1. Should the law be amended along the lines of our suggested amendment (4A) to the new section 98A (added to the bill on 22 June), so as to make it an essential pre-condition of an appeal to the Supreme Court in Scottish criminal cases that the High Court of Justiciary has granted a certificate that the case raises a point of law of general public importance?

2. If YES, to question 1, why?  If NO to question 1, why not?

1. The Review Group’s proposal would, as we understand it, make certification a pre-condition of appeal to the Supreme Court. Without the required certificate, access to the Supreme Court would be barred. In the event of a question being certified, the Supreme Court would have no jurisdiction to entertain argument on any other question (see, as regards the situation in England Jones v DPP [1962] AC 635).

2. The requirement for certification in appeals from courts in England, Wales and Northern Ireland must be understood in context. All aspects of criminal law and procedure in those jurisdictions are, in principle, open to appeal to the Supreme Court.

3. The statutory expression “point of law of general public importance” has been the subject of extensive judicial interpretation in the various contexts in which it appears. In the context of criminal appeals to the House of Lords, the expression first appeared in Section 1 of the Administration of Justice Act 1960. Prior to that Act, such appeals lay only with the fiat of the Attorney General. He had to certify that “the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought”.

4. The 1960 Act made two changes. First, instead of the Attorney General’s fiat, the certificate was to be granted by the Court of Criminal Appeal (or the Courts-Martial Appeal Court). Second, the test of “general public importance” was substituted for that of “exceptional public importance”. (For the background, see the speech of Lord Chancellor Kilmuir when introducing the Bill in the House of Lords (see Hansard HL Deb 24 March 1960 vol 222 cc 247-304).

5. Two conditions must be met to satisfy the new test. (1) The point must be one of general public importance and (2) it must be one which “ought to be considered by the House of Lords [now the Supreme Court]”: Reg. v Lawrence [1972] AC 626 (at page 633), per Viscount Dilhorne.
6. The First Report of the Review Group recognises that, as regards criminal appeals from other UK jurisdictions, there are exceptions to the requirement of certification. The Report states that “There are special rules for special cases, like courts martial, extradition, but they do not alter the basic normal rule of ‘No certificate, no appeal to the Supreme Court’” (footnote 32).

7. We note, however, that these are not the only exceptions. The most notable exception is that “A certificate is not required for an appeal from a decision of the High Court in England and Wales or of the High Court in Northern Ireland on a criminal application for habeas corpus” (see Supreme Court Practice Direction 12, paragraph 12.2.2, and statutory provisions there cited). The writ of habeas corpus is, of course, as regards England, Wales and Northern Ireland, an important element in compliance with the requirements of Article 5 ECHR. Its scope is wider than any single comparable feature of Scots Law. As to the scope of the jurisdiction of the House of Lords in habeas corpus cases, see Zacharia v Republic of Cyprus [1963] AC 694).

8. Both before and after the passing of the Human Rights Act 1998, human rights points have been certified for consideration by the House of Lords – see, for example, Reg v Gough, [1993] AC 646, concerning jury bias.

9. Attorney General’s References have also played a significant role in this context – see AG’s Reference (No3 of 1999) [2001] AC 91 (retention of DNA samples – Articles 6 and 8 ECHR); AG’S Reference (No 2 of 2001) [2004] AC 72 (trial within a reasonable time – Article 6 ECHR – effectively reversing R v HMA 2003 SC (PC) 21; Sheldrake v DPP & AG’s Reference (No 4 of 2002) [2005] 1 AC 264 (presumption of innocence – Article 6 ECHR).

10. The First Report of the Review Group (paragraph 53) suggests that our Group failed to ‘notice or explain’ the ‘striking anomaly’ identified by the Review Group in paragraph 52 – in essence the absence of a requirement of certification in appeals from Scotland.

11. We wish to make it clear that we did indeed consider what guidance we might gain from studying the criteria for access to the Supreme Court in criminal appeals from England & Wales and Northern Ireland. We concluded that any attempt to draw parallels between those jurisdictions and the Scottish would not be appropriate, principally for the reason mentioned in paragraph 2 above. No-one suggested that the jurisdiction of the Supreme Court should extend to all aspects of Scottish criminal law and procedure.

12. If there is a ‘striking anomaly’, it might be thought to lie in the fact, unlike their counterparts in England, Wales and Northern Ireland, accused persons in Scotland cannot seek the protection of the Supreme Court of the United Kingdom except to the limited extent that the Scotland Act allows.

13. Against that background, the relevant question seems to us to be: What purpose would be served by introducing a requirement of certification by the High Court of
Justiciary as an absolute pre-condition of appeal to the Supreme Court with or without any of the exceptions that apply in other jurisdictions (or their Scottish equivalents)?

14. Under Section 17 of the Scotland Bill currently before Parliament, appeal to the Supreme Court by the accused in Scottish criminal proceedings would be available only in relation to the alleged non-compliance with the United Kingdom’s international obligations under the ECHR and EU law of “an act or failure to act of the Lord Advocate in prosecuting any offence or in the capacity of head of the system of criminal prosecution”. The jurisdiction of the Supreme Court would be limited to that question. See the proposed new Section 98A of the Scotland Act 1998, subsections (1), (2) and (8).

15. Suppose then that, in a given case, there is a real issue as to whether there has been non-compliance with the United Kingdom’s international obligations under the ECHR or EU law. How could that issue reasonably be said not to raise a point of law of general public importance? As noted above, certification is not required in England, Wales and Northern Ireland in *habeas corpus* cases and a significant number of ‘human rights’ issues in criminal cases came before the House of Lords either through certification or through an Attorney General’s Reference.

16. It is relevant therefore to ask, In how many cases raising a real issue of compliance with the United Kingdom’s international obligations under the ECHR or EU law has a certificate actually been refused by the Court of Appeal in England & Wales or Northern Ireland? If the answer were few or none, a requirement of certification in Scottish cases would not in fact remedy any anomaly.

17. It may be suggested that a requirement of certification would prevent cases reaching the Supreme Court which do not raise a real issue of compliance with the UK’s international obligations and do not merit consideration by the Supreme Court. In our view, the requirement of leave to appeal is quite sufficient to exclude such cases. That was an integral part of our recommendations, and of the proposed new Section 98A(4). As regards the approach of the Supreme Court to applications for leave to appeal, Lord Hope has said: “We have refused many more applications for leave to appeal than we have allowed to go forward to a full hearing” (see paragraph 3.15 of our Report).

18. Neither certification nor leave to appeal are necessary pre-conditions of resort to the European Court of Human Rights in Strasbourg. However, with a backlog of cases that has grown from 18,000 in 2001 to 150,000 in 2011, the introduction of more restrictive admissibility and pre-admissibility barriers for cases going to that Court seems inevitable. We do not therefore consider that any useful lessons can be drawn from the situation in Strasbourg.

19. In 1993 the Royal Commission on Criminal Justice (the Runciman Commission) recommended that the requirement of certification should be dropped as being ‘unduly restrictive’. The Commission considered that ‘The need to obtain the leave of either the Court of Appeal or the House of Lords before proceeding further is by itself a sufficient
filter” (Cm 2263, Chapter 10, paragraphs 77-79, page 178). This recommendation was not implemented and the requirement of certification remains. The recommendation of a Royal Commission must nevertheless give grounds for questioning whether it would be appropriate at this stage to introduce a new requirement of certification in Scottish cases.

20. Against that background, and given the strictly limited grounds on which access to the Supreme Court would be allowed in Scottish criminal cases, we are not persuaded that it is either appropriate or necessary to introduce an additional requirement of certification as an absolute pre-condition of access. In particular, we believe that it would be wholly inappropriate for such a requirement to be introduced without any of the exceptions provided for in the other jurisdictions. Formulation of those exceptions in Scottish terms would not be straightforward. We therefore respectfully adhere to the recommendations in our Report.

21. If, contrary to our view, consideration were to be given to introducing a requirement of certification, it would be important to be satisfied that this would have a significantly different practical result from the requirement of leave to appeal. We would therefore recommend that enquiries should immediately be set in train in England, Wales and Northern Ireland to find out (i) how that requirement is applied in practice and, in particular, (ii) whether certification has been refused in any case that raised a real issue of compliance with the United Kingdom’s obligations under the ECHR or EU law.

3. On the assumption that such a pre-condition were introduced into the legislation, should the High Court bench that decided the appeal in respect of which leave to appeal is sought be alone responsible for deciding the application(s) for leave and for the necessary certificate, or should there be a statutory requirement for that court to consult other High Court judges (How many?) on the question whether or not the case raises such a point of law?

22. In our opinion, it would not be compatible with the normal Scottish understanding of procedural fairness for a decision as to certification to be taken by judges who have not heard the arguments of the parties on that issue. Indeed, we question whether judges who were not present at the hearing of the appeal before the High Court of Justiciary could properly form a view as to whether the case raised a point of law of general public importance.

23. If the decision as to certification had to be taken by a bench larger than the bench that heard the appeal, a complete or at least partial rehearing would be necessary. We are not in a position to assess the practical consequences for the efficient dispatch of court business, but they cannot be ignored.
4. Should leave/permission be automatically granted if the decision of the judges constituting the court that has decided the appeal is not unanimous?

24. In our opinion, there is a clear distinction between two questions: (a) whether a criminal appeal should succeed on its merits and (b) whether it raises a point of law of general importance that ought to be considered by the Supreme Court. The fact that the bench are not unanimous on the first question does not necessarily mean that they will not be unanimous on the second, or vice versa. This does not therefore seem to be a useful test.

5. Should the current Scotland Bill be amended to alter and re-define the jurisdiction of the Supreme Court in such cases in any of the following ways:

by restricting appeals to the Supreme Court to cases which have been completed, i.e. the trial and appeal processes have been finished;

(as an exception to (a)) by allowing the High Court of Justiciary at any earlier stage in the criminal process to invite the Supreme Court to answer a specific (preliminary) question as to whether or not a defined process or set of circumstances would constitute a violation of a 'Convention' right;

by enabling the Supreme Court to give a binding ruling only on the point of law raised with the case then remitted to the High Court of Justiciary for further procedure;

by empowering the Supreme Court to re-formulate the specific question before ruling on the matter.

25. The effect of the proposed new Section 98A(3), which follows our recommendation, would be to ensure that, in any appeal to the Supreme Court by parties other than the Lord Advocate, the issue of compatibility would already have been the subject of determination by the High Court sitting as a court of appeal. That would not, of course, mean that a case could never reach the Supreme Court at a stage before all trial and subsequent appeal processes had been exhausted. It would, on the other hand, mean that any case going to the Supreme Court would first have been considered and determined by the High Court on appeal – mirroring, in the UK context, the Convention requirement (Article 35.1 of the ECHR) that all domestic remedies must have been exhausted before a case can go to Strasbourg. The provision as drafted appears to us to provide a degree of flexibility while at the same time ensuring compliance with the 'reasonable time' requirement of Article 6 of the ECHR.

26. We are not attracted by the idea of a 'preliminary reference procedure' as between the High Court and the Supreme Court on Convention issues. Apart from the interruption it would cause to the normal criminal process (with consequent effects on the 'reasonable time' requirement), we do not readily see what particular advantage would be gained.
27. As regards issues of EU law, it would seem more appropriate for the High Court to refer any preliminary questions directly to the ECJ.

6. Would there be value in providing, whether by legislation or by convention that the Supreme Court will sit in Scotland in Scottish cases and/or have a majority of Scots on the bench in such cases?

28. As the Supreme Court is a United Kingdom Court different in character from the House of Lords, there may be some attraction in it sitting outside London (not only in Scotland). But that would have cost and resource implications going beyond those of arranging for travel and accommodation of the requisite number of Justices. They would presumably need to be supported by a minimum of registry and secretarial staff (and possibly one or more judicial assistants) with appropriate, if temporary, office accommodation. In addition, the layout of the Supreme Court hearing rooms is different from that of the courts elsewhere and proceedings in the Supreme Court can now be watched live on television. Presumably these features would have to be replicated with consequent resource implications

29. It was initially the practice in the Judicial Committee of the Privy Council to have a majority of Scottish judges on the bench. According to some sources, that is the reason why the judges of the Inner House are all made Privy Counsellors. That practice seems already to have been abandoned before the jurisdiction of the Judicial Committee was transferred to the Supreme Court. We do not know why this was so. We have not formed an opinion on the merits or otherwise of reviving the practice.

Is there anything that you would wish to add?

30. We have nothing to add, other than to assure the Review Group of our willingness to assist in any further way they would find useful.

David Edward, Colin Boyd, Frances McMenamin, Tom Mullen
5th August 2011