisions applying to Scotland and which are:

- i. for devolved purposes; or
- ii. which alter the legislative competence of the Parliament; or
- iii. which alter the executive competence of the Scottish Ministers.

## LEGISLATIVE CONSENT MOTIONS NOT TABLED

|      |  |  |
|------|--|--|
| 73*  | <a href="#">Lighter Evenings (Experiment) Bill</a>               | House of Lords Private Members Bill to devolve legislative competence over time which did not have a <a href="#">Reading in the Commons</a> .  |
| 74*  | <a href="#">Northern Ireland (Miscellaneous Provisions) Bill</a> | Provisions that would legislate in devolved areas were contained in the Bill. SG preferred to rely on Scottish Ministers order-making powers. The Bill was amended to change the extent of the relevant provisions (see s.32(2), <a href="#">Northern Ireland (Miscellaneous Provisions) Act 2006</a> ).   |
| 81*  | <a href="#">UK Borders Bill</a>                                  | The application of clause 27(1) and (2) (now s 31(1) and (2)) of the UK Borders Bill to Scotland was an oversight. The UK Government amended the Bill so that these provisions did not extend to Scotland (see s 60(1), <a href="#">UK Borders Act 2007</a> ).   |
| 82*  | <a href="#">Victims of Overseas Terrorism Bill</a>               | House of Lords Private Members Bill which did not progress beyond <a href="#">1<sup>st</sup> Reading in the Commons</a> .  |
| 88*  | <a href="#">Football Spectators and Sports Grounds Bill</a>      | House of Commons Private Members Bill that did not progress beyond <a href="#">1<sup>st</sup> Reading in the Commons</a> .   |
| 110* | <a href="#">Powers of Entry etc. Bill</a>                        | House of Lords Private Members Bill which did not have a <a href="#">Reading in the Commons</a> .  |
| 111* | <a href="#">Rehabilitation of Offenders Bill</a>                 | House of Lords Private Members Bill which did not have a <a href="#">Reading in the Commons</a> .  |
| 116* | <a href="#">Serious Crime Bill (2)</a>                           | A Legislative Consent Motion was agreed in Feb 2007. A non-UK Government amendment was made to the Bill at Report stage in the House of Lords on 30 April inserting a Clause 78 on searches for firearms. SG did not support the extension of this relevant provision to Scotland; hence the LC memorandum. <a href="#">The UKG also opposed the clause and it was removed in the Commons</a> .                  |
| 117* | <a href="#">Welfare Reform Bill (2)</a>                          | SG lodged a LC memorandum before the 2011 Scottish General Election as this was a relevant Bill but did not bring forward an LCM at that time as it considered more time was required for consideration. <a href="#">An LCM was subsequently brought forward following the election</a> .  |
| 119* | <a href="#">Devolution (Time) Bill [HL]</a>                      | House of Lords Private Members Bill to devolve legislative competence over time which did not have a <a href="#">Reading in the Commons</a> .  |
| 138* | <a href="#">Public Service Pensions Bill</a>                     | The Scottish Government did not support provisions in the Bill concerning certain devolved public pension schemes without proper consultation and therefore it did not lodge a legislative consent motion and UK Government amended the Bill accordingly. See <a href="#">Paragraph 13 of the Explanatory Notes for the Lords</a> and <a href="#">Paragraph 5 of the Explanatory Notes on Lords Amendments</a> . |

