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Review Group Secretariat
Area 1-C (North)
Victoria Quay
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Dear Sir / Madam,

Examination of the relationship between the High Court of Justiciary and the Supreme Court in Criminal Cases

We write in response to the first report of the Review Group regarding the above. We apologise for not having been able to do so by the 12th August as requested, but are submitting these comments nonetheless in case they are of use to the Group, particularly as they include data which may not readily otherwise be available.

General Comments

The context for the setting up of Review Group was a perception that the system of an appeal from the High Court of Justiciary to the Judicial Committee of the Privy Council and later to the Supreme Court of the United Kingdom posed a threat (actual or potential) to the integrity and identity of the Scottish criminal justice system. This factor is also mentioned in the Group's Terms of Reference.

It is therefore surprising that the Report does not present any analysis of the decisions of the Judicial Committee and the Supreme Court to consider the issues involved in such a claim and to examine whether they have any validity.

We have examined 27 cases on Scottish devolution issues decided by those courts. That research is ongoing but as a preliminary matter, we would offer the following data relating to the outcome of these cases: in terms of success or otherwise of the appeals:

Yes at instance of accused, overruling unanimous lower court	6
Yes at instance of Crown, overruling unanimous lower court	2
Yes at instance of accused, overruling split lower court	0
Yes at instance of Crown, overruling split lower court	1
No, upholding unanimous lower court	15
No, upholding split lower court	0
No, lower court bypassed (devolution minute not received)	1
N/A, Crown reference	2

Excluding references, this amounts to a "success rate" of 36%, and this excludes cases where leave was sought but not granted. Furthermore, by concentrating on the cases of successful appeals we have concluded that there is no basis for the view that the courts are imposing English law onto the Scottish criminal justice system or that the courts are imposing doctrines into Scots criminal law which are inconsistent with its fundamental principles (including its adherence to the ECHR). There is, accordingly, no reason to think that the Supreme Court is somehow interfering in Scots law.

Responses to specific questions

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

No.

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

We note the following:

(a) Unless the position regarding civil appeals from the Court of Session to the Supreme Court is also modified, the "coherence" referred to in paragraph 55 cannot be achieved.

(b) More fundamentally, the Group's key argument (paragraphs 54-55) is based on the need for consistency between the ways in which appeals to the Supreme Court are dealt with in the different legal systems in the United Kingdom. The Group conclude that this requirement calls for the same rules of procedure to be applied in all the systems in respect of leave to appeal and/or certification. What the Group fails to point out is that in the other legal systems in the United Kingdom appeals to the Supreme Court are competent on all aspects of criminal law, evidence and procedure and not just, as in Scotland, on matters which fall within the definition of

devolution issues. In those systems the requirement of a procedure of leave to appeal and/or certification, makes sense given the potential for a very large volume of appeals the Supreme Court. By contrast in Scotland that goal is already achieved by limiting appeals to devolution issues.

It is surprising that this difference in the scope of appeals between the different systems is not alluded to in the Report. Indeed at paragraph 51 the Group suggests that the Supreme Court has a wider jurisdiction to hear appeals in Scottish criminal cases than it has in respect of criminal cases from the rest of the UK. This proposition is, quite simply, wrong.

(c) The characterisation of a certificate (in English law) as a power "to determine whether or not a case may go to the Supreme Court" does not provide an accurate representation of the process. Certification is not a grant of leave, and the Court of Appeal in England will frequently grant a certificate while refusing leave to appeal. The rationale for certification is unclear (cf (d) and (f) below) but perhaps the best rationale for the certification process is that it prevents the Supreme Court from being troubled with an excessive number of hopeless petitions for leave to appeal. If that is so, then unless any problems have been found with the number of such petitions from Scotland (and this does not appear to be the case) there is no need to introduce such a requirement in respect of Scottish appeals.

(d) It is not clear that the certification process is a desirable one. The Royal Commission on Criminal Justice (Cd 2263: 1993, para 10.79) recommended its abolition.

> "We agree that it is unduly restrictive to require such a certificate to be issued in addition to the necessity of obtaining leave from the Court of Appeal or the House of Lords itself. We think therefore that the requirement that the Court of Appeal certify that the case involves a matter of law of general public importance should be dropped. The need to obtain the leave of either the Court of Appeal or the House of Lords before proceeding further is by itself a sufficient filter." (p 178).

(e) "General public importance" is not a high threshold. (In English law, it represents a departure from a former requirement of "exceptional public importance", as found in the Criminal Appeal Act 1907 s 1(6); replaced by the Administration of Justice Act 1960 s 1(2)). Given the scope of the Supreme Court's jurisdiction in Scottish criminal matters, it is difficult to see how any issue falling within that jurisdiction could *not* be a point of law of general public importance. The argument that a certification process is required in order to ensure coherence therefore fails.

(f) The concept of "general public importance" is, moreover, an ill-defined one. When the Court of Appeal in *R v Cooper* (1974) 59 Cr App R 120 sought to give reasons for refusing such a certificate, it found itself limited to saying (at 130 per Widgery LCJ):

> "So far as the third point is concerned, this we accept at once does disclose a point of law. The question we have to decide is whether we should certify it as being a point of law of general public importance, and thus fit for consideration by the highest tribunal in the land. We have come to the conclusion in the end that it does not. It is with all deference to Mr. Turner-Samuels a novel point; it is a point upon which there is no authority, and it is a point which does not appeal to us as being one requiring the consideration of the highest tribunal.
>
> Accordingly, when we ask ourselves whether the point of law thus disclosed if one of general public importance, we find it lacks the element of importance which is an essential feature of certifying. Accordingly, not without considerable care and anxious thought, we have come to the conclusion that none of these points is certifiable…"

The case for introducing such a poorly defined concept into Scots law has not been made out. Moreover, there has been no suggestion – and it seems to us that there could not possibly be any suggestion – that any case which has gone to the Supreme Court or Judicial Committee from the High Court of Justiciary did *not* involve a point of law of general public importance. If no such point were involved, leave to appeal would not have been granted. Again, the best rationale for a certification process seems to be that it avoids an otherwise excessive workload which might be faced by the Supreme Court in dealing with applications for leave to appeal. There is no evidence that this is a problem in respect of Scottish appeals. It should certainly not be open to the High Court of Justiciary to in some way "protect the integrity" of Scots law by refusing certification, and – noting the Group's reliance on coherence – we would point out that nothing of this nature forms part of the Court of Appeal's equivalent English role

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

If the rationale for such a pre-condition is simply to save wasted time (and it is difficult to see any other) then the High Court bench that decided the appeal should alone be responsible for deciding the point, otherwise the advantage is at least significantly diminished and possibly lost entirely.

4. Should leave/permission be automatically granted if the decision of the judges constituting the court that has decided the appeal is not unanimous?

No. A lack of unanimity may, for example, disclose nothing more than a disagreement as to the application of an agreed rule of law to the circumstances of a particular case. There would be nothing for the Supreme Court to decide in those circumstances.

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

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

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

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

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

We express no view on this matter beyond those inherent in our comments above.

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

We do not see any practical value, but do see unnecessary disruption and expense, in the first suggestion.

As for the second, of 27 devolution issue cases thus far heard by the Judicial Committee or the Supreme Court, 25 cases have been decided unanimously, one with the Scottish judges in the majority and one with the two Scottish judges split between the majority and minority (*Martin v HM Advocate*), there would seem to be no value in this. There is no reason for thinking that a majority of Scottish judges is in some way necessary to protect Scots law.

7. Is there anything that you would wish to add?

No.

Yours sincerely,

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