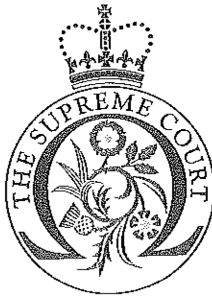

SOLICITOR TO THE
05 OCT 2010
ADVOCATE GENERAL

Lord Hope of Craighead KT
Deputy President of The Supreme Court of the United Kingdom

Devolution issues and acts of the Lord Advocate

1. I should like to submit these brief comments in response to your request for views as to whether the application of section 57(2) of and Schedule 6 to the Scotland Act to acts of the Lord Advocate, in her capacity as prosecutor, cause problems for the operation of the courts or system of criminal justice in Scotland. I must emphasise that I offer these comments in my personal capacity only and not on behalf of the Supreme Court as a whole.

2. In practice, the system for appeals to the JCPC and now the Supreme Court under para 13 of Schedule 6 has not proved to be unduly burdensome. Petitions for leave to appeal are not very numerous, and they are almost always dealt with on paper without the need for an oral hearing (but see *Hoekstra v HM Advocate (No 3)* 2001 SC (PC) 37 and *Follen H M Advocate* 2001 SC (PC) 105). 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. The fact is however that almost all the devolution cases that have reached our level do relate to the acts of the Lord Advocate in her capacity as prosecutor. This has inevitably brought the Scottish criminal justice system under judicial scrutiny in London in a way that was not, to the best of my recollection, anticipated when the Scotland Bill was being examined in Parliament. I am acutely conscious of the need to separate devolution issues from issues about Scots criminal law and procedure which are not within the Court's jurisdiction. The margin is, of course, a narrow one when we are dealing with issues such as the law relating to disclosure which affect the law of evidence. But we have to take the devolution system as we find it. There have inevitably been cases where we have felt it necessary, in our interpretation of the reach of the Convention rights in matters of evidence or procedure, to disagree with the High Court of Justiciary. I must leave it to others to judge whether this has been to the benefit of the system as a whole.

4. The fact that there will inevitably be a number of English lawyers on the panel has proved to be troublesome in only one case: *R v HM Advocate* 2003 SC (PC) 21, where the majority was composed of three Scots Lords of Appeal and the two English Lords of Appeal dissented. The decision in that case was later reversed, as it was found not to be

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sustainable in the light of a subsequent ruling in Strasbourg: *Spiers v Ruddy* 2009 SC (PC) 1. I doubt very much whether it would have been possible to uphold it in any event, as that case was heard by a panel with an English majority who had already reached a contrary decision in a seven judge English case. The issue of time limits is an acutely sensitive one in England, which has a system of time limits in criminal cases that not nearly as strict as those in Scotland.

5. For the most part however 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 any matters of Scots 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 that advantage.

3 October 2010

David Hope.