

COVER NOTE TO THE OPINION CONCERNING THE NATIONALITY AND BORDERS BILL



Report on: Legislative powers of the Scottish and UK Parliaments

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1 Executive Summary

- This note concerns the overarching principles that concern the legislative powers of the Scottish and UK Parliaments.
- The Scottish system of devolution is described as a 'reserved powers' model. The Scottish Parliament has the power to pass laws in all areas subject only to the restrictions set out in the Scotland Act 1998 and (in very exceptional cases) to the common law.
- While certain areas of law fall within the legislative competence of the Scottish Parliament, the Scottish Parliament does not have exclusive legislative power in relation to those areas of law. There is no legal obstacle that can prevent the UK Parliament from legislating in areas of law that are within the legislative competence of the Scottish Parliament.
- The legislative consent convention – in terms of which the UK Parliament does not normally legislate in devolved areas without the consent of the Scottish Parliament – is not legally enforceable and as a political convention it has come under strain in recent years.
- Legislating in breach of the convention may be argued to be politically illegitimate but could not, of itself, be a basis for legal challenge to that legislation.

2 Introduction

- 2.1 We refer to your letter of instruction of 18 August 2021 seeking an opinion on the potential impact of the Nationality and Borders Bill ('the NBB') that has been introduced in the UK Parliament by the United Kingdom Government.
- 2.2 Your instructions ask for an opinion on three questions related to the NBB's potential impact on devolved competences and the obligations of public bodies exercising powers and discharging functions within devolved competence. That opinion has been provided separately.
- 2.3 We highlight in this note some key points about the relationship between the UK Parliament and the devolved institutions that may be relevant to the way in which you and other stakeholders develop your campaign in relation to the NBB.

3 The 'divide' between reserved and devolved areas of law

- 3.1 As you are aware, it is extremely important to bear in mind that devolution within the United Kingdom does not involve the kind of division of legislative responsibility that exists in some federal regimes in which each 'layer' has certain exclusive competences (and may also have shared or 'concurrent' competences). So, for example, under the US Constitution certain powers are reserved exclusively to the states and others to the federal government, with the possibility of legal challenge and adjudication by the Supreme Court if there is an intrusion by one layer of government into the powers of the other.
- 3.2 Devolution within the United Kingdom does not operate in the same way. While certain areas of law fall within the legislative competence of the devolved legislatures, there is no 'exclusivity' of legislative power in relation to those areas of law. The UK Parliament can, and does, continue to pass legislation in areas of law that are within the legislative competence of the Scottish Parliament. The power to do so derives from:
- 3.2.1 The fundamental constitutional principle – upheld by the UK's highest courts – that the UK Parliament can legislate about any matter whatsoever; and
- 3.2.2 The devolution legislation itself. So, for example, section 28(7) of the Scotland Act 1998 provides that the power of the Scottish Parliament to make legislation "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland".
- 3.3 The consequence is that there is no legal impediment to the UK Parliament passing legislation that falls within devolved competence and no possibility (under the current constitutional regime) of a court striking down or refusing to enforce an Act of the UK Parliament simply because it concerns a matter that is devolved.
- 3.4 A further dimension to Scottish devolution (of which again you will be aware) is that it is described as a 'reserved powers' model of devolution, in contrast to a 'transferred powers' model. The key point is that the Scotland Act 1998 does not contain a list of areas of law or policy responsibility that are devolved to

Holyrood. Rather, the 1998 Act confers general law-making powers on the devolved Parliament and those powers are then subject to a number of limitations.

- 3.5 One of those limitations is that the Scottish Parliament may not make laws that 'relate to' reserved matters, with reserved matters being defined by reference to Schedules 4 and 5 of the 1998 Act.
- 3.6 A consequence of this model of devolution is that the exercise of working out whether a matter falls within devolved competence is, in essence, a negative one. It involves checking whether the matter in question falls within the scope of any of the limitations on the Scottish Parliament's competence: if it does not then it will be devolved.

4 The legislative consent convention and its limitations

- 4.1 Notwithstanding the *legal* power of the UK Parliament to legislate in areas devolved to the Scottish Parliament, a political convention was established to govern how that legal power would be exercised. It was originally labelled 'the Sewel Convention' but is now more commonly known as the legislative consent convention.
- 4.2 There is debate about the exact parameters of the legislative consent convention but, at the very least, it is accepted that as a matter of convention the UK Parliament will not normally legislate in areas that fall within the legislative competence of the Scottish Parliament without the consent of the Scottish Parliament to do so.
- 4.3 The convention was reflected in an amendment to the Scotland Act 1998 made by the Scotland Act 2016. Section 28(8) of the 1998 Act now provides that "*it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament*".
- 4.4 The fundamental point about the convention is that it is just that: a convention. It has no binding legal force and cannot be used to prevent the UK Parliament from legislating even where it does not have the Scottish Parliament's consent. This is the case notwithstanding that the convention has been recognised in statute: in Gina Miller's challenge to the triggering of Article 50 of the Treaty on the European Union after Brexit the Supreme Court considered whether the legislative consent convention could impose any constraint on the UK Parliament passing legislation to give effect to the UK's withdrawal from the EU (because such legislation would alter the legislative competence of the devolved legislatures). The Court was unequivocal that the legislative consent convention could not impose such constraints on the UK Parliament: see *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583, paras 135 to 152.
- 4.5 While the convention was observed fairly faithfully for the first two decades of devolution it has come under strain as a result of Brexit. The UK Parliament passed the European Union (Withdrawal) Act 2018 despite the refusal by the Scottish Parliament to give consent. It subsequently passed the European Union (Withdrawal Agreement) Act 2020 despite all three devolved legislatures withholding consent and also passed the Internal Market Act 2020 despite the refusal of the Scottish Parliament and

the Welsh Senedd to give consent: see *In re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* 2017 SC (UKSC) 13.

- 4.6 There is therefore a real risk that even if the Scottish Parliament was to refuse consent to those parts of the NBB that fall within its legislative competence the UK Parliament would nonetheless pass those provisions.

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