Cabinet Secretary for Justice
Kenny MacAskill MSP

T: 0845 774 1741
E: scottish.ministers@scotland.gsi.gov.uk

The Scottish Government

The Rt Hon the Lord Wallace of Tankerness QC
Advocate General for Scotland
Dover House
Whitehall
London
SW1A 2AU

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Dear Sir

Your officials have advised the Scottish Government of the publication of draft clauses for the Scotland Bill by which you propose to implement the Expert Group report on devolution issues and acts of the Lord Advocate. While we may disagree on the fundamental direction of these reforms, the Scottish Government is nevertheless keen to contribute to your consultation.

The position of the Scottish Government remains that the High Court of Justiciary should be restored to its pre-devolution position at the apex of Scottish criminal justice. We note the argument that a court with two Scottish judges might be thought more acceptable than one with none. In fact, what we are arguing for is that issues of Convention rights in criminal matters should ordinarily be decided, for Scotland, by a court composed *entirely* of judges belonging to the Scottish legal system. By any standards, this is the normal position for a legal system under the Convention.

It is suggested that the UK Supreme Court ensures that the fundamental rights enshrined in international obligations are secured in a consistent manner for all those who claim their protection in the United Kingdom. This, however, ignores both the historically separate Scottish jurisdiction in criminal matters and the fact that full consistency is likely to be, in any case, unattainable. As the Sheriffs' Association remarked in response to the Expert Group:

Given the unique features of the law in Scotland, it may not be possible to interpret the requirements of article 6 in precisely the same way in all of the United Kingdom jurisdictions.

This reflects the fact that Scots law has many features that provide protection for human rights that are unique within the United Kingdom. In my view that provides a higher level of protection than in many other jurisdictions. My concern is that your proposals will lead to an unnecessary and unwelcome homogenisation of Scots law with that of the rest of the UK.

This raises a further unwelcome prospect of a weakening of the current exceptionally strong protections for human rights within the Scottish system.

That said, we would be doing Scotland few favours by refusing to engage with the narrower issues set out in your consultation. We welcome the proposed amendments to sections 57(3) and 102 of the Scotland Act 1998. We are, however, deeply concerned about the potential implications of an appeal mechanism to the UK Supreme Court. Consequently, and without prejudice to our view that there should be no such appeal, we would make the following observations in response to the specific questions you ask in your consultation:-

1. There should indeed be a requirement that the High Court certify that a case raises a point of law of general public importance, and grants leave to appeal, before appeal is allowed to the Supreme Court.

2. In the event of the High Court refusing leave to appeal or declining to certify a case as one of sufficient importance, that should be final. It should not be possible to seek leave instead from the Supreme Court.

3. Both the Lord Advocate and the Advocate General should have open to them a reference procedure analogous to that in the Criminal Procedure (Scotland) Act 1995, by which they submit cases to the UK Supreme Court. There should also be a reference procedure for the Lord Advocate and Advocate General for proceedings which have not reached final decision, to achieve faster decision-making in appropriate cases. All such references should proceed only with the certification and leave of the High Court.

I hope these views are of some assistance to you in developing proposals for the Scotland Bill, and am very willing to discuss these matters further with you.

KENNY MACASKILL