SUBMISSION FROM THE FACULTY OF ADVOCATES

Introduction

[1] Views have been sought from the Faculty of Advocates on behalf of the Scotland Bill Committee (the “Committee”) in respect of Question 10 of the Call for Evidence which provides as follows:

“The Session 3 Scotland Bill Committee could not comment on the recommendations of the expert group set up by the Advocate General for Scotland, Lord Wallace, relating to the role of the UK Supreme Court in considering matters relating to the conduct of criminal proceedings in Scotland, as the Committee had not had adequate time to scrutinise the proposed amendments. What is your assessment of the various proposals relating to the final court of appeal in these criminal cases?”

[2] In particular, the Faculty understands that the Committee was interested in the Faculty's views in light of developments since the matter was previously considered by the Scottish Parliament including the recommendations of the expert group set up by the Advocate General and the Report of the Review Group set up by the First Minister.

[3] The Faculty has previously responded both to the request for Informal Consultation by the Advocate General (which preceded the recommendations by the Advocate General’s expert group) and to the Consultation on draft clauses for inclusion in the Scotland Bill (which followed after the recommendations by the Advocate General's expert group). Copies of these documents are appended. The Faculty remains of the views set out previously.

[4] Accordingly, the present response is focused on the issues raised by the Report of the Review Group set up by the First Minister.

The Report of the Review Group

[5] The principal findings of the Review Group are as follows:

- In general, the Review Group endorsed the findings of the Expert Group both as to the need to maintain the Supreme Court’s present jurisdiction over human rights in criminal cases and the need to reform the existing statutory basis for bringing issues to the Supreme Court (see paragraphs 44 to 46);

- However, the Review Group considered that the Supreme Court should only be able to grant permission to appeal if the High Court of Justiciary has granted a certificate that the case raises a point of general public importance (see paragraph 56);

- The Review Group considered that the Supreme Court’s jurisdiction should be exercised in such a way that it defines and expresses the law applicable and
then sends the case back to the High Court of Justiciary to apply that law (see paragraph 58); and

- Finally, the Review Group considered that, in normal circumstances, appeals to the Supreme Court should only take place once the case has been completed albeit that the Group felt that it might be wise to allow the High Court of Justiciary to ask the Supreme Court for a ruling at an earlier stage (see paragraphs 65 and 66).

[6] The views of the Faculty in relation to each of these findings is set out below.

The jurisdiction of the Supreme Court

[7] The Faculty agrees that the Supreme Court’s present jurisdiction over criminal cases should be maintained. For the reasons set out in its response to the Advocate General’s Informal Consultation, the Faculty considers that the preservation of the constitutional right of appellants to appeal to the Supreme Court in criminal matters is essential to ensure uniform application of Convention rights across the United Kingdom. Furthermore, the Faculty again notes that it is important to bear in mind that decisions of the Judicial Committee of the Privy Council and, more recently, the Supreme Court have resulted in a number of important and progressive reforms in criminal procedure most notably the development of a modern law of disclosure and in relation to an accused person’s right to legal assistance.

[8] The Faculty also agrees that reform to the present procedure whereby appeals are made to the Supreme Court would be beneficial provided it can be effected without disturbing the present arrangement under paragraph 13 of Schedule 6 of the Scotland Act 1998 whereby the Supreme Court remains the ultimate arbiter of whether it hears a case.

[9] However, the Faculty also observes that it does not consider that there has been any recent development either in the Supreme Court’s recent decisions or elsewhere which merited the ill-informed and ill-tempered comments concerning the Supreme Court’s jurisdiction which formed the backdrop to the remit to the Review Group.

Certification of cases by the High Court of Justiciary

[10] In summary, the Faculty considers that no adequate justification for seeking to disturb the present status quo has been presented and that the proposed change would potentially cause further procedural problems.

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1 See paragraphs [9] to [12] of the Faculty Response to the Informal Consultation
2 See Foreword to COPS Disclosure Manual (8th Edition) by the former Lord Advocate.
3 Cadder v HMA [2010] UKSC 43
6 See, for example, "The Eck’s factor" Holyrood Magazine 13 June 2011
[11] As stated in its Response on the draft clauses\(^7\), the Faculty considers that the starting point for consideration of this issue is to recognise the importance of preserving the Supreme Court’s primacy because of a tendency by the High Court of Justiciary to construe the devolution issue jurisdiction narrowly.\(^8\) It is notable that in a number of appeals on devolution issues which have resulted in significant developments in the criminal law, the High Court had refused leave on the grounds that it was incompetent.\(^9\) The most striking example of this tendency is the recent case of *Cadder v HM Advocate* in which an appeal to the Supreme Court was unanimously upheld notwithstanding the fact that the High Court of Justiciary had itself refused leave to appeal let alone grant leave to appeal to the Supreme Court.\(^10\) There would seem a material risk that had certification provisions of the sort proposed existed at the time of the *Cadder* case, the Supreme Court would have been denied the opportunity to hear the case. As a result, criminal proceedings in Scotland would have continued to be pursued in a way which was incompatible with the European Convention of Human Rights and Fundamental Freedoms pending the later determination of a similar case. Given the disruption caused by the ultimate result in *Cadder*, a system which would have delayed and exacerbated that result would be undesirable.

[12] Against this background, it is notable that the sole argument presented by the Review Group for the proposed introduction of certification is the supposed inconsistency between the position of the High Court of Justiciary and the Court of Appeal in England.\(^11\)

[13] It is particularly striking that there is no suggestion that the existence and exercise of the Supreme Court’s power to grant permission to appeal even when the High Court of Justiciary has refused permission has resulted in a significant number of additional cases being heard or that it results in further delay and uncertainty.

[14] The Faculty considers that the reason for this is that, in reality, very few applications for permission to appeal are made to the Supreme Court and even fewer are granted. From October 2009 until 14 April 2011, only 18 such applications were made. Of those, only 2 were granted\(^12\).

[15] The Faculty further notes that it is not suggested by the Review Group that on any occasion in the past the Supreme Court has granted permission to appeal in a case which, on any objective view, did not raise a point of general public importance. Given the two cases in which permission was granted\(^13\) and the Supreme Court’s own Practice Directions\(^14\), such a suggestion would not seem tenable.

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\(^7\) See paragraph [9]
\(^8\) This was recognised in *McDonald v HM Advocate* 2010 SC (PC) 1 at [16]
\(^9\) See *Holland v HM Advocate* 2005 SC (PC) 3; *Sinclair v HM Advocate* 2005 SC (PC); 28 *McDonald v HM Advocate* (above); and *Cadder v HM Advocate* (above).
\(^10\) 2010 SLT 1125 at [9] and [11]-[12]
\(^12\) *Fraser v HM Advocate* 20 May 2010 and *Cadder v HM Advocate* 26 October 2010 (ultimately only granted in part).
\(^13\) See footnote 12 above.
\(^14\) See Supreme Court Practice Direction 3 paragraph 3.3.3
Accordingly, the only argument advanced by the Review Group for altering the present arrangements for permission to appeal is that it is contended that they are anomalous when compared with the position of the English Court of Appeal.

The Faculty considers this argument is misconceived. The comparison that the Review Group makes ignores the fact that the nature of the right of appeal from the High Court of Justiciary is restricted to devolution issues and therefore is not comparable to the general right of appeal from the English Court of Appeal on criminal matters. The more appropriate comparator is other appeals relating to devolution issues. In such cases both under the Northern Ireland Act 1998 and the Government of Wales Act 1998, the arrangements for leave are the same as presently provided by paragraph 13 of Schedule 6 to the Scotland Act 1998 in that certification of the sort suggested is not required.

When the Review Group’s proposal is considered in this light it can be seen that, far from removing an anomaly, it would create one. Appeals to the Supreme Court in relation to devolution issues (or questions of compatibility) arising in Scottish criminal proceedings would be subjected to an additional requirement not present in either such appeals arising in civil proceedings in Scotland or in any other equivalent appeals arising in England, Wales or Northern Ireland. As the Review Group itself recognises in this context, a consistent and coherent approach across the United Kingdom is desirable and this would not be achieved by this proposal.

Exercise of the Supreme Court’s jurisdiction

The Faculty does not consider that there is any need for a change as proposed by the Review Group.

The Supreme Court has made it very clear in a number of recent judgments that 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” and referred to the need for reticence, given the Supreme Court’s restricted role in determining devolution issues.

In light of these pronouncements, the Faculty does not consider that the traditional role of the High Court of Justiciary is threatened by the appeal being determined, where appropriate, by the Supreme Court rather than being remitted back to the High Court of Justiciary.

The Faculty considers that requiring such a remit in every case would also have the unfortunate consequence of creating additional delay and uncertainty.

15 See, for example, section 33(2) of the Criminal Appeal Act 1968
16 See Schedule 10 paragraphs 10, 20 and 31
17 See Schedule 9 paragraphs 11, 21 and 28
18 Review Group Report paragraph 55
When the jurisdiction of the Supreme Court should be invoked

[23] The Faculty broadly agrees with the suggestions of the Review Group in this respect.

[24] In this regard, for the reasons set out in the Response to the Consultation on draft clauses\(^\text{20}\), the Faculty also considers that so-called “leap-frog” provisions exercisable by the Lord Advocate, the Advocate General, or the court either ex proprio motu or having been moved to do so by an appellant, would be logical and practical.

The Faculty of Advocates
15 September 2011

\(^{20}\) See paragraphs [12] to [15]