Dear Linda,

Thank you for your letter of 14 November seeking clarification on some additional matters following my appearance before the Committee on 1 November.

**Powers of referral**

You asked why the Scottish Government’s illustrative amendments incorporate the power for the Lord Advocate and the Advocate General to refer cases to the UK Supreme Court where either believe that case contains a matter of general public importance, and whether this contradicts our position in seeking to establish the High Court as the ‘apex’ court.

I should reiterate that our draft clauses are intended to give effect to the recommendations made by Lord McCluskey’s review group. Paragraph 11 of the Executive Summary of the review group’s report states that the group considered that the current powers of the Lord Advocate and the Advocate General to refer or require the High Court to refer devolution issues to the UK Supreme Court should continue and be extended to compatibility issues [main body of report, paragraphs 46-47]. Currently, under Schedule 6 of the Scotland Act (1998), the Lord Advocate and Advocate General have the power to require any court to refer to the Supreme Court any devolution issue which has arisen in proceedings before it.

We have noted that one of the criticisms of certification has been that the UK, as the signatory to the European Convention of Human Rights, might potentially find itself in a situation whereby it may be unable to meet its international treaty obligations because the High Court may have decided not to certify a certain case.
Ensuring the Lord Advocate and the Advocate General have an equivalent power to the one that currently applies for devolution issues acts as a failsafe mechanism and ensures that due account is taken of the wider perspective that they may have as Law Officers acting in the public interest, including consideration of the United Kingdom’s international obligations. As I said in my evidence, I would expect it to be used sparingly. Such a power also ensures that Law Officers can quickly refer points of law of significance that affect large numbers of pending cases for a definitive determination, as uncertainty could have the capacity to halt the progress of large numbers of cases through the system and bring the justice system to a standstill. The Lord Advocate’s present powers of reference were used for precisely this purpose in the recent UK Supreme Court cases of Ambrose v Harris and McGowan v B. This fast tracks cases to the Supreme Court. Without this power cases will require to be firstly determined by the Appeal court before referral.

As I also indicated at Committee, I consider that referrals would be much more likely as a preliminary point in proceedings and not at the conclusion of the proceedings. To date the power of referral has never been exercised at the conclusion of proceedings in the Appeal court. However, I agree that the provisions do allow a referral post a decision by the High Court of Justiciary. For the reasons noted above, we consider that this is entirely appropriate and we do not think there is any inconsistency with our position in relation to the High Court as the ‘apex’ court. In any case, to have certification complemented by powers of referral is a far better solution than the suggestion that we might have no certification and no powers of referral.

**Time limits for appeals/referrals**

You asked for further clarification on the issue of time limits/referrals to the UK Supreme Court, what the Scottish Government’s position is on a time limit and whether the illustrative amendment delivers such a time limit. Our view is that the current position on time limits is undesirable, contrasts with the provisions in England, and is not conducive to finality and certainty.

My predecessor as Lord Advocate set out the position in correspondence to the Advocate General in October 2010 in response to his consultation. She noted that when Schedule 6 to the Scotland Act 1998 was enacted, and certainly when the Act of Adjournal (Criminal Procedure Rules) was put in place, it was envisaged that to have a right of appeal to the UK Supreme Court a party wishing to take a devolution issue required to comply with the procedures contained within the Act of Adjournal, including timeously lodging and intimating a devolution minute to the Courts after due service upon the Lord Advocate and Advocate. Since the decision in McDonald v HMA (2008 SCCR 954), this is no longer the case. Nor is it the case that there is presently any time limit for making an application for leave to appeal to the UK Supreme Court from the High Court of Justiciary.
Several recent applications have been made a number of years after the decision of the High Court which are sought to be appealed. The decision in McDonald would no doubt apply to any time limit that the High Court sought to introduce for such an application, the UK Supreme Court not considering itself bound by it. One element of this relates to the point in criminal proceedings when compatibility issues may be raised. The review group has recognised the problems that are caused by ECHR issues being raised throughout criminal proceedings and recommends that, in the normal case, an appeal should be competent only after the conclusion of all proceedings in the courts below.

This is reflected in our illustrative amendments at section 288ZB(3) which specifically provide that the High Court need not determine a compatibility point unless it is necessary to enable the proceedings to be finally determined. In addition, once a compatibility issue has been determined, we consider that it is important for there to be time limits in relation to any appeal. Specifically, in our illustrative clauses: section 288ZA(6) states that “an application for permission to appeal... (a) if made to the High Court, must be made within 28 days of the date of the final determination of the proceedings [or, where the court considers that determination of the compatibility question by the Supreme Court is necessary to enable the proceedings to be finally determined, by such time as the court may specify], (b) if made to the Supreme Court, must be made within 28 days of the date on which the High Court refused permission under subsection (3)(c) [of 288ZA]”. These time limits are equivalent to the time periods that currently apply for certification in England and Wales. The Committee will note that in clause 17 of the Scotland Bill there are currently no time limits set out for appeals under the new section 98A.

You will also have noted that the issue of time limits for appeal procedures is one which was considered by Lord Carloway in his Review, published on 17 November. He observes that “If procedures for an appeal are to be regarded as part of the overall trial process, which they must be seen to be in terms of the Convention jurisprudence, it must be recognised that the reasonable time requirement of Article 6 applies to appeals.”[para 8.1.2] His review goes on to consider [paras 8.1.25 - 8.1.28] the problems occasioned by late appeals, and draws attention to the position in England and Wales. I should point out that the Scottish Government is considering carefully the recommendations that Lord Carloway makes. However, it is clear that the context of considering any new appeal provisions to be set out in the Scotland Bill is one in which Article 6 of the Convention is informing a move towards stricter time limits.
Extension to ASPs

You asked for views on extending the scope of ECHR compatibility referrals to Acts of the Scottish Parliament (ASPs). The Scottish Government’s proposals provide for all ECHR issues in criminal proceedings, including those arising in ASPs to be dealt with in the same way and we disagree with the views of the Law Society on this point. Our reasoning for this is set out in some detail in paragraphs 12 to 14 of our explanatory note on the illustrative provisions. We would also refer to paragraph 17 of the review group’s report which drew a distinction between questions that might arise about the division of powers between different legislatures as distinct from human rights issues.

In our view, the Scotland Bill provides an opportunity to establish a straightforward route for dealing with all ECHR issues and avoid the confusion that has arisen with the interaction of devolution issues and human rights points. Under our proposals, the mechanism for raising an ECHR issue in relation to the act of any public authority in criminal proceedings would be through the new appeal mechanisms and the definition of a compatibility issues. It would remain the case under our provisions that an ASP could be rendered invalid by the courts if it was found to be incompatible with ECHR. The alternative of continuing to deal with ECHR issues arising from ASPs as devolution issues in criminal proceedings is a recipe for confusion. As more legislation from the Scottish Parliament emerges, and prosecutions increasingly take place under ASPs, the devolution mechanisms will remain as a second and overlapping route of challenge for certain ECHR issues and the overall purpose behind those alternative proposals will not be achieved.

We accept that issues about the reserved/devolved division of powers should continue to be devolution issues. It might therefore be possible for there to be a devolution issue on an reserved/devolved point and a compatibility issue on an ECHR/EU point to arise in the same criminal proceedings with separate appeal routes. That is a very different proposition from the possibility of having provisions which will leave us with two appeal routes on an ECHR point that is essentially the same point.

That is our position, and we continue to argue for the inclusion of ASPs on that basis. Given the fact that the Advocate General would be happy for his proposals to be widened out to include ECHR issues arising from the acts of all public authorities, we see no justification for continuing to treat ECHR issues arising from ASPs in a different way as devolution issues.
Other comments

We note that in his letter to the Committee Lord McCluskey has indicated that he understands the thinking behind our proposals in relation to the inclusion of ECHR issues arising from ASPs and would like to consider this further. Lord McCluskey has also emphasised that the aim of his group was to achieve simplicity and clarity whilst preserving the distinction between true devolution issues and ECHR compatibility issues. I note that Lord McCluskey and Sheriff Stoddart have raised two minor drafting queries in relation to our illustrative clauses. We are giving further consideration to those points, and the UK and Scottish Governments continue to have constructive discussions on these issues at Ministerial and official level.

I hope this is helpful. I have copied this letter to the Cabinet Secretary for Parliamentary Business and Government Strategy and the Cabinet Secretary for Justice.

Yours sincerely,

FRANK MULHOLLAND