In September 2010 we were asked by the Advocate General for Scotland to consider an issue that had been raised by the Scottish Judiciary in their submission to the Calman Commission on Scottish Devolution regarding the working of Section 57(2) and Schedule 6 of the Scotland Act 1998 in relation to the role of the Lord Advocate as head of the system of criminal prosecution in Scotland. The Calman Commission considered that some of the matters raised went beyond the remit of the Commission and so did not make any recommendation.

Our Group was constituted on 21 September 2010. On 22 September 2010 the office of the Advocate General issued an informal consultation paper entitled *Devolution Issues and Acts of the Lord Advocate* and invited responses by 22 October 2010.¹ We were asked to report to the Advocate General by mid-November 2010.

¹ See [http://www.oag.gov.uk/oag/102.62.html](http://www.oag.gov.uk/oag/102.62.html). In view of one response, we should emphasise that the consultation paper was prepared and issued by the Office of the Advocate General rather than by our Group.
17 responses to the consultation paper were received. Some of them raised questions as to the sufficiency of the time allowed for consultation. We believe that the time allowed and the range and scope of the responses have been sufficient to enable us to identify and consider the relevant issues and to report by mid-November 2010.

Put very shortly, the question at issue is whether, and if so under what conditions, the Supreme Court of the United Kingdom should have jurisdiction to consider matters relating to the conduct of criminal proceedings in Scotland.

We begin by setting out the basis on which the Supreme Court has acquired such jurisdiction (Section 1) and how it is related to the role of the Lord Advocate as head of the system of criminal prosecution in Scotland (Section 2). We then set out the substance of the responses to the consultation paper (Section 3) and our own analysis of the problems raised (Section 4). Finally, we set out our conclusions and recommendations (Section 5).

Our conclusions and recommendations are unanimous.

We are grateful for the assistance of the Office of the Advocate General, and in particular of Jim Logie, a solicitor in that Office, who prepared the first draft of Section 3.

1. THE JURISDICTION OF THE SUPREME COURT IN RELATION TO CRIMINAL PROCEEDINGS IN SCOTLAND

The jurisdiction of the Supreme Court apart from the Scotland Act 1998

1.1. The House of Lords had no jurisdiction to entertain appeals against decisions of the Scottish criminal courts. The historical background is fully explained in

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paragraph 3.2 and Appendix II of Professor Neil Walker’s Report to the Scottish Government on *Final Appellate Jurisdiction in the Scottish Legal System.*³ It is sufficient for present purposes to note that the House of Lords itself, on more than one occasion, held that a criminal appeal to the House from the High Court of Justiciary was not competent. This was put beyond doubt by the Criminal Procedure (Scotland) Act 1887. The Criminal Procedure (Scotland) Act 1995 provides that decisions of the High Court of Justiciary ‘...shall be final and conclusive and not subject to review by any court whatsoever.’⁴

1.2. Appeals to the Supreme Court from the High Court of Justiciary are likewise excluded (by implication) by the Constitutional Reform Act 2005 which provides that ‘An appeal lies to the [Supreme] Court from any order or judgment of a court in Scotland if an appeal lay from that court to the House of Lords at or immediately before the commencement of this section.’⁵

1.3. The jurisdiction of the Supreme Court in respect of criminal proceedings in Scotland derives from the jurisdiction originally conferred on the Judicial Committee of the Privy Council by the Scotland Act 1998. This jurisdiction was transferred to the Supreme Court by the Constitutional Reform Act 2005.⁶

*The jurisdiction of the Supreme Court under the Scotland Act 1998*

1.4. The jurisdiction conferred on the Supreme Court is a ‘constitutional’ jurisdiction designed to ensure

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⁴ Section 124(2).

⁵ Section 40(3).

⁶ Section 40(4) and Schedule 9.
• that Acts of the Scottish Parliament are within the ‘legislative competence’ of the Parliament; and

• that the Scottish Ministers exercise their functions within the scope of their ‘devolved competence’.

1.5. The Scotland Act provides that any legislative provision or act of the Scottish Parliament or the Scottish Ministers is outside their respective legislative and administrative competences “so far as it is incompatible with the Convention rights or with Community law” – i.e. the rights and fundamental freedoms identified in Section 1 of the Human Rights Act 1998 and the law of the European Union.

1.6. The expression ‘Scottish Ministers’ refers collectively to the members of the ‘Scottish Executive’ who are:

• the First Minister,

• such Ministers as the First Minister may appoint; and

• the Lord Advocate and the Solicitor General for Scotland.

1.7. Section 57(2) of the Scotland Act provides that:

‘A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law.’

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8 Sections 53 and 54

9 Sections 29(2)(d) and 57.

10 Section 126 (1) and (9).

11 Section 44(1) and (2).
1.8. Section 57(3) provides a limited exception to this general rule, by reference to Section 6 of the Human Rights Act 1998. The effect is to exclude any act of the Lord Advocate (a) in prosecuting any offence, or (b) in her capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland which is compelled by, gives effect to, or enforces ‘primary legislation’ [i.e. legislation of the UK Parliament].

1.9. Subject to that limited exception (designed to preserve the sovereignty of the UK Parliament), the Lord Advocate, being a member of the Scottish Executive, may not do any act that is incompatible with Convention rights or EU law. Any such act is outwith the powers of the Lord Advocate and therefore, in legal terms, *ultra vires*.

1.10. The following questions are declared, amongst others, to be ‘devolution issues’:

- questions as to whether an Act (or any part of an Act) of the Scottish Parliament is with its legislative competence;
- questions as whether the exercise (or purported or proposed exercise) of a function by a member of the Scottish Executive is (or would be) within devolved competence, or incompatible with a Convention right or EU law; and
- questions as to whether a failure to act by a member of the Scottish Executive is incompatible with a Convention right or EU law.\(^\text{12}\)

*The procedure for invoking the jurisdiction of the Supreme Court*

1.11. Before enactment by the Scottish Parliament, the Advocate General, the Lord Advocate or the Attorney General may refer (directly) to the Supreme Court the question whether a Bill (or part of a Bill) would be within the legislative competence of the Scottish Parliament.\(^\text{13}\) Such a question (pre-enactment) is not a ‘devolution

\(^{12}\) Section 98 and Schedule 6, paragraph 1.

\(^{13}\) Section 33.
issue’ for the purposes of the Scotland Act, and this Report is not concerned with this aspect of Supreme Court jurisdiction.

1.12. Proceedings for determination of a devolution issue can be instituted by the Law Officers in Scotland, England & Wales and Northern Ireland. Otherwise the Act presumes that a devolution issue may ‘arise’ in the course of civil or criminal proceedings in any of those jurisdictions.

1.13. For present purposes, we concentrate on the situation where a devolution issue arises in criminal proceedings in Scotland, although the same procedure, *mutatis mutandis*, applies in civil proceedings. In the criminal context, the Act distinguishes between (a) a court consisting of two or more judges of the High Court of Justiciary (i.e. the High Court sitting as an appeal court), and (b) any lower court, including the High Court sitting at first instance.

1.14. A court below the level of the appeal court may refer a devolution issue to the appeal court, or the issue may reach there (or arise there) in the ordinary course of an appeal. The appeal court may either (i) refer the issue (directly) to the Supreme Court, or (ii) determine the issue itself.

1.15. The Act provides that:

‘An appeal against a determination of a devolution issue by-

(a) a court of two or more judges of the High Court of Justiciary (whether in ordinary course of proceedings or on a reference under paragraph 9) …

shall lie to the Supreme Court, but only with leave of the court concerned or, failing such leave, with special leave of the Supreme Court’.

14 Schedule 6, paragraph 9.
15 Schedule 6, paragraph 11.
16 Schedule 6, paragraph 13.
1.16. The Act requires intimation of any devolution issue to be given to the Advocate General and the Lord Advocate unless already a party to the proceedings.\textsuperscript{17}

1.17. The procedure by which a party to criminal proceedings (other than the prosecutor) may raise a devolution issue is set out in Rule 40 of the Criminal Procedure Rules.\textsuperscript{18} In proceedings on indictment, written notice of the intention to raise a devolution issue (known as a ‘devolution minute’) must be given to the clerk of court, with intimation to other parties, the Lord Advocate and the Advocate General not later than 7 days after service of the indictment.\textsuperscript{19} In summary proceedings notice must be given before the accused is called on to plead.\textsuperscript{20,21} The prescribed time limits are mandatory ‘unless the court, on cause shown, otherwise determines’.\textsuperscript{22}

1.18. The devolution minute must ‘specify the facts and circumstances and contentions of law on the basis of which it is alleged that a devolution issue arises in the proceedings in sufficient detail to enable the court to determine ... whether a devolution issue arises in the proceedings’.\textsuperscript{23}

1.19. The Rules go on to deal in detail with the way in which devolution issues are to be dealt with by the Scottish courts.

\textsuperscript{17} Schedule 6, paragraph 5.

\textsuperscript{18} Act of Adjournal (Criminal Procedure Rules) 1996 (SI 1996/513), Schedule 2 as amended,

\textsuperscript{19} Rule 40.2(1).

\textsuperscript{20} Rule 40.3(1).

\textsuperscript{21} Comparable rules are made for ‘other criminal proceedings’, e.g. bills of suspension and petitions to the \textit{nobile officium}.

\textsuperscript{22} Rule 40.5(1).

\textsuperscript{23} Rule 40.6.
1.20. The Supreme Court Rules\textsuperscript{24} provide how that Court’s ‘devolution jurisdiction’ is to be invoked and exercised,\textsuperscript{25} and provide in particular\textsuperscript{26} that

‘In relation to an appeal or a reference, the Supreme Court has all the powers of the court below and may –
(a) affirm, set aside or vary and order or judgment made or given by that court;
(b) remit any issue for determination by that court;
(c) order a new trial or hearing.’

2. THE JURISDICTION OF THE SUPREME COURT IN RELATION TO ‘ACTS OF THE LORD ADVOCATE’

2.1. By far the most productive source of references or appeals to the Judicial Committee, and thereafter to the Supreme Court, has been Section 57(2) of the Scotland Act as it relates to ‘acts of the Lord Advocate’. Indeed, the number of court cases that have raised questions as to the legislative or administrative competence of the Scottish Parliament or Scottish Ministers is, by comparison, minuscule.

2.2. As noted above (paragraphs 1.7-1.9), the effect of Section 57(2) is that acts of the Lord Advocate that are incompatible with Convention rights or EU law are, \textit{ipso facto, ultra vires}, except in so far as they are exempt under Section 57(3). The case law of the Judicial Committee and the Supreme Court has given a wide interpretation to the concept of ‘acts of the Lord Advocate’ so as to embrace many aspects of Scottish criminal proceedings.

2.3. Three points should be stressed:

\textsuperscript{24} SI 2009 no. 1603, replacing The Judicial Committee (Powers in Devolution Cases) Order 1999 (SI 1999/1320).

\textsuperscript{25} Rule 41.

\textsuperscript{26} Rule 29(1).
• The Supreme Court has, by virtue of the Scotland Act, acquired a jurisdiction (albeit limited) in respect of criminal proceedings in Scotland which the House of Lords never had (and expressly disclaimed), and which was initially given by the Scotland Act to the Judicial Committee of the Privy Council.

• This jurisdiction depends entirely upon the way in which the Scotland Act is drafted. It is because (and only because) the Lord Advocate is ‘a member of the Scottish Executive’ that her acts are subject to review as a devolution issue.

• The extent to which the concept of ‘acts of the Lord Advocate’ has been interpreted so as to embrace many aspects of Scottish criminal proceedings is due to the unique position of the Lord Advocate, recognised in the Scotland Act, as ‘head of the systems of criminal prosecution and investigation of deaths in Scotland’. There is no parallel in other parts of the United Kingdom.

2.4. The Human Rights Act 1998 provides judicial remedies for contraventions of Convention rights by public authorities. The Lord Advocate is a ‘public authority’ within the meaning of the Human Rights Act. In so far as her acts are incompatible with Convention rights, they are ‘unlawful’ by reason of Section 6(1) of that Act.

2.5. While it is possible to raise such human rights issues in an appeal to the Supreme Court in respect of criminal proceedings in England, Wales and Northern Ireland, the Human Rights Act provides no right of appeal from decisions of the High Court of Justiciary, any such right of appeal being, as noted above (paragraph 1.2), excluded by the Constitutional Reform Act.

27 Sections 48 and 57.

28 Sections 6 to 9.
2.6. The result is that an act of the Lord Advocate that is incompatible with Convention rights is both *ultra vires* by reason of Section 57(2) of the Scotland Act, and therefore subject to review by the Supreme Court as raising a ‘devolution issue’, and ‘unlawful’ by reason of Section 6 of the Human Rights Act but not subject to review by the Supreme Court under that Act.

2.7. It follows that if acts of the Lord Advocate as head of the system of criminal prosecution were simply to be excluded from the scope of Section 57(2) of the Scotland Act, they would remain ‘unlawful’ under the Human Rights Act but would not be subject to review by the Supreme Court.

3. RESPONSES TO THE CONSULTATION PAPER

3.1. The responses to the consultation paper can be found on the website of the Office of the Advocate General.29

*Arguments in favour of the present system*

3.2. The Faculty of Advocates, the Law Society of Scotland, the Equality and Human Rights Commission, the Scottish Human Rights Commission, Justice, Aidan O’Neill QC and Professor Tony Kelly argue in favour of retaining the system established by the Scotland Act. They contend that the ‘devolution issues’ raised in relation to criminal proceedings are not simply about criminal law and procedure, but rather about fundamental constitutional propriety - namely, the proper and effective vindication of fundamental human rights as an inherent part of the devolution settlement.

3.3. The Supreme Court has the constitutional role of ensuring a uniform standard of protection and interpretation for Convention rights across the United Kingdom, in criminal as much as in civil matters. Removal of this jurisdiction would place accused persons in Scotland in a potentially disadvantageous position as compared

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29 See footnote 2 above.
with those in other UK jurisdictions given the scope that would then arise for differences in interpretation and application of Convention rights north and south of the border.

3.4. If the jurisdiction of the Supreme Court were removed, the only remedy against an adverse decision of the High Court of Justiciary would be to bring a case against the United Kingdom in the European Court of Human Rights. While it is the role of that Court to provide consistency of interpretation and application, recourse to it provides a more limited and far less timely and effective remedy than recourse to the Supreme Court. More cases from Scotland would probably be taken to the European Court, with increased liability of the United Kingdom both to adverse findings in law and also to awards of damages in respect of unremedied breaches of Convention rights.

3.4. To remove the Lord Advocate from the ambit of section 57(2), at least in regard to her functions as head of the systems of criminal prosecutions and investigation of deaths, would put her in a unique position among Scottish Ministers as being the only Minister exempt from the section 57(2) control. As the Minister responsible for ensuring that the Scottish Government keeps within the law, she should in the same position as other Ministers.

3.5. There is a lack of empirical evidence that the existing arrangement disrupts the Scottish court system. In so far as delay does occur, it is caused more by the increasing use of Convention rights arguments in the criminal courts (and other causes) which will not disappear merely by amendment of section 57(2) and abolition of the Supreme Court’s jurisdiction. As regards the complications of procedure involved in recourse to the Supreme Court, these stem primarily from the Scottish Criminal Procedure Rules and not from the Scotland Act. In any event, there are in fact few cases that go to the Supreme Court.
3.6. Any tension between the tests applied by the Supreme Court and the High Court was effectively resolved by the decision of the Supreme Court in *McInnes*.  In that case, the Supreme Court also made clear that where a case raises special features of Scots criminal law and practice, the Supreme Court ‘must be careful to bear in mind the fact that the High Court of Justiciary is the court of last resort in all criminal matters in Scotland’.  In adopting this approach the Supreme Court recognised what has been repeatedly emphasised by the European Court, namely that it is not concerned with substantive domestic law but only with ensuring compliance with the rights secured under the Convention.  Devolution issues only properly arise where there is an issue of procedural unfairness.

*Arguments against the present system*

3.7. The Judiciary in the Court of Session and High Court of Justiciary, the Sheriffs’ Association, the Lord Advocate, the Cabinet Secretary for Justice in the Scottish Government, the Scottish Law Commission, Sheriff Kenneth Maciver, R.L. Martin QC, and Professor Alan Page argue against retention of the present system and in favour of removing the Lord Advocate’s prosecutorial functions from the ambit of section 57(2).  In some cases, they argue for total abolition of the Supreme Court’s jurisdiction in Scottish criminal cases and reversion to the situation that prevailed before the passing of the Scotland Act.

3.8. In reality the Lord Advocate is the only one of the Scottish Ministers that is directly affected by section 57(2).  Other provisions contained in the Scotland Act (principally in sections 29, 53 and 54) provide effective controls to prevent the other Scottish Ministers from acting contrary to the Convention.  There is no comparable

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30 *McInnes v Her Majesty’s Advocate* [2010] UKSC 7.

31 *Ibid* at paragraph 5 *per* Lord Hope of Craighead

32 See, for example, *Garcia Ruiz v Spain* (2001) 31 EHRR 22 at paragraph 28
**vires** control of the acts of prosecutors in other parts of the United Kingdom, and it is not clear why it should be thought necessary for Scotland.

3.9. Section 57(2) has not in practice provided any greater substantive protection to an accused person than would otherwise be available under the Human Rights Act or indeed under the common law of Scotland. If the Lord Advocate’s prosecutorial functions were removed from section 57(2), she would still, in exercising those functions, and in common with other prosecuting bodies in the United Kingdom, be subject to Section 6 of the Human Rights Act. It would be unlawful for her to act in a way which was incompatible with a Convention right. She would remain subject to the control of the High Court of Justiciary to ensure that criminal prosecutions are conducted compatibly with the relevant provisions of the Convention. This position would not be less satisfactory than the present. Indeed, having regard to the difficulties which the formulation of section 57(2) has caused for the courts, it may well be that the position would be more straightforward.

3.10. In so far as any constitutional significance is to be attached to removal of acts of the Lord Advocate from the scope of section 57(2), its true significance would be to return the autonomy and authority of the High Court of Justiciary to the pre-devolution position. The jurisdiction originally conferred on the Judicial Committee of the Privy Council and now on the Supreme Court was never intended to create a wide jurisdiction in relation to Scottish criminal proceedings which the House of Lords never had. Indeed, it is paradoxical that a consequence of the devolution settlement should be greater interference with the historic autonomy of the Scottish criminal courts. Convention rights alone do not provide sufficient justification for such a departure from the pre-existing constitutional position.

3.11. In asserting a wide jurisdiction in relation to criminal matters in Scotland, the Judicial Committee and latterly the Supreme Court have taken a different approach from that taken in the High Court as to the test to be applied in determining appeals and, for example, the admission of fresh evidence. Notwithstanding the detailed
rules laid down for the timeous lodging of devolution minutes and definition of the ‘devolution issue’ in question, the Supreme Court has held that refusal by the High Court to allow late lodging of a devolution minute constitutes ‘a determination of a devolution issue’ within the meaning of the Scotland Act, thus opening the jurisdiction of the Supreme Court. Further, in reviewing a devolution issue, the Supreme Court has (at least in certain circumstances) effectively reviewed the whole merits of a decision. It is unsatisfactory that such a wide jurisdiction should be the by-product of interpretative ingenuity applied to the concept of the expression ‘act of the Lord Advocate’.

3.12. As regards the effect on the work of the courts, the Sheriffs’ Association and Sheriff Maciver draw attention to the Report of Lord Bonomy, *Improving Practice – the 2002 Review of the Practices and Procedure of the High Court of Justiciary.* Chapter 17 of that Report discussed ‘devolution issues as a source of delay’ and urged that ‘Schedule 6 of the Scotland Act should be amended to make it clear that acts or failures to act by the Lord Advocate as prosecutor, and anyone acting on his authority or behalf as prosecutor, are excluded from the definition of devolution issue’. The situation has not improved since 2002. Sheriff Maciver, who sits both as a Sheriff and as a Temporary Judge of the High Court, refers to ‘inordinate delays’, particularly in relation to extradition cases. He says, ‘We now have the reputation of being the slowest country in Europe in dealing with European Arrest Warrants under the new international processes’.

3.13. As regards the volume of cases, in excess of 10,000 devolution issues have, since devolution, been intimated to the Advocate General. The Advocate General has intervened in only 35 of those cases. According to the Lord Advocate, Crown

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33 See paragraph 1.15 above.

records indicate that, in 2009/10, 1263 devolution minutes were served on the Lord Advocate, and following the hearing in the Supreme Court of *Cadder*, 652 devolution minutes were served during the period from 18 August and 12 October 2010.

3.14. The Lord Advocate draws attention to the anxiety for victims and other persons involved in the criminal process caused by delay.

*The response of Lord Hope of Craighead*

3.15. In a brief response written in a personal capacity, Lord Hope, Deputy President of the Supreme Court, says that ‘We have refused many more applications for leave to appeal than we have allowed to go forward to a full hearing. Those that do go forward to an oral hearing do not occupy an excessive amount of the Court’s time.’

3.16. Lord Hope concludes by saying:

> ‘For the most part the fact that the Supreme Court draws its membership from several jurisdictions has not given rise to difficulty. In practice the other justices defer to the expertise of the Scots on matters of Scottish criminal law and procedure that may come under scrutiny, and I am confident that this will continue to be the case. It will however be necessary to ensure in the future that the Scots Justices do have the necessary element of expertise for them to be able to maintain this advantage.’

4. Analysis of the Problems

4.1. In this section, we offer our own analysis of the problems. We begin with some preliminary observations.

4.2. First, it is important to distinguish clearly between the question whether the Supreme Court should have *any* jurisdiction in relation to criminal proceedings in

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*Cadder v HM Advocate [2010] UKSC 43.*
Scotland and the question whether the present arrangements for the exercise of that jurisdiction are satisfactory. It is true that if ‘acts of the Lord Advocate’ were simply to be excluded from the scope of Section 57(2), that aspect of the Supreme Court’s jurisdiction would be brought to an end, but it could nevertheless be maintained by other statutory provisions.

4.3. Second, we cannot accept that, as some responses suggest, there is no problem or that empirical evidence is required to show that there is a problem. Paragraphs 3.12-3.14 above show that, judged by any rational standards, the existing arrangements create a very serious problem for the Scottish court system and the work of the Lord Advocate and Advocate General. The Lord Advocate draws attention to the procedural history of DS v HM Advocate, where some two and a half years elapsed between the lodging of a devolution minute and delivery of the judgment of the Judicial Committee.

4.4. Third, we believe that insufficient consideration is given by those who argue in favour of retaining the present system to its effect on victims, witnesses and others apart from the accused who are caught up in the criminal process. It is well known that their interests have, until very recently, been largely ignored, and Chapter 16 of Lord Bonomy’s Report deals in detail with the way in which they should be treated. The focus of Convention rights is inevitably on the interests of the victims of violation of those rights, so that the focus of Article 6 (‘Right to a fair trial’) is upon the rights of the accused person. But compliance by the State with the ‘reasonable time’ provision of Article 6(1) will also work in the interests of victims of crime and of witnesses, as well as of the system of criminal law as a whole and its public reputation.

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36 2007 SC (PC) 1 (one of the few cases concerned with the legislative competence of the Scottish Parliament).

37 See paragraph 3.12 above.
4.5. Fourth, the Scottish system of criminal prosecution has been required for centuries to work within very strict time limits in order to protect the interests of persons in custody. The speed with which criminal proceedings in Scotland are conducted has, indeed, been a source of pride and it is due in no small measure to the unique Scottish system of public prosecution under the Lord Advocate.

4.6. Fifth, we note that there is little or no reference in the responses received to the question of compatibility with EU law.

4.7. Against that background, we address the issues in the following order:

- Should the Supreme Court have any jurisdiction in respect of criminal proceedings in Scotland, and in particular in relation to alleged violations of Convention rights or of EU law?
- If so, is the statutory basis of the Supreme Court jurisdiction satisfactory?
- If not, how should the jurisdiction be defined?
- By what procedure and at what stage(s) should the jurisdiction of the Supreme Court be invoked?
- What should be the powers of the Supreme Court in relation to disposal of the case? In particular, according to what criteria should the Supreme Court have power to quash a conviction?

**Should the Supreme Court continue to have any jurisdiction in relation to criminal proceedings in Scotland?**

4.8. It is, in our opinion, unprofitable to discuss the original intention of the UK Parliament in passing the Scotland Act. It is well settled (and in our view obvious) that, with the limited exception provided by Section 57(3), the scheme of the Act was that acts of the Lord Advocate should be subject to judicial review with reference to

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38 For a full discussion, see the Bonomy Report, Chapter 9.
their compatibility with Convention rights and EU law, and that this should extend to review by the Judicial Committee of the Privy Council as the appropriate ‘constitutional’ court. We accept, however, that it was not anticipated either (a) that this jurisdiction would be invoked in so many cases, or in such a range of cases, or (b) that the effect on Scottish criminal procedure would be so extensive.

4.9. The existing jurisdiction of the Supreme Court is limited to questions of compatibility with the international obligation of the United Kingdom to ensure protection of Convention rights and compliance with EU law. We have yet to gauge the full extent to which domestic criminal law and procedure will be affected by measures adopted under Title V of the Treaty on the Functioning of the European Union (Area of Freedom, Security and Justice). Compatibility with EU law may (or may not) come to be as contentious an issue in the criminal context as compatibility with Convention rights is at present.

4.10. In the case of failure to protect Convention rights, the United Kingdom may be brought before the European Court of Human Rights. In the case of non-compliance with EU law, the United Kingdom may be faced with infringement proceedings before the European Court of Justice at the instance of the European Commission. In neither case will the court now include any judge who is familiar with Scots criminal law and procedure. (Although Scots law has, in certain respects, common roots with other European systems, Scottish criminal law and procedure are, as the Sheriffs’ Association puts it, idiosyncratic.)

4.11. Dissatisfaction with the present system derives in part from a sense that the autonomy of Scottish criminal law and procedure are, for the first time, subject to scrutiny by a court the majority of whose members know nothing of them. Lord Hailes remarked at the trial of Deacon Brodie, “By the articles of the Union, our own laws and forms of procedure are secured to us, and we have as little connection with those of England as with the laws of Japan, being as little bound to obey them”.39

39 Roughead The Trial of Deacon Brodie page 130.
Today, the laws of the European Convention and the EU Treaties are neither English nor Japanese, nor yet are they Scottish, but we are nevertheless bound to obey them.

4.12. We do not understand why it should be thought preferable that issues of Scottish criminal law and procedure that affect the international obligations of the United Kingdom should be subject to scrutiny by a court in Strasbourg or Luxembourg which includes no Scottish judges than by a court in London which includes two of them.

4.13. It is, in any event, crucial to distinguish between, on the one hand, dissatisfaction with the fact that, in a limited number of cases, the Judicial Committee and latterly the Supreme Court have reached conclusions different from those of the High Court of Justiciary with consequences that some, but by no means all, consider to have been detrimental to the conduct of criminal proceedings in Scotland and, on the other hand, the question whether the Supreme Court should, in principle, continue to have such a jurisdiction at all.

4.14. It is not for us, in this Report, to comment on the soundness or otherwise of the decisions of the Judicial Committee or the Supreme Court. Suffice it to note that there is a strong body of opinion, which we share, that the effect of this jurisdiction has, on the whole, been a salutary one for the conduct of criminal proceedings in Scotland and public respect for our criminal courts. As we explain below, we believe that the root cause of most of the dissatisfaction with the present arrangements lies in the existing statutory framework rather than the Supreme Court jurisdiction as such.

4.15. In our opinion, the jurisdiction of the Supreme Court should be maintained both for reasons of constitutional propriety and, more importantly, to ensure that fundamental rights enshrined in international obligations are secured in a consistent manner for all those who claim their protection in the United Kingdom. The same is true of the obligations that arise (or may arise in the future) under EU law.
4.16. The Scottish Law Commission contend that “There is simply no constitutional requirement for there to be a ‘consistent and coherent view’ across the United Kingdom on the meaning of Convention rights in relation to criminal proceedings”. With respect, this begs the question. The international obligations of the United Kingdom do not vary according to whether the issue arises in Scotland, England, Wales or Northern Ireland. The point is well illustrated by the case of Cadder, where the question at issue concerned the nature and extent of the obligation in relation to legal advice and assistance imposed by Article 6(1) of the Convention as interpreted by the European Court of Human Rights in the case of Salduz. While it is true that Scots law differed in this respect from the law of other jurisdictions in the United Kingdom and was held to be Convention-compliant by the High Court in McLean, the reason why the Supreme Court held otherwise was not that Scots law ‘ought’ to be the same as the law of England, Wales and Northern Ireland, but rather that, as Lord Rodger put it,

‘On this matter Strasbourg has spoken: the courts in this country have no real option but to apply the law which it has laid down.’

4.17. It is important, however, to stress that the jurisdiction of the Supreme Court is a ‘constitutional’ jurisdiction limited to compliance with the international obligations of the United Kingdom and the terms of the devolution settlement enshrined in the Scotland Act. It is not a general jurisdiction, and none of the responses suggest that it should become so.

40 Footnote 35 above.

41 Salduz v Turkey (2008) 49 EHRR 421.

42 HMA v McLean 2010 SLT 73:

43 Cadder, supra, at paragraph 93.

44 See, for example, the observations of Lord Hope in Robertson v Higson 2006 SC (PC) 22, paragraphs [5]-[6].
Is the statutory basis for the Supreme Court jurisdiction satisfactory?

4.18. We have already noted that the statutory route to Supreme Court jurisdiction in respect of criminal proceedings in Scotland depends (i) upon bringing particular aspects of criminal proceedings within the concept of an ‘act of the Lord Advocate’, (ii) upon treating this as a devolution issue, and (iii) upon this issue being raised in a devolution minute with the statutory time limit or with exceptional leave of the court.

4.19. This arrangement is criticised as being clumsy, bureaucratic and productive of delay. The judiciary in the Court of Session and High Court also point out that Rule 40.5 of the Criminal Procedure Rules, which prescribes strict time limits for raising and giving specification of devolution issues\(^\text{45}\) has effectively been rendered a dead letter by the decision of the Judicial Committee in *McDonald v HM Advocate*.\(^\text{46}\) We agree with these criticisms. As we have indicated above (paragraphs 4.3 and 4.4), the existing arrangement creates a very serious problem for the Scottish court system and the work of the Lord Advocate and Advocate General, as well as for victims and witnesses. So far as this is unnecessary, the causes of the problem should be removed.

4.20. We consider, however, that there is a more fundamental constitutional objection to the existing statutory framework. The special position of the Lord Advocate as ‘head of the systems of criminal prosecution and investigation of deaths in Scotland’ is recognised (directly or indirectly) in the Scotland Act.\(^\text{47}\) Her functions in this respect are ‘retained functions’ (functions exercisable before the devolution settlement).\(^\text{48}\) The Act further recognises the special position of the Lord Advocate.

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\(^{45}\) See paragraph 1.17 above.

\(^{46}\) 2008 SCCR 954.

\(^{47}\) Sections 23(19), 27(3), 29(2)(e), 48(5) and 57(3).

\(^{48}\) Section 52(6).
and Solicitor General for Scotland in that they, unlike other members of the Scottish Executive, are appointed by Her Majesty on the recommendation of the First Minister with the agreement of the Scottish Parliament.\textsuperscript{49} The Act also provides that decisions of the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths ‘shall continue to be taken by [her] independently of any other person’.\textsuperscript{50}

4.21. Before devolution, it was recognised that the functions of the Lord Advocate in relation to the initiation and conduct of criminal prosecutions were ‘quite distinct in character from his ministerial responsibility to Parliament’.\textsuperscript{51} In that capacity, the Lord Advocate was, and remains, ‘Her Majesty’s Advocate’. The Lord Advocate’s ‘retained functions’ are so classified by the Scotland Act precisely because they are not functions conferred by the Act nor part of the devolution settlement.

4.22. It is therefore, in our opinion, constitutionally inept to treat the acts of the Lord Advocate in respect of her retained functions as raising a ‘devolution issue’. As we have noted, this is the consequence of the wording of the Act, but there is no good reason why this constitutional error, or the problems that flow from it, should be perpetuated. This cannot conduce to the good reputation of the Scottish legal system or that of the United Kingdom as a whole.

\textit{How should the jurisdiction of the Supreme Court be defined?}

4.23. It would be possible to remove uncertainty as to the nature and scope of the Supreme Court jurisdiction, while arriving at the same result as existing, by simple amendment of Section 57(3) and paragraph 1 of Schedule 6 of the Scotland Act.

\textsuperscript{49} Section 48(1). Compare Section 47(1) which provides that other Scottish Ministers are appointed by the First Minister with the approval of Her Majesty.

\textsuperscript{50} Section 48(5).

\textsuperscript{51} Stair Memorial Encyclopaedia of the Laws of Scotland, Vol. 5, paragraph 535.
4.24. Section 57(3) would be amended by deleting the concluding phrase (‘which, because of subsection (2) of section 6 of the Human Rights Act 1998, is not unlawful under subsection (1) of that section’). This would have the effect that acts of the Lord Advocate in prosecuting any offence or in her capacity as head of the systems of criminal prosecution and investigation of deaths would no longer be ‘acts of a member of the Scottish Executive’ for the purposes of Section 57(2).

4.25. The jurisdiction of the Supreme Court could then be maintained by adding to the list of devolution issues in paragraph 1 of Schedule 6 a further item to include ‘a question as to whether anything done in the course of prosecuting crime or investigating deaths in Scotland has been, is or would be incompatible with any of the Convention rights or with European Union law’.

4.26. While straightforward, this solution would perpetuate, and indeed aggravate, the ground of criticism discussed above by treating the matter as a devolution issue, whereas it is in no sense dependent upon the devolution settlement.

4.27. In our opinion, it would be preferable, having deleted the concluding phrase of Section 57(3) of the Act, to substitute a self-standing provision that would make explicit, and put beyond doubt, the nature and limits of the jurisdiction of the Supreme Court in relation to criminal proceedings, and (if necessary) the investigation of deaths, in Scotland. This should make it clear that the purpose of the jurisdiction is (and is only) to ensure compliance with the international obligations of the United Kingdom with particular reference to Convention rights and EU law.

4.28. In so far as it relates to the protection of Convention rights, the statutory formulation should be such as to concentrate attention on the compatibility with Convention rights of the criminal proceedings as a whole. The need to consider the proceedings as a whole has been emphasised in the case of the European Court of
Human Rights and, notably, in the judgment of the Judicial Committee in Spiers v Ruddy.\footnote{Spiers v Ruddy [2007] UKPC D2: [2008] 1 AC 873; 2008 SCCR 131}

**By what procedure and at what stage(s) should the jurisdiction of the Supreme Court be invoked?**

4.30. In our opinion, much of the dissatisfaction with the current procedures is attributable to the fact that in Scotland (unlike England, Wales or Northern Ireland) issues of compatibility with Convention rights and EU law are not dealt with by the normal procedures of the criminal courts, but by procedures designed to deal with issues of legislative or administrative *vires*.

4.31. We also consider that the existing procedure for raising devolution issues is particularly ill-suited to determining issues of compatibility with Convention rights. As we have observed (paragraph 4.4 above), it is not only the accused person who has an interest in observance of the ‘reasonable time’ requirement of Article 6 of the Convention. There is a public interest, as well as a legitimate interest of victims and witnesses, in determining criminal proceedings as speedily as is consistent with justice. The existing procedure focuses on the ‘act of the Lord Advocate’ rather than fairness of the criminal proceedings as a whole.

4.32. If, as we recommend, Convention and EU issues affecting the prosecution of crime and investigation of deaths were no longer to be treated as devolution issues, then it would, in our opinion, be desirable to maintain the possibility, as at present, for such issues to be referred, as issues of law, to the High Court or the Supreme Court in the same way as ‘devolution issues’. In every other respect, there seems to us to be no good reason why issues of compatibility with Convention rights or EU law should not be treated in the same way as other issues of law arising in the course of criminal proceedings.
4.33. If that is accepted, recourse to the Supreme Court by parties other than the Lord Advocate should be by way of appeal from a decision of two or more judges of the High Court of Justiciary (i.e. of the High Court sitting as a court of appeal) – the scope of the appeal being limited to questions of Convention or EU compatibility. We recommend that leave should be required to appeal to the Supreme Court – in the first instance from the High Court, which failing on application for special leave to the Supreme Court as at present.

4.34. There would be no need for any special procedure in the Scottish courts but the Criminal Procedure Rules and the Supreme Court Rules would have to be amended appropriately.

4.35. There would equally no need for routine intimation to the Lord Advocate or the Advocate General. The Lord Advocate would in any event be involved in appeal proceedings and the High Court could, where appropriate, order intimation to the Advocate General.

4.36. The existing devolution procedure would remain for other devolution issues. As we have noted above (paragraph 4.3), issues concerning the legislative competence of the Scottish Parliament do arise in the course of criminal proceedings\textsuperscript{53} and are equally liable to cause delay. We have not, however, been asked to consider Section 57 apart from its application to acts of the Lord Advocate, nor have we had time to consider the implications in detail.

\footnote{53 For examples of such cases, see DS v HMA, footnote 36 supra, and Martin & Miller v HMA [2010] UKSC 10.}
What should be the powers of the Supreme Court in relation to disposal of the case? In particular, according to what criteria should the Supreme Court have power to quash a conviction?

4.37. In our opinion, the Supreme Court should continue to have power to make any order that it would be competent for the High Court to make. Since, however, the issue would always come before the Supreme Court on appeal from a determination of the High Court, we consider that the criterion for determining whether a conviction should be set aside should be the same as the criterion that the High Court is enjoined to apply by the Criminal Procedure (Scotland) Act 1995 – that is to say, whether the incompatibility with Convention rights or EU law has been, or would be, such as to result in a miscarriage of justice.

5. Conclusions and Recommendations

5.1. The existing statutory provisions whereby acts of the Lord Advocate in her capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland are deemed to be ‘devolution issues’ are constitutionally inept because such acts fall within the retained functions of the Lord Advocate and have nothing to do with the devolution settlement.

5.2. The existing arrangements by which the jurisdiction of the Supreme Court can be invoked (except for the special reference procedure) are productive of delay and other serious problems for the Scottish court system, the Lord Advocate, the Advocate General and for victims, witnesses and others who are caught up in the court process.

5.3. The jurisdiction of the Supreme Court should be maintained both for reasons of constitutional propriety and, more importantly, to ensure that fundamental rights enshrined in international obligations are secured in a consistent manner for all those who claim their protection in the United Kingdom. That jurisdiction should, however, be clearly limited to ensuring compliance with the international obligations of the United Kingdom.
5.4. Acts of the Lord Advocate in her capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland should therefore be removed from the purview of Section 57(2) of the Scotland Act and replaced by a self-standing provision defining the jurisdiction of the Supreme Court in relation to the criminal proceedings in Scotland.

5.5. Apart from the special reference procedure, recourse to the Supreme Court should be available only with leave of the High Court or special leave of the Supreme Court after determination of the relevant issue in the normal course of appeal proceedings in Scotland. The existing ‘devolution minute’ procedure should no longer apply. Intimation to the Lord Advocate and the Advocate General should not be required, but the Court should have power, where appropriate, to order intimation.

5.5. The Supreme Court should continue to have power, but only in the context of appeal proceedings as recommended in the preceding paragraph, to make any order that it would be competent for the High Court of Justiciary to make.

ON BEHALF OF THE EXPERT GROUP

DAVID EDWARD, Chairman

11th November 2010.
Annex 1. List of responses to the consultation paper.

1. Equality and Human Rights Commission
2. Faculty of Advocates
3. Judiciary in the Court of Session and the High Court of Justiciary
4. Justice
5. Law Society of Scotland (Constitutional Law Sub-Committee)
6. Scottish Human Rights Commission
7. Scottish Law Commission
8. Sheriffs’ Association
9. Lord Advocate
10. Lord Hope of Craighead
11. Cabinet Secretary for Justice
12. Iain Jamieson, former legal adviser to the Scottish Office and the Scottish Executive
13. Tony Kelly, Solicitor and Visiting Professor of Human Rights, University of Strathclyde
14. Sheriff Kenneth Maciver
15. Roy Martin Q.C.
16. Aidan O’Neill Q.C.
17. Professor Alan Page, University of Dundee