

WITHDRAWAL FROM THE EUROPEAN UNION (LEGAL CONTINUITY) (SCOTLAND) BILL

STATEMENTS ON LEGISLATIVE COMPETENCE

As required under Rule 9.3.1 and 1A of the Parliament's Standing Orders, these statements on legislative competence are published to accompany the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, introduced in the Scottish Parliament on 27 February 2018. The following other accompanying documents are published separately:

- a Financial Memorandum (SP Bill 28–FM);
 - Explanatory Notes (SP Bill 28–EN);
 - a Policy Memorandum (SP Bill 28–PM).
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PRESIDING OFFICER'S STATEMENT ON LEGISLATIVE COMPETENCE

On 27 February 2018, the Presiding Officer (Rt Hon Ken Macintosh MSP) made the following statement:

“Under section 31(2) of the Scotland Act 1998, I am required to make a statement on the introduction of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, as to whether its provisions would be within the legislative competence of the Parliament.

Given the constitutional significance of this Bill and the complexity of the issues it presents, I consider it important to set out clearly the legislative context in which my statement sits and in which my decision has been reached.

The statutory test for determining whether a provision is within legislative competence is set out in section 29 of the 1998 Act. That section also makes clear that legislative competence is central to the validity of Acts passed by the Scottish Parliament. Provisions of an Act of the Parliament which are outside legislative competence are not law and have no legal effect.

The question of whether or not a provision is within legislative competence can only be determined by the courts and the ultimate authority on the matter is the United Kingdom Supreme Court. The Scotland Act provides a mechanism which allows the UK and Scottish Law Officers to refer a Bill to the Supreme Court for such a determination within the period of four weeks after a Bill has been passed by the Parliament. In addition, the

validity of Acts which have received Royal Assent can be challenged by individuals with a relevant interest under various court procedures.

Any subsequent decision that an Act which has been in operation is not lawful can have serious consequences for the public who rely on it and on whose behalf the Parliament exercises its legislative powers. The exercise of my function under section 31(2) is therefore one I take extremely seriously.

My view is reached in each case after careful reflection and is informed by a robust consideration of the legal issues. My statement sits alongside the statement on the same issue from the Member introducing the Bill required by section 31(1). I have no doubt that any Member introducing a Bill would adopt a similarly thorough and robust approach and my statement on competence does not infer criticism of their view.

Both statements are provided to help inform Parliament and to assist Members in ensuring that laws passed are valid. They are part of the checks and balances set out in the legislative process. The statement from the Member introducing a Bill must indicate that in their view the Bill which they invite the Parliament to consider is within competence. Accordingly, this offers Members the assurance that the promoter of a Bill has considered the matter and reached the view that the Bill as introduced would be valid.

My statement on legislative competence offers Members a second point of view at introduction. I may conclude either that the Bill if passed would be within competence or that it would not. If I reach the view that provisions of the Bill would not be within competence, I require to indicate which provisions those are and state why I have reached that view.

In my view the purpose of this second opinion is to provide an opportunity to make Members of the Parliament aware of any significant concerns which I may have as to the legal validity of the Bill or legal risks that it may present. Notification of such concerns at this point is intended to assist the Parliament in considering and debating any such issues in the course of the Bill process. It allows Members to take an informed view on how to proceed, including to decide on whether amending the Bill could address such concerns during its passage through the Parliament.

In coming to my view, it is not for me to take into account whether there is a need for legislative action, nor to weigh up the merits of the Bill, nor to reflect on the policy to which it seeks to give effect. Nor is my function intended to be a veto. As I have stated, only the courts have the power to determine whether the provisions of a Bill are valid. If the Member wishes, he or she can still introduce a Bill which I consider is not within legislative competence.

The issuing of my statement on competence fulfils my statutory duty to inform Parliament. From that point on, the exercise of legislative authority and consideration of any issues relevant to that, rests with the Parliament. When a Bill is passed the Scotland Act imposes a further responsibility on the Law Officers to consider competence and only when their functions have been discharged, or the four weeks allowed for doing so has passed without challenge, can Royal Assent be given. This offers a further check and balance.

In making my decision I have regard to the tests set out in the Scotland Act as those have been interpreted by the courts to date. I also have regard to the views of the Member introducing the Bill and which inform their positive statement on competence. The legislative tests are complex and novel situations can arise where there is no binding judicial authority on the matter. There may be arguments that can be made on both sides which I have to balance before reaching my view.

Such complex and novel issues are presented by this Bill.

In my view the fundamental question at issue is whether the provisions of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill would be compatible with European Union Law when enacted as required by section 29(2)(d). This issue is relevant to a number of sections of the Bill. Section 1(2) of the Bill seeks to address this by stating that the effect of provisions of the Bill that would be incompatible with EU law is to be suspended until such time as EU law ceases to have effect. The Supreme Court recognised in the case of *R (Miller) v Secretary of State for Exiting the European Union* that the constraint upon the Parliament in the Scotland Act to act compatibly with EU law would cease to operate upon the UK's withdrawal from the EU Treaties. The Court also recognised that alternative constraints may be introduced at that point subject to the necessary legal and political processes having taken place. Whether there may be such future limitations on the Parliament's competence at that point is not yet decided.

In short, the Bill anticipates the impact of the withdrawal of the United Kingdom from the European Union and the removal of the obligations of the UK under the EU Treaties which the EU law restriction in section 29(2)(d) imposes on the Parliament. It assumes that the Parliament can make provision now for the exercise of powers which it is possible the Parliament will acquire in the future.

The European Union (Notification of Withdrawal) Act 2017 takes a step towards the constitutional change the Miller case identified. I recognise that there may be different views as to the impact that may have on the powers of the Parliament. I am not persuaded, however, that anticipation of prospective effect is the correct interpretation of the impact of the 2017 Act on the Scotland Act 1998. To date, the courts have taken a strict approach to interpretation of the Scotland Act and specifically rejected the proposition that the UK's internal constitutional arrangements should be interpreted differently to other statutes. In my view the Scotland Act provides that the legislative competence of the Parliament is to be assessed at the point at which legislation is passed. The Parliament and the Scottish Ministers will remain bound to act compatibly with EU law until such point as the Treaties cease to apply. In my view this prevents the Parliament from exercising legislative power now, even though it assumes it will be legally able to act in the future.

It is a familiar concept that the limitations on competence set out in section 29(2) will fluctuate over time. The devolution settlement was designed to adapt and change within the legislative scheme set out in the Scotland Act. The consistent approach to interpreting the powers of the Parliament has been that legislation cannot seek to exercise competence prior to that competence being transferred. In my view, postponing the exercise of powers until a future date, may change the legal effect of a Bill but does not resolve the question of its legal validity.

These documents relate to the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (SP Bill 28) as introduced in the Scottish Parliament on 27 February 2018

I have therefore concluded that provisions of the Bill whose effect is postponed by section 1(2) to ensure compatibility with EU law as required under section 29(2)(d) of the Scotland 1998 would not be within the legislative competence of the Parliament.”

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

On 27 February 2018, the Deputy First Minister and Cabinet Secretary for Education and Skills (John Swinney MSP) made the following statement:

“In my view, the provisions of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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