FACULTY OF ADVOCATES

RESPONSE BY THE FACULTY OF ADVOCATES

to

the request for further consultation by the Office of the Advocate General for Scotland in relation to

Devolution Issues and acts of the Lord Advocate – Consultation on clauses

Introduction

[1] Views have been sought by the Office of the Advocate General in relation to draft clauses which have been prepared for inclusion in the Scotland Bill currently before Parliament.

[2] In particular, comments were requested on the following issues:

- Should there be a requirement that the High Court (sitting as a Court of Criminal Appeal) certify that a case raises a point of law of general public importance, and grants leave to appeal, before the appeal is allowed to the Supreme Court? And in the event of certification but a refusal of leave, should it be possible to seek leave to appeal from the Supreme Court?

- Should provision be made for appeals to be taken to the Supreme Court direct from a trial court without the involvement of the Court of Criminal

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- Appeal (so-called "Leap-frog" provisions)? And, if so, then which parties should permitted to do this and under what condition?

- Should the Lord Advocate's Reference procedure currently contained in the Criminal Procedure (Scotland) Act 1995 be extended to allow for references to the Supreme Court?

[3] Comments were also invited on any other aspect of the draft clauses.

[4] The view of the Faculty in respect of each of the issues raised is set out below together with some comments about the drafting of the proposed clauses.

Issue 1 – Certification of cases and grant of leave

[5] As a preliminary comment, the consultation paper does not make it clear whether the intended effect of the proposed certification is to circumscribe the jurisdiction of the Supreme Court to determine the cases it hears. In other words, whether the intended effect of the proposed certification is to prevent the Supreme Court from hearing a case in the absence of such certification by the High Court.

[6] For the avoidance of doubt, the Faculty is strongly of the view that the proposed changes to the Scotland Act should not alter 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.

[7] This is for two principal reasons.

[8] First, to alter the present arrangement in respect of appeals concerning issues of compatibility of the acts of the Lord Advocate (as defined in subsections 98A(1) and (2) of the draft clauses) would significantly alter the position of the Supreme Court in respect of this class of appeals alone. At present it is clear as a matter of statute that the Supreme Court itself is the ultimate arbiter of any

question necessary to be determined for the purposes of doing justice in an appeal.[1] In the case of devolution issues, this necessarily includes determining whether the Supreme Court has jurisdiction.[2] However, no explanation is put forward in the consultation to justify interfering with the primacy of the Supreme Court in determining its jurisdiction to hear the proposed new class of appeals. In these circumstances, the Faculty considers that the *status quo* should not be disturbed.

[9] Second, the Supreme Court has recognised the importance of preserving this avenue because of a tendency by the High Court to construe the devolution issue jurisdiction narrowly.[3] 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 had itself refused leave to appeal, let alone grant leave to appeal to the Supreme Court.[4] 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 that result is plainly undesirable.

[10] In short, bearing in mind both the salutary effect of the decisions of latterly the Supreme Court on the conduct of criminal proceedings in Scotland and the need to ensure that fundamental rights are secured in a consistent manner across the United Kingdom[5], the Faculty submits that the Supreme Court remains best placed to determine its own jurisdiction. It is important to bear in mind in

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[1] See section 40(5) of the Constitutional Reform Act 2005
[2] See *McDonald v HM Advocate* 2010 SC (PC) 1 at [15] – [17], [48] – [49]; and *Allison v HM Advocate* 2010 SC (UKSC) 19 at [6]
[3] See *McDonald v HM Advocate* (above) at [16]
[4] 2010 SLT 1125 at [9] and [11]-[12]
[5] See Report of the Expert Group at paragraphs 4.14 and 4.15

this regard that at present, the Supreme Court is sparing in its grant of permission to appeal.[6]

[11] Over and above this preliminary comment, the Faculty observes that the certification of points as being of general public importance may be of assistance in focusing the issues in a case in advance of a hearing before the Supreme Court. At present, particularly when permission to appeal is granted by the Supreme Court, it is not always apparent in respect of which particular issues arising in the case the permission related.

Issue 2 – "Leapfrog" provisions

[12] At present, both the Lord Advocate and the Advocate General have the power, in terms of paragraph 33 of Schedule 6 of the Scotland Act 1998, to require any court or tribunal to refer to the Supreme Court any devolution issue which has arisen in proceedings to which either is a party.

[13] The Faculty considers that the existence of the present provisions, although not exercised particularly frequently, is both logical and practical. As such, the Faculty considers that equivalent provisions should be included in respect of the proposed new appeal to the Supreme Court.

[14] In this regard, the Faculty also observes that if such provisions are to be included in respect of the proposed new appeal it will be necessary to re-draft subsection 98A(3) of the draft clauses to make clear that, in these circumstances, an appeal may lie even where there has not been a determination by a court of two or more judges of the High Court.

[15] Finally, the Faculty would also suggest that an equivalent right should be given to the High Court (sitting as a Court of Criminal Appeal) to exercise either

[6] See the submission of Lord Hope of Craighead to the Expert Group at paragraph 2.

ex propio motu or, having been moved to do so by an appellant, if the court considers it in the interests of justice to do so.

Issue 3 – Lord Advocate's reference

[16] The Faculty considers that, in cases raising issues of compatibility of the acts of the Lord Advocate, it is logical and practical to extend the Lord Advocate's power under section 123 of the Criminal Procedure (Scotland) Act 1995 (the "1995 Act") to include references to the Supreme Court.

Other comments on the draft clauses

[17] The Faculty notes that in subsections 98A(7) to (9) of the draft clauses express provision is made to enable the Supreme Court to apply the relevant provisions of the 1995 Act relating to the determination of appeals. These provisions will have the effect that the Supreme Court is to apply the same test of miscarriage of justice which is applied by the High Court (sitting as a Court of Criminal Appeal).

[18] The Faculty welcomes these proposed provisions in that they would make clear beyond doubt that there is to be no difference in approach to determination of appeals by the Supreme Court and the High Court (sitting as a Court of Criminal Appeal)[7]. As was made clear by the Supreme Court in *McInnes,* "...[i]t is axiomatic that the accused will have suffered a miscarriage of justice if his trial was unfair."[8]

[19] Finally, the Faculty would also make the following two observations on the drafting of the proposed clauses:

- First, there appears to be an inconsistency between subsections 98A(3) and (4). Whereas the former states that an appeal under the section shall

[7] *Cf Fraser v HM Advocate* 2008 SCCR 407 at [214] to [220]
[8] *McInnes* at [23] *per* Lord Hope of Craighead

lie to the Supreme Court against the determination by a court of two or more judges of the High Court, the latter section states that an appeal under the section lies from "any court". (This point may, in any event, require to re-drafted if the "leap-frog" provisions discussed above in Issue 2 are included.[9])

- Second, the opening wording of subsection 98A(7) is unhelpfully ambiguous. It is not immediately apparent what "[t]hose subsections" refers to. Given, as discussed above[10], the importance of this subsection, it is suggested that this wording is made clearer.

[9] See paragraph [14] above.
[10] See paragraph [18].