

FIRST REPORT OF REVIEW GROUP

EXAMINATION OF THE RELATIONSHIP BETWEEN THE HIGH
COURT OF JUSTICIARY AND THE SUPREME COURT IN
CRIMINAL CASES

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INTRODUCTION

Our appointment

1. Following widespread public debate about the interrelated roles of the High Court of Justiciary and the Supreme Court, in relation to appeals to the Supreme Court in criminal cases involving human rights issues, the First Minister invited us, a small group of independent people with substantial experience of the traditions and practice of criminal law and criminal justice in Scotland, to consider the issues involved and to advise. In this report, we usually refer to ourselves as “the Review Group”.

Terms of Reference

2. The Terms of Reference agreed between the group and the First Minister are:

“To consider and assess the mechanisms created under the Scotland Act 1998 and the Human Rights Act 1998, and developed since then, for applying Human Rights law to criminal cases in Scotland, including particularly the regulation, subject matter and scope of appeals from the High Court of Justiciary to the Supreme Court of the United Kingdom; to consider the criticisms of and various suggested amendments to those mechanisms in light of current assessments, including criticisms of their operation; and to advise on the ways in which they might best be altered, if appropriate, by legislation or otherwise, to ensure Scotland’s unique system of Criminal Law and Procedure is fully protected, within the context of the accepted need for that system to comply with the Human Rights Act.”

Format of the Report

3. The Report identifies some fundamental principles, considers the Advocate General’s Expert Group report and sets out our advice.
4. In addition, there are two further documents that can be considered alongside this report. The first is an Appendix, which sets out a bibliography of the principal materials that we have

had access to in forming our views, with online references where available. The second is a Supplement that contains the main briefing papers that supported our discussions.

The timescale

5. As it was envisaged that the Scottish Parliament would debate these issues before the end of June 2011, we were invited, if possible, to prepare a first report in advance of that debate. That meant that we had only three weeks to prepare and submit that report.
6. We agreed to attempt to meet the timetable; but that meant inevitably that the work of investigating the issues could not possibly include taking some weeks to call for and receive submissions from Government ministers, legal bodies, the judiciary, including Justices of the Supreme Court, and the many others who had provided such excellent papers to the Expert Review Group chaired by Sir David Edward.¹ Nor was there time to interview all the interested parties about the very many aspects and details of a field of legal practice that had seen thousands of human rights issues raised before the criminal courts throughout Scotland. We conducted no interviews.
7. Fortunately, our Review Group had extensive knowledge and experience of the practical and constitutional aspects of this new dimension to the legal landscape, created by the coming into effect² of the Scotland Act 1998 and the Human Rights Act 1998. We were able not only to read all the material presented to the Expert Group, but much else besides. We concluded that we knew essentially what the main lines of argument were and were confident that the material already available to us was ample for our present purposes. We also had in mind the possibility that we would prepare a further report.
8. In addition the Scottish Parliament's Scotland Bill Committee has now been reconvened to consider the Scotland Bill in its amended form and will take evidence on this matter amongst

¹ A list of those who made such submissions appears in the Report of that Group.

² At different dates. The Scotland Act came into effect in July 1999 and the Human Rights Act on 2 October 2000.

others to enable it to report back to the Scottish Parliament no later than December 2011.

9. We were also particularly well served by the officials who were allocated to assist the Review Group. They were extremely valuable in carrying out the research that we thought appropriate to check or vouch some fact or proposition that we knew or understood to be true. The most relevant fruits of that work are contained in the Supplement.

The Advocate General's Expert Group

10. Additionally, the Advocate General had set up an Expert Group to inquire into what were essentially the same matters. That inquiry was related to the Scotland Bill, currently awaiting Second Reading in the House of Lords; it is a bill intended to effect changes to the devolution system created by the Scotland Act 1998, in the light of the report of and the submissions to the Calman Commission.
11. We acknowledge our indebtedness both to the Expert Group and to the many others who contributed to the debates, including particularly all those who made submissions to the Expert Group and those who later responded to the Advocate-General's consultation on the terms of the related possible amendments to the Scotland Bill. The Expert Group carried out in a remarkably short time the kind of inquiry that was appropriate and we have made the fullest use of the evidence that that Group received. They looked particularly closely at the legal and constitutional aspects of the matter.

Identifying the principles involved

12. We think that, at this stage, it is the principles, the big issues that need to be considered and assessed. The consequential procedural details (sometimes referred to as "the legal plumbing") can be worked out once the big issues have been identified and considered. We are not attempting to re-invent the wheel: it is entirely unnecessary to do so given the thoroughness of the work already done.

Summary and Solemn

13. We are not concerned at this stage with making a detailed analysis of current criminal procedure, beyond highlighting the basic distinction between solemn and summary cases. The former are more serious than the latter and are tried before a High Court judge or a Sheriff sitting with a jury of 15 persons. Summary cases are tried without a jury either by a Sheriff or a Stipendiary Magistrate (for Glasgow only) or by lay Justices of the Peace sitting with a legally qualified clerk or assessor. Important human rights issues have arisen in both types of cases but the emphasis in this report is on how these issues arise in solemn cases.

Avoiding jargon

14. We have attempted to write this report in language that, where possible, avoids legal jargon. We hope that the reasoning and discussions in the Report will make it more readily accessible to all who are not familiar with all the terms commonly used by practitioners of Scots criminal law. The issues are not mere technical issues of interest only to lawyers. Many others will be involved in the legislative deliberations which will follow the House of Commons amendments to the Scotland Bill that relate to the subject matter of this review³.

15. As indicated already, the legal plumbing details consequential on any change in legislation are important; but we have decided not to deal fully with such details at this stage when we cannot be sure what the final shape and content of the proposed amendments will be as the parliamentary processes continue. Those who seek to know more about the details of the current procedures, often expressed in technical terms, will find most of what is needed in the material listed in the Supplement and the Appendix. We have found the reports, submissions, articles etc listed there immensely valuable.

³ *Scotland Bill House of Commons Report Stage 21 June 201, Columns 275 and 276*
<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110621/debtext/110621-0004.htm>

16. As we have mentioned previously, we are satisfied that, at least for the purposes of producing this Report, we have been made fully aware of all the arguments that have been made in the public domain. We see no need to repeat them all here in any detail. The material available reflects well on the knowledge, wisdom, and concern of so many Scots, and others, including many members of the legal profession. The strength of citizens' views about the protection and improvement of the machinery of the Rule of Law and of the traditional features of Scotland's criminal legal system is admirable.

FUNDAMENTALS

The true basis of criminal justice, including procedure

17. We begin by drawing attention to some of the fundamental principles and facts that must, in our view, inspire the decisions that have to be taken and also the technical work that is necessary to make the system work. The system affects not only lawyers, judges, police officers or party politicians. Countless citizens are also directly affected by the operation of the criminal law, more often and more deeply than they might have imagined before becoming personally involved, whether as victims, wrongdoers, witnesses, jurors, social workers, prison staff or in any other way.
18. This Report is intended to clarify the issues for everyone: it is not meant to promote a conversation in which only lawyers are expected to take part.

Role of Appeal Court

19. It is essential to understand the true role of any appeal court considering an appeal against a conviction in a jury trial. The appeal judges do not decide the facts of the case: that is the jury's task. Judges do not retry the case although the Criminal Procedure (Scotland) Act 1995 empowers the appeal court to hear evidence, or order evidence to be heard by a judge of the High Court of Justiciary, or another person, if it is relevant to an alleged miscarriage of justice⁴.
20. Subject to this, appeal court judges approach the verdict on the basis that the jury's decision is final, if they are satisfied that the relevant law has been explained to the jurors, the well-established rules of evidence have been respected and that the whole process has been fair. So the main issue on appeal is whether or not the trial process has been so flawed that it has resulted in a 'miscarriage of justice'⁵. Minor errors are not treated as vitiating the result; but major flaws are very likely to

⁴ Section 104 and 106

⁵ The meaning and application of this term - *see s.175 (5) to (5E) of the Criminal Procedure (Scotland) Act 1995* – has been the subject of much discussion and analysis in recent appeal cases. We do not enter that debate here.

undermine the verdict⁶. Any assessment by commentators of a ruling by an appeal court must be based on an acceptance of this basic truth about the role of an appeal court.

The traditional Scottish approach to 'fairness'

21. This paramount need to determine if the whole process leading to conviction is so unfair as to invalidate the verdict is fundamental to the Rule of Law. There is nothing new about this: it was not suddenly brought to the attention of the Scottish Courts in 1998 when the Human Rights Act was passed. It has been a defining feature of our criminal law since at least the 1920s, when the Criminal Appeals (Scotland) Acts⁷ allowed appeals to the High Court of Justiciary against convictions by juries. Lord Justice General Cooper (then LJC) expressed this clearly⁸ in a case in 1946⁹. In short, it cannot be emphasized enough that appeal courts do not determine the fact of guilt or innocence; they determine if the trial process itself has been fatally undermined by circumstances established before them.

Victims, delays, finality, public confidence

22. A civilised system of criminal justice must be as concerned with protecting victims as with bringing offenders to justice and ensuring the innocent are not wrongly convicted. The brocard, 'Justice delayed is justice denied' applies equally to victims. The criminal justice system has to move as swiftly as possible, not

⁶ *To give an extreme example: if it were established on appeal that, unknown to the Jury, a "confession" by the accused, heavily relied on by the prosecution and apparently accepted by the Jury, had been obtained by torture, or been fabricated, the jury's verdict would be undermined. The appeal court would quash the verdict, not because the jury had made a mistake and so got the result wrong but because their verdict had been arrived at in ignorance of a vital matter, and that therefore the trial had been "unfair"*

⁷ *This legislation followed a campaign led by Sir Arthur Conan Doyle to have the conviction of Oscar Slater reviewed by a court of law.*

⁸ *"It is not in the interests of justice that any needless obstacle should be placed in the way of the police in due performance of their task of investigating the commission of crime. On the other hand, it is equally essential that no relaxation should be permitted of the safeguards which our law has long insisted upon to prevent any hint or trace of unfairness in the treatment of persons accused or suspected of crime...The ultimate test to be applied in determining questions of this kind is the test of fairness to the accused."*

⁹ *HMA v Rigg 1946 JC 1*

least because victims have an understandable desire to see wrongdoers brought to trial, and to have closure.

23. Public confidence in the system can be weakened if there is prolonged delay. Public confidence may be further undermined if delay is accompanied by a sense that the appeal process considered as a whole may contribute to, rather than resolve, uncertainty in the law.
24. The current system for dealing with human rights issues in criminal cases is, in our view, responsible for some slowing down of the courts' processes and some lack of finality. We believe that such delay and uncertainty as does occur in the current systems for resolving human rights issues must be taken into account¹⁰.
25. The High Court of Justiciary, sitting, as a criminal appeal court was the final court of appeal for Scottish criminal cases until May 1999 when the Scotland Act came into effect and gave the Judicial Committee of the Privy Council a devolution jurisdiction: that Act created a new right of appeal (with leave) in cases involving human rights issues; many such cases related to the right to a 'fair trial' under Article 6 of the ECHR. The main statutory provision by means of which this was achieved was section 57(2), which provided 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 Community law*". Thus the acts of the Lord Advocate in the exercise of his prosecution functions became subject to human right challenges.
26. If the jurisdiction of the European Court of Human Rights¹¹ is invoked - though Strasbourg is not an appeal court in the traditional sense - there is the potential for further uncertainty and delay.

¹⁰ We understand that the Carloway Review is considering the issue of delay as part of its remit to make recommendations for further changes to the law to maintain an efficient and effective system for the investigation and prosecution of crime.

¹¹ Referred to as 'Strasbourg'

27. The balancing of all these various considerations - fairness to the accused against the values of promptness and finality - is a necessary part of the judgment process. Getting the balance right is essential to maintaining public confidence in the criminal justice system itself.

The essentials of an appeal system

28. However many layers of appeal there are, perfect justice cannot be guaranteed in a human situation¹². What is necessary is that a highly experienced, independent court – or series of courts - considers exhaustively all the real issues of due process that are raised by parties appearing before it. Criminal cases should not be allowed to drag on interminably¹³. However, both the entitlement to a fair hearing within a reasonable time and the right of an accused to have adequate time for the preparation of his defence are important features of Article 6 of the European Convention on Human Rights.

¹² Lord Hoffman "The Universality of Human Rights" *Judicial Studies Board Annual Lecture*, 19 March 2009 and CJS Knight "Second criminal appeals and the requirement of certification" *Law Quarterly Review*, Volume 127, April 2011, 188

¹³ There are certain statutory time limits

BASIC TRUTHS AND SOME MISCONCEPTIONS

Responsibility for legislating on the issues under review

29. We must preface our advice by making it perfectly clear that it is beyond the legislative competence of the Scottish Parliament to take unilateral steps to amend the relevant UK legislation in relation to reserved matters¹⁴. So the Scottish Parliament has no power to alter the jurisdiction of the Supreme Court in human rights matters. Nor, under existing legislation, can the Scottish Parliament, or High Court of Justiciary, alter the procedural rules or practices of the Supreme Court, for example in not applying to their proceedings time limits contained in Scottish criminal procedure rules made by Acts of Adjournal¹⁵ and thereby made applicable in the High Court of Justiciary or courts below.
30. Equally, the legislation prohibiting all public authorities, including the Lord Advocate and the Courts themselves, from acting incompatibly with the Convention rights enacted in the Human Rights Act is not able to be amended except by the UK Parliament¹⁶.
31. This does not mean, however, that the views of the Scottish Parliament on these matters are unimportant. While constitutional issues, including the framework of the Scotland Act itself, have been retained within UK competence, the administration of justice, including the system of prosecution and of criminal (and civil) courts, is a devolved matter under the terms of the Scotland Act.
32. Legislation bearing on the domestic justice system, such as any measures affecting the role of the Law Officers at the apex of our prosecution system, has a mixed character. It engages both reserved constitutional matters and devolved matters.
33. Under settled constitutional convention (the so-called Sewel Convention)¹⁷, in order to proceed at Westminster any such

¹⁴ *Principally the Scotland Act 1998, the Human Rights Act 1998 & the Constitutional Reform Act 2005*

¹⁵ *See the Glossary*

¹⁶ *The same applies to E.U. laws, not discussed here.*

¹⁷ *Sewel Convention – Appendix items 86-88*

matter encroaching upon devolved competence requires a Legislative Consent Motion before the Scottish Parliament. Indeed, this procedure is being followed in the Scottish Parliament's reception of the relevant clauses of the present Scotland Bill on the relationship between the Supreme Court and the High Court of Justiciary. Effectively, therefore, the Scottish Parliament does retain an important voice in the legislative resolution of issues of final appellate jurisdiction. As a matter of constitutional *law*, Holyrood cannot dictate to Westminster. But as matter of constitutional *convention*, just as firmly established, Westminster cannot dictate to Holyrood. In order to be enacted, any such change must in practice be consented to by both Parliaments.¹⁸

Realities to be taken into account

34. For those who do not wish to be part of the UK State, arguments about the retention of the Supreme Court as a matter of constitutional integrity will carry no weight.
35. Nevertheless while Scotland remains in the United Kingdom it is clear, in our judgment, that, whatever alterations are proposed in amendments to the current Scotland Bill as we note below, the prevailing constitutional position makes it unrealistic to suggest that the Supreme Court should not have a continued jurisdiction to determine what might conveniently be called demarcation questions. In this context, these are questions concerning whether or not acts, legislative or executive, of statutory bodies or ministers whose functions are defined and limited by the Scotland Act 1988, including acts in the domain of criminal law and justice, are within the powers conferred on these entities by that legislation¹⁹.
36. We note the UK Government has announced its intention to ensure that the Scotland Bill will also retain the role of the

¹⁸ *Sewel Convention – Appendix items 86-88*

¹⁹ *cf Martin & Miller v HM Advocate*, <http://search3.openobjects.com/kb5/justice/uksc/decided.page?qt=2009%2F012Z>, which dealt with the issue of whether or not an Act of the Scottish Parliament dealing with sentencing in the context of road traffic offences – a reserved matter – was *ultra vires*”

Supreme Court in relation to human rights matters in Scotland²⁰.

Why retain any jurisdiction of the Supreme Court?

37. The reasons for retaining the Supreme Court's jurisdiction in some form in relation to human rights issues are stated with clarity in the Report of the Expert Group²¹. Independently, we have come to the same conclusion, though as we say below we differ on one very important aspect. We accept that, as a matter of international law, the UK's membership of the Council of Europe and its position as a signatory to the European Convention of Human Rights entail that the various legal jurisdictions of the United Kingdom should adopt a coherent approach to the meaning of its basic provisions. Though, as demonstrated by the considerable differences in the administration of criminal justice both within the UK, and even more so, between the UK and the other 46 member states of the Council of Europe, such coherence by no means implies uniformity of detailed application.
38. We also accept that as matter of constitutional principle, a requirement of coherence of approach, though once more not uniformity, is underwritten by the Human Rights Act 1998, which incorporates the ECHR into our various domestic legal systems. And we further accept, of course, that the rights contained in the Convention, and Article 6 in particular, are not simply of formal legal significance but also represent a commitment of universal moral value – reflecting and restating a key set of general standards against which the adequacy of any system of criminal justice may be measured.
39. Given these considerations of coherence and universality, it is important that the Supreme Court has some role in influencing the relevant laws of the various UK jurisdictions. In addressing this question, it is important to preserve a due balance with other authoritative sources of interpretation of the relevant standards, both national (Edinburgh) and international (Strasbourg).

²⁰ <http://www.scotlandoffice.gov.uk/scotlandoffice/15562.html>

²¹ <http://www.advocategeneral.gov.uk/oag/225.html>

What is realistic?

40. All that we can see as falling within our terms of reference and the constitutional realities of the situation is a reconsideration of the manner in which jurisdiction of the Supreme Court should be exercised. The purpose would be to ensure that, while the Supreme Court would continue to make final and binding rulings on human rights issues, including those arising in criminal cases from Scotland, it would do so in a way that reflected more clearly the long history of separate development of the Scottish criminal justice system and the closely associated tradition of the High Court of Justiciary as the final court for determining criminal justice in Scotland²².

²² This tradition was reaffirmed in section 124(2) of the Criminal Procedure (Scotland) Act 1995, which states that decisions of the High Court of Justiciary:

“...shall be final and conclusive and not subject to review by any court whatsoever”.

The Constitutional Reform Act, 2005 also confirms by necessary implication that there are to be no appeals from the High Court of Justiciary to the Supreme Court. The UK legislation that allowed “devolution issues”, including human rights issues, to be taken before, and decided by, judges in the Judicial Committee of the Privy Council was contained in the Scotland Act 1998. The Constitutional Reform Act 2005 merely transferred that jurisdiction the new Supreme Court without alteration

THE ADVOCATE GENERAL'S EXPERT GROUP REPORT

Summary: the problem identified

41. The Expert Group's Report narrates the arguments for the status quo, or some procedural variants of it, and it considers the arguments for and against change. These arguments are contained in the submissions made to that Group²³.
42. Those who prefer to see the essence of the arguments distilled will find that that has been expertly done in the Expert Group Report. It would be superfluous to repeat their summary here. But, to note their most important conclusion very briefly, that Group concluded that the legislative mechanisms created by Section 57(2) of the Scotland Act²⁴ relating to acts of the Lord Advocate were "by far the most productive source of references or appeals to the Justice Committee of the Privy Council (JCPC)/Supreme Court". The reason for reaching this conclusion, with which we fully agree on the basis of our own experience and knowledge of practice, was that the High Court of Justiciary, the JCPC and its successor, the Supreme Court, have given a wide interpretation to the concept of 'acts of the Lord Advocate', with the consequence of unexpectedly bringing many aspects of Scots criminal proceedings under review in that Court²⁵.
43. This widening of jurisdiction, as exercised by the Supreme Court, whatever the intention of the UK legislature when the Scotland Act was passed, had surprised everyone and had created real problems, including "a very serious problem" for the Scottish court system and the work of the Lord Advocate and the Advocate General. In our view, though the necessary material is sparse²⁶, no one during the passage of the Scotland

²³ <http://www.oag.gov.uk/oag/225.html>

²⁴ <http://www.legislation.gov.uk/ukpga/1998/46/section/57>

²⁵ *Although the meaning of 'acts' in this context was not a matter about which judges agreed initially, it was soon accepted that anything done by the Crown in instituting or continuing a prosecution in any court was an act of the Lord Advocate – see for example Montgomery v HM Advocate 2000 SCCR 1044, Starrs v Ruxton 1999 SCCT 1052 and HM Advocate v Scottish Media Ltd 1999 SCCR 599 Also see Supplement Paper on Changed Role of the Scottish Law Officers*

²⁶ *See Supplement Papers on Scotland Act/Human Rights Act debates and the Changed Role of the Scottish Law Officers*

Bill thought through fully the effects of section 57(2) of the Scotland Act and realised or predicted how it was going to produce such a plethora of human rights arguments and changes to criminal law and practice.

The Expert Group's solution to that problem

44. Noting that the wording of Article 6 of the European Convention had led to a focus on the rights of accused persons facing trial, and that the rights of victims and others had been “until very recently largely ignored”, the Expert Group advised that, although the Supreme Court should continue to have jurisdiction over human rights in criminal cases, including relevant aspects of the functions of prosecutors, the existing statutory basis for bringing human rights issues to the Supreme Court was seriously flawed - “constitutionally inept” was the term used. **We agree.**
45. The problem lay in the statutory provisions that focused on the “acts” of the Lord Advocate as public prosecutor. The solution was to amend Section 57²⁷. The details are in paragraphs 4.23 to 4.29 of the Expert Group Report. The Expert Group's intention was to make it clear that the true purpose of vesting the (new) jurisdiction in the Supreme Court in relevant criminal matters should be to ensure compliance, within the Scottish Criminal Justice system, with the pertinent international obligations of the UK.
46. The Expert Group's view was that “*the new statutory formulation should be such as to concentrate attention on the compatibility with Convention rights of the criminal proceedings as a whole*”²⁸. This was plainly the intention of the Strasbourg Court - also emphasised repeatedly by the JCPC. The Expert Group Report also recommended that leave²⁹ of the High Court of Justiciary should be necessary for an appeal to the Supreme Court, but that the Supreme Court should be able to grant “special leave”, as at present³⁰.

²⁷ *And the related part of Schedule 6*

²⁸ *Emphasis added*

²⁹ *Now referred to as ‘permission’” S. 40, Constitutional Reform Act 2005; but we will continue to use the terms “leave’ and “special leave” to reduce confusion.*

³⁰ *So the Supreme Court could continue to grant ‘special leave’ even although the High Court of Justiciary refused to grant leave.*

Our view of the Expert Group Report: 'leave', 'special leave'

47. We have already made it clear that we agree with the analysis by the Expert Group of the existence, the causes, reality and character of the problems flowing from the 1998 Act. **In our view, however, the Expert Group did not pursue the full implications of their excellent analysis.**
48. In the first place, dealing with *“the scope of the appeal”* in paragraph 4.33, they simply state, *“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”*. What is notably absent from this recommendation, and the discussion that leads up to it in the Report, is the failure to take account of the fact that in the rest of the UK the statutory provisions about “leave” have created a quite different system. There is no discussion whatsoever of the anomaly that it is only in the case of Scotland that the Supreme Court has an unqualified statutory right to grant special leave when the court below has not granted leave.

The position elsewhere in the UK

49. In the rest of the UK, leave to appeal to the Supreme Court, including special leave, cannot be granted unless the court from which the appeal lies grants a certificate that a point of law of “general public importance” is involved in the decision, and that court considers that the point is one that ought to be considered by the Supreme Court³¹.
50. If the court from which the appeal lies refuses leave but grants the necessary certificate, then – and then only – can the Supreme Court entertain an application to grant special leave, and grant it if so minded³². The clear result of this is that alleged violations of Convention human rights by public prosecutors elsewhere in the UK can be brought to the courts under the

³¹ See Supplement Paper 2 - Process for assessing whether to certify a point of law of general public importance

³² 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 Supreme Court’ See also Supreme Court Practice Direction 12 – Criminal Proceedings <http://www.supremecourt.gov.uk/procedures/practice-directions.html>

Human Rights Act and its ancillary procedures but the cases in which such alleged violations are dealt with cannot go to the Supreme Court unless the court below issues the necessary certificate.

Comparison with the system for Scotland

51. The conclusion referred to in paragraph 46 yields obvious, closely related questions:

- **Why should the High Court of Justiciary not be placed under the same regime as elsewhere, whereby, there can be no right of appeal to the Supreme Court except in circumstances where, having considered the case in detail, the High Court of Justiciary grants a certificate that the case raises a point of law of general public importance?**
- **Why therefore should the Supreme Court have a wider jurisdiction to hear appeals in Scottish criminal cases than it has in respect of criminal cases from the rest of the UK?**
- **Why, in further consequence, should the actions of Scotland's public prosecutor that are alleged to threaten a violation of statutory human rights be dealt with differently from those of public prosecutors elsewhere in the UK?**

A striking anomaly

52. In our view it is anomalous that the High Court of Justiciary, which for so long³³ has been recognised as the "apex court" in criminal cases originating in Scotland, should find that, as a result of a devolution statute, it has been placed under a broader and, in the light of developing practice since 1998, a more intrusive jurisdiction than has been created for the rest of the UK in relation to applying the law governing human rights issues in criminal cases. The anomaly is heightened in the light of the statutory provisions referred to earlier in footnote 20.

³³ See para 3.2 and Appendix II of Professor Neil Walkers report, *Final Appellate Jurisdiction in the Scottish Legal System*:
<http://www.scotland.gov.uk/Publications/2010/01/19154813/0>

The anomaly neither noticed nor explained

53. The Expert Group does not discuss or express any view about this anomaly. We can find no explanation why it was left out of account, although we recognise that it hardly figured in the submissions. Others have recently written to the Advocate General in support of his Expert-Group-based amendments, which continue the existing system for leave and special leave, but we find no satisfactory reasoning anywhere to justify that position.

Consistency

54. One of the arguments advanced by the Expert Group in favour of allowing the Supreme Court any jurisdiction at all in relation to cases decided in the High Court of Justiciary is that, because the UK is the signatory state to the European Convention on Human Rights, and therefore answerable before the Strasbourg Court, it follows - from the fact that cases from anywhere in the UK may be taken to Strasbourg - that the step of making the Supreme Court the apex court for cases raising Convention violation issues is a necessary means for securing "consistency" throughout the distinct jurisdictions within the union that constitutes the UK³⁴. However, they added, "*That jurisdiction should, however, be clearly limited to ensuring compliance with the international obligations of the United Kingdom*". We would not differ from that.

55. If "consistency" – as already noted we should prefer the term 'coherence' - of approach on the substantive meaning of Article 6 is desirable, uniformity of systems and solutions is clearly not. Since we believe that coherence within the UK is desirable – and indeed that is one reason why we support a continuing jurisdiction for the Supreme Court – then why should 'coherence' not also be respected as regards *procedures of application* for leave to appeal to the Supreme Court? Why should the power of the English courts, through the Court of Appeal, to determine whether or not a case may go to the Supreme Court not be given to the High Court of Justiciary? **The question of leave/special leave in relation to Scottish criminal cases decided in the High Court of Justiciary**

³⁴ *The Scottish Law Commission took a very different view on this matter*

cannot sensibly and properly be discussed without taking these considerations into account.

Proposed amendments to the Scotland Bill

56. In our view, the way to raise this issue for consideration and decision is to add a new subsection to the amendments made in the House of Commons on 21 June 2011. Those amendments include a new section 98A. We propose a new subsection (4A) to the new section 98A. Subsections (4) and the new (4A) of 98A would then, if the amendments were accepted, read as follows:

“(4) An appeal under this section lies from any court only with the permission of that court or, failing such permission, with permission of the Supreme Court.

(4A) Permission is not to be given unless ---

(a) the court from which the appeal lies certifies that the determination raises a point of general public importance, and

(b) it appears to the court giving permission that the point is one that ought to be considered by the Supreme Court.”

57. Skilled parliamentary draftsmen would of course have to put the necessary amendments into proper shape and to show what consequential amendments would be necessary: but the basic idea should be clear enough from what we have written here. In our view, the question of certification to put leave/special leave/permission and the High Court of Justiciary onto the same basis as has been created for the rest of the UK must be properly discussed and debated in Parliament and elsewhere.

DEFINING THE JURISDICTION OF THE SUPREME COURT

58. **In our view, it should be made clear that the jurisdiction of the Supreme Court should be exercised in such a way that it identifies clearly the law that the criminal courts have to apply, but that the application of the law to the case in which the issue is being litigated should be remitted to the High Court of Justiciary.**
59. It is very common indeed for appeal courts, reviewing the law applying to, and applied in, decisions of courts or tribunals, to express the relevant law clearly, and then to remit to the court or tribunal below to apply the law as clarified and expressed to the case in hand³⁵.
60. Once the Supreme Court has defined and expressed the law applicable in response to the point of general public importance raised in the certificate, the High Court of Justiciary should be able to apply that law to the case in hand. This method of proceeding would ensure that the Supreme Court, in dealing with its human rights jurisdiction in criminal cases, would concentrate on identifying and articulating clearly the relevant law contained in the Human Rights Act³⁶ and would not proceed to decide the case as if it were the High Court of Justiciary. **In this way the traditional role of the High Court of Justiciary would be preserved.**
61. There are various ways in which what is proposed in the previous paragraph might be achieved. We have not had time to discuss these possible ways with those, not least the Scottish Justices currently sitting in the Supreme Court, but also the Scottish-based judiciary, who would have to deal with cases under such a system. It would be important to do that. It would also be essential to have skilled advice on the drafting of the provisions that might be necessary to clarify the nature of the Supreme Court's jurisdiction.

³⁵ *The court order often just tells the court or tribunal below to "proceed as accords" – for example, in Cadder the Supreme Court, allowing the appeal, "ORDERED that... the case be remitted to the High Court of Justiciary for further procedure"*

³⁶ *Which incorporates into UK law certain rights contained in the convention*

62. It is also worth observing that the task of defining what the law contained in the Human Rights Act is, and expressing it with binding authority, is one that members of the Supreme Court are eminently capable of carrying out³⁷. The task of applying that law to the circumstances of Scottish criminal cases and procedures is one for which the High Court of Justiciary is fully qualified.
63. This would, in our view, be a sound application of the Strasbourg court's principle of allowing each different jurisdiction a "margin of appreciation" to apply the law in the context of its separate legal system.
64. In this connection, it is important to recognise how different the laws and practice governing Scots criminal evidence and procedure are from those elsewhere in the UK and Europe. We do not provide an exhaustive list, but we mention some by way of illustration: the size of the jury (15 members); the whole method of conducting trials (e.g. no opening speeches) the simple majority verdict; the 'not proven' verdict; the necessity for corroboration; the strict limits on detention before charge and similar strict limits on detention before trial. The differences from England are striking; the differences in "the whole proceedings" in Scotland from those elsewhere in Council of Europe countries even more so.

When to invoke the jurisdiction of the Supreme Court

65. In considering the exercise of jurisdiction by the Supreme Court and the technique of remitting to the High Court of Justiciary to "proceed as accords" or "for further procedure", we have also considered carefully whether the Supreme Court should be asked to give a definitive ruling on the law applicable **but only when the case has been completed**. This would cut out preliminary appeals that delay trial or final disposal of the case.
66. At the moment however, we are inclined to favour allowing the High Court of Justiciary, if so minded, to ask the Supreme Court

³⁷ *We have no hesitation in recognising the expertise in Scots criminal law and procedure of Lord Hope of Craighead and Lord Rodger of Earlsferry: but it is not disrespectful to remember that some of their predecessors had little experience in this area of law and practice. Sadly, Lord Rodger of Earlsferry died while this report was being prepared.*

to give a ruling³⁸ **even before trial** on the human rights law applicable, if in the opinion of the High Court of Justiciary that ruling would assist in the disposal or proper conduct of the case. Again this is a matter on which consultation with judges and others would be appropriate.

Possible new provision about leave/permission/certification

67. We have discussed the possibility of introducing an additional element into the matter of obtaining leave to appeal to the Supreme Court, although we recognise that there is no such element in the system obtaining elsewhere in the UK. There are many examples in court procedures that put the decision whether or not to grant leave to appeal in the hands of the judge or court whose decision a litigant seeks to challenge. There are also types of case in which, if the deciding bench consists of three or more judges, leave to appeal is automatically granted, if one of the judges *dissents* from the decision of the court³⁹.

68. We raise the possibility of introducing such a rule in cases in which there is a dissent in a bench of three or more judges in the High Court of Justiciary. In our view, this should be considered in the context of adding a new provision about leave/special leave such as that discussed above. We have also discussed the possibility of introducing a different technique, the purpose of which would be to introduce an independent element into the decision whether or not to grant leave/certificate. For example, there might be a requirement to consult other senior judges. That is a step that can already be taken in the High Court of Justiciary.

69. However, ideas of this kind would need to be discussed with the judiciary, and others, to see if they are workable. We have not had time to reach a definite conclusion.

³⁸ *Preliminary but definitive*

³⁹ *For example, civil appeals in Scotland from interlocutory judgments from the Inner House, as opposed to those on the merits where there is a difference of opinion among the judges or where the interlocutory judgment is one sustaining a dilatory defence and dismissing the action – See Walker report at paragraph 3.5*

Powers of the Supreme Court

70. When considering new provisions to enable the Supreme Court to concentrate on defining the law applicable to any case before it, it will be necessary to consider what powers it should have. If our suggestion were to be accepted – that it should in effect answer the question of law and remit to the High Court of Justiciary for further procedure then appropriate statutory provisions would be needed to give effect to this concept⁴⁰.

Unresolved issues

71. We have not, as yet, discussed fully existing provisions that allow References to the Supreme Court by the Lord Advocate and similarly by the Advocate General. This is a matter for consideration at a later date.

⁴⁰ *Effectively, the Supreme Court's jurisdiction would begin to resemble the Preliminary reference jurisdiction in the ECJ. See the Walker Report, Chapter 6 and the Supplement*

SUMMARY OF ADVICE

72. **We agree with the Expert Group that serious problems have arisen - in relation to the jurisdiction of the Supreme Court in criminal cases involving human rights issues - because the statutory basis in the Scotland Act 1998 for that jurisdiction is unsatisfactory (cf. paragraphs. 42 and 43). We do not suggest that the jurisdiction of the Supreme Court should be ended.**
73. **We endorse the general solution proposed by the Expert Group and adopted by the House of Commons on 21 June 2011 to create a different procedure for human rights appeals, but we advise consideration of a new provision governing permission to appeal to the Supreme Court from a determination by the High Court of Justiciary of any question of “compatibility”, as defined in the new Section 98A (2) (paragraphs 53 to 57).**
74. **Our proposed new provision (outlined in paragraph 56) would put the High Court of Justiciary on an equal footing with its counterparts elsewhere in the UK by enabling the Supreme Court to grant permission to appeal only if the High Court of Justiciary has granted a certificate that the case raises a point of general public importance. Other issues about permission are suggested for further discussion (paragraphs 67 to 69).**
75. **It should be made clear that, in criminal appeals from the High Court of Justiciary on “compatibility” questions, the Supreme Court’s jurisdiction is to 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 (paragraphs 60 to 64). In this way the traditional role of the High Court of Justiciary, reflecting the long history of separate development of the Scottish criminal system, would be preserved. The precise method of achieving this clarification should be fully discussed with those who have to deal with such cases in practice.**
76. **We advise that careful consideration be given to a general rule that normally the Supreme Court should give a ruling on a “compatibility” question only after the case has been**

completed. However, it might be wise to permit the High Court of Justiciary to ask the Supreme Court for a ruling at an earlier stage (paragraphs 65 and 66). We have not, as yet, fully discussed the provisions that allow References to the Supreme Court by the Advocate General or the Lord Advocate.

77. We are prepared to consult interested parties on the way forward following publication of this Report and the subsequent Parliamentary debate.

JOHN McCLUSKEY
Chair, Review Group

GLOSSARY

ACTS OF ADJOURNAL

Rules of criminal court procedure made by the High Court of Justiciary under statutory authority.

ACT OF THE LORD ADVOCATE

The Scotland Act 1998 prohibits members of the Scottish Executive from acting incompatibly with Convention Rights or European Community Law. By virtue of section 44(1) (c) of the Scotland Act 1998, the Lord Advocate is a member of the Scottish Executive. Accordingly and by virtue of section 57(2) of the Act, anything done by the Lord Advocate in the conduct of a prosecution must be compatible with Convention Rights or EC law. An act includes a “failure to act”.

ADVOCATE GENERAL

The Advocate General is a Law Officer and a Minister of the Crown. He is the UK Government's principal legal adviser on Scots law and its senior representative within the Scottish legal community.

ASP

Act of the Scottish Parliament.

DEVOLUTION JURISDICTION

The jurisdiction of the Supreme Court to resolve disputes relating to devolution in the United Kingdom concerning the legal powers of the three devolved governments and/or laws made by the devolved legislatures. These disputes are known as “DEVOLUTION ISSUES”.

DEVOLUTION MINUTE

In criminal court proceedings, the written notice lodged in court setting out the details of a devolution issue. A copy must be sent to all the other parties and be intimated to the Advocate General, who may then decide to intervene in the case.

ECHR

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. It sets out a number of “Convention Rights”, with which, by virtue of the Human Rights Act 1998, all public authorities in the United Kingdom must comply.

EUROPEAN COURT OF JUSTICE (ECJ)

The European Court of Justice is the Luxembourg-based court that rules on questions arising under EU law raised in the courts of member countries and which have to be decided to enable those courts to determine the issues in dispute before them.

EUROPEAN COURT OF HUMAN RIGHTS (ECtHR)

The European Court of Human Rights is an international court set up by the Council of Europe in 1959 and is based in Strasbourg. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. Since 1998 it has sat as a full-time court and an individual claiming a violation of the Convention can apply to it directly after exhausting all his domestic remedies.

HIGH COURT OF JUSTICIARY

The High Court of Justiciary is Scotland's supreme criminal court. It sits both as a trial court and an appeal court. It has jurisdiction over the whole of Scotland and over all crimes, unless that jurisdiction is excluded by statute.

HUMAN RIGHTS ACT 1998 (HRA)

The Act incorporates into UK law certain rights contained in the European Convention.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (JCPC)

The Judicial Committee of The Privy Council is the court of final appeal for UK overseas territories and Crown dependencies, and for certain Commonwealth countries. Prior to the Constitutional Reform Act 2005 the Privy Council was the court of final appeal regarding devolution issues. On 1 October 2009 this jurisdiction was transferred under the 2005 Act to the Supreme Court of the United Kingdom.

LEAVE TO APPEAL

Leave to appeal is the permission of a court to appeal its judgment to a higher court.

LORD JUSTICE GENERAL (LJG)

The most senior judge in the High Court of Justiciary. He normally presides in the Appeal Court in the most serious and complex appeal cases.

LORD JUSTICE CLERK (LJC)

The second most senior judge in the High Court of Justiciary, who also regularly presides in serious and complex cases in the Appeal Court.

OPINION

A judgment by the High Court of Justiciary in its appeal capacity setting out the detailed reasons for its decision in a case.

PETITION FOR SPECIAL LEAVE TO APPEAL (TO THE SUPREME COURT)

If leave to appeal to the Supreme Court on a devolution issue is refused by the High Court sitting in its appellate capacity, the aggrieved party may petition the Supreme Court directly for special leave to appeal to that court.

REFERENCE

This is a procedure whereby a devolution issue may be referred to the Supreme Court in any ongoing criminal case.

SCOTLAND ACT 1998

This Act established the Scottish Parliament and the Scottish Executive. The Act does not specify those areas for which the Scottish Parliament and Executive have responsibility (devolved matters) but rather specifies those areas for which they do not (reserved matters). Reserved matters are beyond the legislative competence of the Scottish Parliament.

SCOTTISH GOVERNMENT

Following the election of the SNP administration in 2007, the term Scottish Government replaced that of the "Scottish Executive". However, Scottish Executive remains the legal term under the Scotland Act 1998.

SCOTTISH LAW COMMISSION

The body charged with producing proposals for reform of all aspects of Scots law, whether reserved or devolved.

SOLEMN CASES

Cases prosecuted before a jury, either in the High Court or the Sheriff Court.

STRASBOURG

Our shorthand reference to the European Court of Human Rights.

SUMMARY CASES

Cases prosecuted before a judge sitting without a jury. The judge may be a Sheriff or (in Glasgow only) a Stipendiary Magistrate, both of whom are legally qualified and full time office-holders. But many summary cases are tried by lay Justices of the Peace, who preside on a part-time basis along with a legally-qualified assessor or clerk.

SUPREME COURT OF THE UNITED KINGDOM

Established on 1 October 2009, the Supreme Court of the United Kingdom is the final court of appeal in all matters arising under English law, the law of Northern Ireland and in civil cases from Scotland. The Supreme Court also has jurisdiction to resolve all disputes relating to devolution in the United Kingdom: see above "DEVOLUTION JURISDICTION".

ULTRA VIRES

Beyond the legal authority of the person or body which purports to do something.