



The Scottish Parliament  
Pàrlamaid na h-Alba

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Procedure Committee  
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*Dear Mr Walker,*

**Certification of legislation within devolved competence**

The Presiding Officer has asked me to respond to your letter of 28 July 2015. As requested I attach a note setting out the procedure which is followed when the Presiding Officer exercises her function of issuing a legislative competence statement under section 31(2) of the Scotland Act 1998.

I hope that this is of assistance to your committee in connection with your current inquiry.

*Yours sincerely*

Judith Morrison  
Solicitor to the Scottish Parliament



## **Note to House of Commons Procedure Committee**

### **Certificates of Legislative Competence issued by the Presiding Officer of the Scottish Parliament**

#### **Introduction**

Familiarity with the legislative background to the Presiding Officer's certificate on legislative competence and the purpose of her function provide important context for an explanation of the procedure which the Presiding Officer and her officials follow when preparing and issuing such certificates.

#### **Legislative background**

The Scottish Parliament ("the Parliament") is established by statute – the Scotland Act 1998 ("the 1998 Act"). The 1998 Act sets out the powers of the Parliament including its powers as a legislature. The 1998 Act also makes some provision as regards the procedure by which the Parliament exercises its legislative power. At present this statutory framework is protected from modification by the Parliament. Some changes to this principle are proposed in the Scotland Bill currently being considered by the Westminster Parliament. However, for present purposes these changes are not material, since power to modify the statutory provisions with which this note is concerned will not be transferred to the Parliament by the Scotland Bill.

The principal sections which are relevant to this note are sections 29 and 31 of the 1998 Act.

Section 29 sets out the limits on the legislative competence of the Parliament. This section also provides that legislation passed by the Parliament which reaches beyond legislative competence is invalid and does not have legal effect.

Section 31 contains one of the checks and balances included within the structure of the 1998 Act to support the Parliament in the lawful exercise of its legislative powers.

Section 31(1) requires the person in charge of a Bill to make a statement on introduction of a Bill confirming that in their view the Bill would be within the legislative competence of the Parliament. Section 31(2) requires the Presiding Officer to make a statement on the introduction of every Bill setting out her view as to whether or not the Bill would be within the Parliament's legislative competence. Section 31(3) provides that the form of any statement made under that section and the manner in which it is made is to be set out in the Parliament's standing orders and that standing orders may provide for any statement to be published

Standing orders describe the practical means by which the Presiding Officer's statutory function is exercised. In the event of the Presiding Officer issuing a statement that any provisions of a Bill are not within legislative competence rule 9.3.1 adds the requirement for the Presiding Officer to identify which provisions those are and to provide reasons for that view. Rule 9.4.1 provides for the Presiding Officer's statement to be published as one of the Bill's accompanying documents.

The manner in which the function has been exercised by successive Presiding Officers is informed by their interpretation of the intention of the Westminster Parliament in enacting section 31(2).

## **Purpose of section 31(2)**

The Presiding Officer acts as the principal office holder in the Parliament. Her function under section 31(2) is to provide the Parliament with an independent assessment of the legislative competence of the Bill in question. Her certificate is intended to provide independent guidance to the members of the Parliament about issues of competence, to highlight any concerns and to inform what action may be necessary to address such concerns. Once a Bill is introduced it ceases to be the "property" of the promoter and responsibility for its content passes to the Parliament as a whole. It is the Parliament that will ultimately be responsible for the content of the Bill as enacted.

While the availability of a certificate from the Presiding Officer is a necessary precondition to introduction of a Bill it should be recognised that the Presiding Officer does not have a power of veto over its introduction of a Bill should she consider that it is, or any of its provisions are, outside legislative competence. The purpose of the certificate is advisory. It is not determinative of the legal validity of the Bill nor does it determine any particular procedure that is to apply.

The only body with the power to determine the legality of a Bill passed by the Parliament is a court with jurisdiction over the issue in question. Ultimately this function rests with the Supreme Court. The Court has made clear that where it is considering the matter it places no weight on the certificates issued by either the promoter of the Bill or the Presiding Officer and makes its own assessment on the application of the statutory tests set out in section 29 of the 1998 Act.<sup>1</sup>

## **Statutory competence tests**

The 1998 Act adopts a reserved model for describing the limits of competence centred on a purpose test. The principal test of relevance to the Committee is set out in section 29(2)(b). Unless the purpose of a provision relates to any of the reserved matters set out in Schedule 5 the Parliament has competence to legislate for that purpose. To this basic principle are added the requirement that Bills must not (i) be incompatible with European Union law or rights under the European Convention on Human Rights (section 29(2)(d)), (ii) breach the specific rules relating to protected enactments and the modification of the law of reserved matters set out in Schedule 4, (iii) form part of the law of a country other than Scotland, or confer or remove functions otherwise than in or as regards Scotland (section 29(2)(a)), or (iv) remove specified protected functions of the Lord Advocate.

These rules may appear reasonably straightforward. However, as the courts have recognised, their application to the unique set of circumstances presented by each Bill is a detailed and often complex process.<sup>2</sup> This is also not a static but a developing area of law. There are few authoritative court decisions, many aspects of the devolution settlement are untested and each new court decision has to be considered carefully for its wider application and relevance to the devolution settlement in general. The evolving jurisprudence in relation to the devolution

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<sup>1</sup> Imperial Tobacco Limited [2012] UKSC 61 para 7.

<sup>2</sup> See for example the 3:2 division of opinion in *Martin v HMA & Miller v HMA* [2010] UKSC 10.

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settlement in Wales is also of importance where considering common principles such as questions of compatibility with Convention rights.

### **Exercise of the function**

To summarise the above context: the statutory function of issuing a statement as to the legislative competence of a Bill is conferred on the Presiding Officer in her role as primary office holder and guardian of the institutional reputation of the Parliament.

Reaching a view on legislative competence serves a procedural function: to allow introduction and facilitate scrutiny. However, it involves the determination of a potentially complex legal issue. The consequences of legislation passed by the Parliament subsequently being found to be outwith competence and therefore invalid are potentially very severe. In addition to reputational damage for the Parliament, individuals could be adversely affected.<sup>3</sup> The Presiding Officer therefore considers this function to be of great importance and one that is to be exercised with a high degree of care and attention, underpinned by robust advice.

The Presiding Officer makes her determination on the basis of detailed legal advice provided by the Office of the Solicitor to the Scottish Parliament. Lawyers with detailed experience of the devolution settlement and scrutiny of legislation provide briefing to the Presiding Officer to support her decision.

The legal analysis proceeds by applying each of the five limitations on legislative competence described above to the provisions of the Bill. Briefing may also be provided on the existing law, previous examples with similar issues arising and areas where matters of competence may be postponed (for example where further detail is to be provided through making subordinate legislation).


The issues arising and the level of complexity vary from case to case. There are cases where there is no straightforward answer to the question of whether the Bill is within legislative competence. A provision may be close to the boundary of legislative competence or it may be the case that it is unclear where the boundary lies. Typically assessing the compatibility of provisions with Convention rights involves balancing competing rights and an assessment of proportionality. In such cases a detailed understanding of the policy which the provision seeks to implement and its likely practical effect is required in addition to the evaluation of its legal effect.

In the case of Government Bills, the Government provides the Parliament's Solicitor with a note setting out the Government's view on legislative competence. A draft of the policy memorandum and explanatory notes which are to be published alongside the Bill on introduction are also useful to the Parliament's lawyers. These may clarify the policy intent and alternative options which have been considered. Where necessary to complete their analysis and fully brief the Presiding Officer the Parliament's lawyers may seek further information about the Government's view on any matter relevant to the competence tests.

A draft policy memorandum and explanatory notes should also be provided for Committee Bills and Members' Bills. There are slightly different requirements in relation to the accompanying documents which must be submitted for private Bills. In such cases there is no expectation that the Member in charge or promoter will

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<sup>3</sup> *Salvesen v Riddell* [2013] UKSC 22.



provide a note on their views on competence. In practice, a note is provided where the Bill is supported by the Parliament's Non-Government Bills Unit. As with Government Bills any further information necessary to apply the competence tests will be sought by the Presiding Officer's advisers.

The Parliament's published guidance on public bills<sup>4</sup> provides more general information as to the procedure followed. As it explains the time period between submission for pre-introduction scrutiny and introduction is normally 3 weeks. In some cases it may prove difficult to complete briefing for the Presiding Officer within the normal period. This may be due to the length of the Bill, the number of competence issues arising, the complexity or sensitivity of the subject matter or to a significant number of Bills being considered for introduction at the same time.

The standard 3 week scrutiny period is used to assist the planning of parliamentary and Government business. However, ultimately it is a matter for the Presiding Officer to determine whether or not she has sufficiently robust advice on which to make her decision. In some cases the period is extended either by prior arrangement or during the initial scrutiny period. For practical and political reasons these occasions are however rare.

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<sup>4</sup> [http://www.scottish.parliament.uk/S3\\_Bills/GuidanceonPublicBills.pdf](http://www.scottish.parliament.uk/S3_Bills/GuidanceonPublicBills.pdf)