SUBMISSION FROM THE LORD ADVOCATE

UK SUPREME COURT JURISDICTION

Background

1. The First Minister asked a review group, chaired by Lord McCluskey, to examine the relationship between the High Court of Justiciary and the UK Supreme Court, with a view to identifying areas of concern and to advise on ways in which the mechanisms might be altered. The group’s final report was published on 14 September. Paragraph 3 of the Executive Summary of the McCluskey Report advises that the jurisdiction of the Supreme Court should go no further than is necessary to ensure that Convention rights may be applied consistently by courts throughout the United Kingdom. The Scottish Government has welcomed the McCluskey Report and accepted the need to implement the advice within the Report. This submission contains draft illustrative provisions designed to effect the advice.

2. The draft illustrative provisions are in the form of a clause to replace clause 17 of the Scotland Bill and are designed to give effect to the advice in the McCluskey Report. They also apply the same procedure to issues that relate to EU law. The Advocate General’s provisions in clause 17 of the Scotland Bill apply equally to Convention rights and to EU law. Although the McCluskey Report deals only with matters relating to ECHR, we also see no basis for making any distinction between matters of ECHR or EU law. Indeed, this is appropriate because human rights issues can arise in criminal proceedings under EU law. In addition, the EU has started making provision for a roadmap of EU rights in criminal procedure. So far, the UK Government (with Scottish Government agreement) has agreed to two Directives, negotiations on a third are underway and further Directives are expected to be proposed.

UK Supreme Court – appellate jurisdiction

3. Lord McCluskey’s Report said that an appeal from the High Court to the Supreme Court should not be limited to the acts or failures of the Lord Advocate but instead ought to be open to any accused person claiming to be a victim of a violation of his or her Convention rights irrespective of which “public authority” is alleged to have caused such violation (paragraphs 5 and 6 of the Executive Summary). Subsection (8) of the draft provisions accordingly inserts a new section 288ZA into the Criminal Procedure (Scotland) Act 1995 which creates a new right of appeal to the Supreme Court from a determination by a decision of the High Court that is based on whether or not there has been an act by a public authority which is incompatible with Convention rights or EU law.

4. The McCluskey Report advises that, in line with the position in England and Wales, in criminal proceedings such an appeal should be competent only where the High Court has granted a certificate that the case raises a point of general public importance (paragraph 7 of the Executive Summary). The main point is that it is the assessment by the High Court which determines whether the case may go to the Supreme Court. It is important to clarify how certification would work in practice,
and the distinction between leave to appeal and the granting of a certificate. The stages are that:

- High Court grants certificate – or not, and gives reasons;
- If the High Court grants the certificate, the High Court grants leave or not; in the latter case, the Supreme Court considers whether to grant leave.

5. In other words, if the High Court does not issue a certificate there is no appeal to the Supreme Court. Subsections (3)(b) and (c) and (5) of new section 288ZA give effect to this policy.

6. Similar to the position in England and Wales, the certification decision by the High Court will not be appealable or subject to review. There is no statutory provision in England and Wales which requires the court to give reasons for not giving a certificate and this has been one of the criticisms of the process. For Scotland, as the McCluskey Report sets out at paragraph 45, what is important is the development of the test of “general public importance” and it is considered important that the courts develop a considered jurisprudence on this matter. New section 288ZA(4) makes provision requiring the High Court to give reasons for granting or refusing a certificate.

7. New section 288ZA(6) makes provision for the time limits applicable for the new appeals. The time limits are in line with those that apply to similar appeals in England and Wales under the Criminal Appeal Act 1968. In summary an appeal must normally be lodged within 28 days of the High Court’s final determination of the proceedings in which the compatibility question arises. Where the High Court grants a certificate under new section 288ZA(3)(b) but refuses permission to appeal under section 288ZA(3)(c), the application to the Supreme Court for permission to appeal must be lodged within 28 days of the date on which permission under new section 288ZA(3)(c) was refused.

References prior to trial and Law Officer references

8. The McCluskey Report advises that in the normal case, an appeal to the Supreme Court should be competent only after the conclusion of all proceedings in the courts below. In exceptional circumstances, the High Court should continue to have power to refer a compatibility issue prior to trial (paragraph 10 of the Executive Summary). New section 288ZB(1) makes provision for lower courts to refer matters to the High Court prior to trial. Section 288ZB(2) also makes provision for the Lord Advocate and the Advocate General to require lower courts to refer such questions to the High Court for determination (see also below). Under 288ZB(3), the High Court need not determine such questions unless it considers that it is necessary to enable the proceedings before the lower court to be finally determined.

The High Court’s determination of the pre-trial point could then be appealed to the Supreme Court under 288ZA. Section 288ZA(3)(a) allows this by creating an exception to the rule that the appeals should be made only after final determination of proceedings.

9. Paragraph 11 of the Executive Summary of the McCluskey Report indicates 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 Supreme Court should be extended to apply to the new provisions. The thinking behind this is that any argument about lack of consistency across the UK caused by giving the High Court ultimate power to refer can be dealt with by ensuring that the Advocate General can refer any cases in his capacity as UK Law Officer for Scotland. It is also appropriate that the Lord Advocate should retain this role in the public interest. New section 288ZB creates appropriate powers which are based on the equivalent powers that Law Officers have for devolution issues. As noted above this new section gives the Lord Advocate and Advocate General power to require any court to refer a compatibility question to the High Court. In addition, section 288ZB(4) gives the Lord Advocate and the Advocate General power to require the High Court to refer a compatibility question to the Supreme Court where they consider that its determination raises a point of general public importance which ought to be considered by the Supreme Court. The latter power is not restricted to cases where the High Court has withheld a certificate.

**Powers of the Supreme Court**

10. A further key aspect of the advice in the McCluskey Report is at paragraph 8 of the Executive Summary: the powers of the Supreme Court should be limited to declaring whether or not there has been a breach of the Convention right. It will be left to the High Court to determine the appropriate disposal. This differs from the position in clause 17 of the Scotland Bill where new section 98A(9) of the Scotland Act provides that the Supreme Court is given all the powers of the court below and in consequence power to affirm, set aside or vary orders, remit issues for determination by that court and order a new trial or hearing. Given the way in which the powers of the Judicial Committee of the Privy Council and the Supreme Court have developed over time, the Scottish Government agrees that it is necessary to ensure that this limited role of the Supreme Court is made absolutely clear on the face of the legislation.

11. New section 288ZC deals with the powers of the Supreme Court. Section 288ZC(2) adjusts the effect of section 40(5) of the Constitutional Reform Act 2005 to provide a sharper focus on the compatibility question, allowing the Supreme Court to reformulate the compatibility question only so far as necessary to deal with the point of general public importance. The test is necessity, so ought to be strictly applied. This gives effect to the advice in the McCluskey Report that the Supreme Court should have power to re-formulate the question of law set out in the certificate and to address the questions re-formulated. Section 288ZC(3) provides that the Supreme Court’s powers are limited to those necessary to determine the compatibility question and remit the case back to the High Court.

**Consequential amendments**

 Scotland Act 1998

*Devolution issue procedure*

12. As a consequence of the new appeal provisions, paragraph 1 of Schedule 6 to the Scotland Act is amended to remove from the definition of devolution issue any
issue relating to ECHR or EU compatibility arising in criminal proceedings. This ensures that questions about the ECHR or EU compatibility of Acts of the Scottish Parliament or acts of Scottish Ministers cannot be raised separately in criminal proceedings as devolution issues. In future, the only mechanism for raising an ECHR/EU issue in criminal proceedings will be through the new appeal mechanism and the definition of a compatibility issue. For ECHR matters this is linked to the Human Rights Act in line with the advice in the McCluskey Report that an appeal should be open to any accused person claiming to be a victim of a breach of Convention rights, irrespective of which “public authority” is alleged to have caused the violation.

13. In relation to the incompatibility of an Act of the Scottish Parliament which is relevant to criminal proceedings, it would be necessary for the point to be a compatibility question in line with the test in new section 288ZA(1)(a) or (b). For example, a question whether a public authority such as the courts, the Lord Advocate, the Scottish Ministers or another authority has acted in a way that is made unlawful by section 6 of the HRA. It would also remain possible to raise an issue about the ECHR compatibility of an Act of the Scottish Parliament in civil proceedings.

14. Questions about reserved/devolved matters which are raised in criminal proceedings will continue to be dealt under the devolution procedure in the Scotland Act – what are referred to as “true devolution” issues in the McCluskey Report. This also ensures that the jurisdiction of the Supreme Court in Scottish cases goes no further than is necessary (paragraph 3 of the Executive Summary of the McCluskey Report).

Scotland Act controls on powers of the Lord Advocate

15. Sub-paragraph (2) of the draft provisions replicates the amendment to the limits in the Scotland Act on the powers of the Lord Advocate in the amendment the Advocate General included in his provisions at clause 17(2) of the Scotland Bill. The amendment adopts the same approach as the UK Government.

16. At present, under section 57(2) of the Scotland Act, the Scottish Ministers, including the Lord Advocate, have no power to act incompatibly with ECHR or EU law. Section 57(3) of the Scotland Act creates an exception for acts of the Lord Advocate where the Lord Advocate could not have acted differently because of Westminster primary legislation. Sub-paragraph (2) of the draft provisions (as with clause 17 of the Scotland Bill) amends section 57(3) of the Scotland Act to widen that exception. The effect is that the Scotland Act will no longer restrict the Lord Advocate’s powers where he might be acting incompatibly with ECHR or EU law when prosecuting or in relation to the investigation of deaths—whether or not that is justified by Westminster primary legislation. However, those acts may still be unlawful under section 6 of the Human Rights Act (where the section 6(2) exception applies). This is a technical change to avoid the current confusion where the Human Rights Act makes it unlawful for the Lord Advocate to act incompatibly and separately the Scotland Act says he has no power to act incompatibly.
17. Subsections (4) to (7) of the illustrative draft provisions make consequential amendments to the 1995 Act. The amendments are largely technical and self-explanatory and are updated versions of the Advocate General’s provisions in clause 17(5) to (7) and (9) of the Scotland Bill. They add references to the new appeal provisions to the existing references in the 1995 Act to devolution appeals.

18. In view of the reference provisions in section 288ZB, it is not considered necessary to provide the Advocate General with further reference powers under section 288A. The Scottish Government has therefore not replicated the Advocate General amendments in clause 17(8) of the Scotland Bill.

Other matters

Miscarriage of Justice

19. The McCluskey Report states that it is not appropriate that the Supreme Court should be required by statute to apply the test of “miscarriage of justice” in Scottish criminal appeals. The draft provisions therefore do not seek to replicate the provisions proposed by the Advocate General in new section 98A(7) and (8) of the Scotland Act inserted by clause 17(8) of the Scotland Bill.

Court procedure

20. In keeping with the approach of Schedule 6 to the Scotland Act, the provisions to give effect to the McCluskey Report do not set out all of the detailed procedure on matters such as the stage in proceedings when a compatibility question is to be raised, the manner in which and the time within which any intimation or notice relating to a compatibility question is to be provided and the procedure for setting out the question.

Scottish Government
October 2011
Convention rights and EU law: appeal to Supreme Court

(1) The 1998 Act is amended as follows.

(2) In section 57(3) (Convention rights and EU law: excepted acts of Lord Advocate), omit the words after paragraph (b).

(3) After paragraph 1 of Schedule 6 (devolution issues), insert—

“1A But a question arising in criminal proceedings in Scotland that would, apart from this paragraph, be a devolution issue is not a devolution issue if (however formulated) it relates to the compatibility with any of the Convention rights or with EU law of—

(a) an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament,

(b) any function,

(c) the purported or proposed exercise of a function,

(d) a failure to act.”

(4) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

(5) In each of sections 112(6), 121(5)(a), 121A(5), 122(4) and (5) and 177(8), after “under” insert “section 288ZA of this Act or”.

(6) In section 124(2)—

(a) after “Part XA” insert “and sections 288ZA and 288ZB”;

(b) after “appeal under” insert “section 288ZA of this Act or”;

(c) after “that Schedule” insert “or a reference under or in pursuance of section 288ZB of this Act”.

(7) For the italic cross-heading before section 288A substitute—

“Convention rights and EU law compatibility questions and devolution issues”.

(8) Before section 288A insert—

“288ZA Compatibility questions: appeal to Supreme Court

(1) For the purposes of this section and sections 288ZB and 288ZC the following are compatibility questions—

(a) a question whether a public authority within the meaning of section 6 of the Human Rights Act 1998 has acted (or proposes to act) in a way which is made unlawful by section 6(1) of that Act,

(b) a question whether an act or failure to act of a public authority within the meaning of section 6 of that Act is incompatible with EU law.

(2) For the purposes of determining a compatibility question raised by the accused in criminal proceedings, an appeal lies to the Supreme Court against a determination of the question by a court of two or more judges of the High Court.

(3) An appeal under this section lies from such a court only—

(a) after the final determination of the proceedings, except in the case of a determination on a reference under subsection (1) of section 288ZB or in pursuance of subsection (2) of that section,
(b) if the court certifies that the compatibility question raises a point of general public importance, and

c) with the permission of that court or, failing such permission, with the permission of the Supreme Court.

(4) The High Court must give reasons for its decision to grant or withhold a certificate under subsection (3)(b), but that decision is final.

(5) Permission under subsection (3)(c) may be given only if it appears to the court in question that the point is one that ought to be considered by the Supreme Court.

(6) An application for permission to appeal under this section—

(a) if made to the High Court, must be made within 28 days of the date of the final determination of the proceedings or, as the case may be, the determination on the reference under subsection (1) of section 288ZB or in pursuance of subsection (2) of that section,

(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).

288ZB Compatibility questions: references to High Court and Supreme Court

(1) A court, other than any court of two or more judges of the High Court, may refer any compatibility question that arises in criminal proceedings before it to the High Court for determination.

(2) The Lord Advocate or the Advocate General for Scotland may require any court other than a court of two or more judges of the High Court to refer any compatibility question that arises in criminal proceedings before it to the High Court for determination.

(3) The High Court need not determine a compatibility question on a reference under subsection (1) or in pursuance of subsection (2) unless it considers that determination of the question by it is necessary to enable the proceedings before the court making the reference to be finally determined.

(4) Subsection (5) applies where the Lord Advocate or the Advocate General for Scotland considers that the determination of a compatibility question by a court of two or more judges of the High Court raises a point of general public importance which ought to be considered by the Supreme Court.

(5) The Lord Advocate or the Advocate General for Scotland may require the High Court to refer the question to the Supreme Court for determination.

288ZC Compatibility questions: powers of Supreme Court

(1) This section applies in relation to an appeal to the Supreme Court under section 288ZA and a reference to that Court in pursuance of section 288ZB(5).

(2) The Supreme Court’s power under section 40(5) of the Constitutional Reform Act 2005 (power of Supreme Court to determine questions in statutory appeals) is to be read as a power to determine—

(a) the compatibility question set out in the certificate under section 288ZA(3)(b) or the reference in pursuance of section 288ZB(5), or

(b) such reformulation of the question as the Supreme Court considers necessary to allow it to deal satisfactorily with the point of general public importance set out in the certificate or reference.
(3) Despite section 45 of that Act and any rules made under that section, the
Supreme Court’s powers consist only of such of the powers of the High Court
as are necessary to enable it to determine the compatibility question and remit
the proceedings to the High Court.”

(9) In section 288B(1)—
(a) after “under” insert “section 288ZA of this Act or”;
(b) omit “of a devolution issue”.
