Response to invitation to comment on proposed changes to Section 57(2) of the Scotland Act 1998

I am a solicitor in private practice. My practice, Taylor & Kelly, in the main focuses upon taking forward challenges against Scottish Ministers on behalf of prisoners. Many of the Court cases that I have commenced on behalf of clients incorporate Convention rights challenges on the basis of what is said to be a breach of Section 57(2) Scotland Act 1998 ("SA").

I was the instructing solicitor in the following cases:

1. **Napier v. Scottish Ministers** 2005 SC 307, IH; 2004 SLT 555, OH; 2001 Prison Law Reports 347. Successful judicial review challenge to the slopping out regime imposed on remand prisoners in Scotland on the basis of breach of Articles 3 and 8 ECHR, as well as common law duty of care.
2. **Davidson v. Scottish Ministers (No. 1)**, 2006 SC (HL) 42; 2002 SC 205, IH; [2002] 1 *Prison Law Reports* 58, OH; 2002 SCLR 166. Successful constitutional challenge to the non-availability of interim and final coercive court orders in respect of the acts and omissions of the Scottish Government.
3. **Davidson v. Scottish Ministers (No. 2)**, 2005 SC (HL) 7; 2003 SC 103, IH. Successful challenge to the Inner House decision in *Davidson No. 1* on the grounds of apparent judicial bias given previous legislative and executive involvement of one of that bench when Lord Advocate in the very legal issue raised in that case.
4. **Somerville & Ors v Scottish Ministers** [2007] UKHL 44, [2007] 1 WLR 2734, 2008 SC (HL) 45; 2007 SCLR 830; [2006] CSIH 52, 2007 SC 140 IH; [2005] CSOH 24; 2004 SLT 1263, OH These were judicial review petitions taken on behalf of serving prisoners seeking to challenge the lawfulness of the decisions of the Scottish Ministers in relation to placing them in conditions of segregation as a method of overall prison management rather than individual prisoner discipline. The matter was appealed, with leave of the Inner House, to the House of Lords where argument was heard over a one week period in July 2007. The House of Lords held that the petitioners were correct in selecting the Scotland Act 1998 as the appropriate vehicle for claiming a breach of convention rights by Scottish Ministers
5. **Smith v Scott** 2007 SC 345; 2007 SLT 137; 2007 SCLR 268. A successful application for a declarator of incompatibility in respect of the statutory blanket prohibition on prisoners voting at Scottish and UK Parliamentary elections. This involved an application to the Electoral Registration Officer; an appeal to the local sheriff at Alloa and then an appeal to the Registration Appeal Court
6. **A v Scottish Ministers** [2007] CSOH 189; 2008 S.L.T. 412; 2008 S.C.L.R. 105; 2008 G.W.D. 6-97 a petitioner brought a case before the Outer House of the Court of Session challenging the Convention compatibility, in terms of Article 8 ECHR, of the notification requirements on sex offenders. Although unsuccessful at first instance his appeal against the decision was upheld by the Inner House.
7. **Ruddy –v- Griffiths** 2006 SC (PC) 22, 2006 S.C.C.R. 151; 2006 SLT 478; 2005 S.C.C.R. 134 (HCJ) 2005 JC 210, 2005 SLT 131 the Judicial Committee of the Privy Council held that principle of acquiescence applied to a bill of suspension presented to the High Court of Justiciary challenging the use of temporary

Sheriffs presiding over criminal convictions. The subsequent devolution minute in Mr Ruddy's criminal process from Airdrie Sheriff Court was referred directly from that court by the Lord Advocate in terms of paragraph 33 of Schedule 6 to the Scotland Act 1998. The Lord Advocate successfully persuaded the Judicial Committee to overrule its previous decision in *R v HM Advocate:* see *Spiers v Ruddy*

8. **Sinclair v HM Advocate** 2005 SC (PC) 28; 2005 SCCR 446; 2004 SCCR 499(HCJ) ; 2004 SLT 794 concerned a devolution issue regarding the failure of the prosecution prior to the commencement of a criminal trial to disclose evidence of the police statements of a crown witness. The Judicial Committee of the Privy Council held this to be a breach of Article 6 ECHR which vitiated the fairness of the trial. It quashed the conviction of the appellant and recast the Law of Scotland in relation to disclosure, described by Professor Peter Duff as "*Sinclair and Holland: A revolution in 'disclosure*"', 2005 SLT (News) 105).
9. **Speirs v Ruddy** [2007] UKPC D2; [2008] 1 A.C. 873; [2008] 2 W.L.R. 608; 2008 S.L.T. 39; 2008 S.C.C.R. 131; [2008] H.R.L.R. 14; 2007 G.W.D. 40-700; Times, December 31, 2007 concerned a referred devolution issue from Airdrie Sheriff Court directly to the Judicial Committee of the Privy Council by the Lord Advocate by virtue of the power contained in the Scotland Act to overrule previous settled authority on the question of the remedy to be afforded to an appellant where more than reasonable time had elapsed.
   See *Delay, expediency and judicial disputes: Spiers v Ruddy* Edin. L.R. 2008, 312.
10. **R (F) v Secretary of State for Justice** [2010] 2 WLR 992, UKSC intervention with leave of the UK Supreme Court on the question of the incompatibility with Article 8 of the notification scheme under the Sex Offenders Act 2003.
11. **Cadder v HM Advocate** UKSC. Intervention on behalf of JUSTICE in connection with the application to Scots Law of the rule expounded in the Grand Chamber decision of *Salduz v Turkey* (2008) 49 EHRR 421 and reviewing the correctness of the unanimous seven judge decision of the Appeal court in *McLean v HM Advocate* [2009] HCJAC 97, 2010 SLT 73

I have written upon several aspects of devolution:

'*Spiers v Ruddy*: Delay is Dead': Scottish Criminal Law September 2008

'Bringing Remedies Home: Scotland Act 1998' 2009 SLT (News) 87

I am a visiting Professor of Human Rights in the University of Strathclyde

<u>Scope of Consultation</u>

As I read the brief paper setting out the matters upon which responses are invited, there are two separate aspects which are said to raise concern. These are:

1. The procedure for raising a devolution issue under Schedule 6 SA together with the necessary intimations etc upon the Office of the Advocate General.

2. A wider question about the application of Section 57(2) SA to acts of the Lord Advocate as prosecutor

The Raising of a Devolution Issue

I am assuming for the purposes of this response that the expert group are well aware of the civil and criminal rules of procedure to apply in connection with the raising of devolution issues – Act of Sederunt (Proceedings for Determination of Devolution Issues Rules) 1999; Act of Adjournal (Devolution Issues Rules) 1999. I will not rehearse them in any detail here.

Criminal

There seems to have been a concern raised by the Judiciary of the Court of Session in the response to the Calman Commission that the raising of a devolution issue is somehow constrained by the imposition of these procedural rules and time limits, especially that created by the Act of Adjournal. Whilst it is not difficult to see that on the face of it the timetable is in certain instances tight (and in others impossible) it is difficult to see, and point to specific instances of, devolution issues which have not been raised or determined in proceedings as a result of the operation of these rules and procedures.

In criminal cases the time limit for raising devolutions issues runs from the commencement of proceedings and in some instances before that. The importance of following the procedure laid down in the Act of Adjournal has been repeated several places.

In *Mills v HM Advocate* 2001 SCCR 831 the Advocate General for Scotland intervened to have the importance of following the intimation route as laid down in the Act of Adjournal underlined by the Appeal Court:

[18] "Devolution issues" are defined in para 1 of Sched 6 to the Scotland Act 1998. By para 1 (d), "devolution issues" include "a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights or with Community law". Paragraph 1 (e) is in similar terms in relation to failures to act by members of the Scottish Executive. Paragraph 5 of Sched 6 provides: [his Lordship quoted the terms of para 5 and continued:]
[19] On the terms of these provisions, it does appear that, if a question arises in any proceedings as to whether any act or failure to act on the part of the Lord Advocate is in breach of the Convention, then that automatically raises a devolution issue and brings into play the requirement to intimate. It might be argued that an accused person could make a challenge to the court proceedings on the ground that they were incompatible with his Convention rights without stating a challenge to the powers of the Lord Advocate to proceed. However, on the view hitherto taken, a challenge to the court proceedings in any form implies a challenge to the powers of the Lord Advocate, at least up to the stage of conviction. If so, we can see no reason to hold that the coming into force of the Human Rights Act has altered that situation and, therefore, no reason to treat the coming into force of the Act as having modified the requirement to intimate to the Advocate General. Indeed there are a number of reasons why it should be regarded as not having removed that requirement. The Human Rights Act and the Scotland Act were passed at much the same time and the legislature must be taken to have had both Acts in mind while they were passing through the legislative process. Most surprisingly, none of the counsel addressed us on the authorities

relating to the principles of statutory construction to be applied in these circumstances. In our view, however, it would be quite inappropriate to read either set of provisions as superseding the other. There is no necessary contradiction or inconsistency between s 6 of the Human Rights ***1365*** Act and para 5 of Sched 6 to the Scotland Act. If it could be said that the requirement to intimate did constitute a restriction or burden on the Convention right then there might be room for an argument that the requirement was itself inconsistent with the Convention. But we were not given any authority for holding that a mere requirement to intimate might be held unlawful on such a ground. There is also, in our view, force in the argument that the particular and detailed provisions dealing with devolution issues are part of the constitutional settlement embodied in the Scotland Act and that requirement should not therefore be avoided or circumvented. If the effect of the provisions is that appeals are open to the Privy Council on matters involving questions of Scots criminal law, that, in our view, must simply be accepted. It does not provide any reason to reject the argument based on the plain terms of the legislation. In any case, the Privy Council would be involved in any such question in its role as a constitutional court and would doubtless approach any issues on that basis only, without entering further than necessary into questions of substantive criminal law.
[20] Further, as the Advocate General submitted, the question in the present case can be answered without deciding what issues are and are not included under the definition of "devolution issues". That is a matter which can be left to be worked out on a case by case basis. The present issue is a procedural one only. Having said that, however, we should add that the Scotland Act and the Human Rights Act, separately and together, pose novel questions and that further experience of those questions may require revision of some of the views which have been expressed. As is pointed out in the article by Jamieson referred to above, intriguing issues may arise as to the interrelationship between the duty imposed on the court under the Convention – which does not raise any kind of devolution issue – and the duty or duties imposed on the Lord Advocate. That interrelationship may have to be examined and might give rise to further consideration of the view to be taken as to what is comprised in actings of the Lord Advocate. The possibility of some limitation on the circumstances in which the Lord Advocate can be said to be acting in proceeding with a prosecution was hinted at in the speech of Lord Nicholls of Birkenhead in Montgomery , at 2001 SC (PC) , pp 5–6; 2001 SLT , p 40, and the problem of relevancy of allegations of breach of a Convention right in relation to art 6 and devolution issues is mentioned by Lord Clyde in the same case (p 34 (p 57)). Given that issues under the Convention can arise at any stage in a prosecution we would not be surprised to see arguments designed to limit the scope of the issues which must be classed as devolution issues being presented in future cases. As we have said, on the view hitherto taken, a challenge to any part of the court proceedings implies a challenge to the power of the Lord Advocate: but there may be room, for instance, for an argument that that does not necessarily extend to challenges to incidental steps in the proceedings, such as a decision to lead or not lead particular evidence. We were assured by the Advocate General that steps had been taken to ensure that any intimation of a devolution issue would be responded to without delay. Nevertheless, a requirement to intimate on every occasion on which an incidental question of the kind indicated above arises could be burdensome and disruptive to the process of justice. For the present purpose, however, it is enough to say that we accept the Advocate General's simple argument that if, as here, an issue which falls within the scope of the definition of "devolution issue" in para 1 of Sched 6 to the Scotland Act, arises, then there must be intimation in accordance with Sched 6.

This point was reiterated when an appellant was unable to proceed to due failing to follow the correct procedure under the Act of Adjournal:

The decision by the procurator fiscal on behalf of the Lord Advocate to prosecute the complainer in the District Court rather than in the Sheriff Court is plainly an "act" of the Lord Advocate within the meaning of section 57 of the Scotland Act 1998. It is that act which is the immediate cause of the alleged infringement of the complainer's human rights. If the complainer wishes to persist in his plea, he can do so only by way of a devolution minute directed to that point. The court cannot waive that requirement (*Mills* v *HM Adv*, *supra*). *(Robbie the Pict* v *Alison Wylie* 7 December 2004)

In some custody cases, eg under summary procedure, the time limits cannot be obtempered. It is impossible to intimate a devolution issue prior to the commencement of proceedings.

In appellate proceedings, the procedural rules have now been construed to refer to the nature of the proceedings that the appeal originates from (See the decision of the High Court of Justiciary in *McDonald v HM Advocate* 2008 S.L.T. 144, para. [65] on this point not appealed). Accordingly, in endeavouring to raise a devolution issue on appeal inevitably the Court's leave is required.

It may be thought that the practice of the Court in granting or refusing leave has, at times, operated to the exclusion of devolution issues being properly raised, but the Judicial Committee of the Privy Council, and now the Supreme Court, have been astute to recognise that the refusing of leave to raise a devolution issue is the same as determining a devolution issue: *McDonald v HM Advocate* 2010 SC (PC) 1 at paras. [14] – [19] per Lord Hope of Craighead and para. [49] per Lord Rodger of Earlsferry.

Notwithstanding the prima facie difficulty in abiding by the time limits contained in the Act of Adjournal, one aspect of the rules mentioned in the consultation paper is their apparent rigidity, for example in requiring that a devolution issue be raised by either party, and the court not being able to do so *ex proprio motu.* In *HM Advocate v Montgomery* 2000 JC 111, the High Court of Justiciary, in one of the first cases concerning the question of compliance with the new time limits, said this of the provisions of the Act of Adjournal:

"Chapter 40 of the Act of Adjournal, which deals with devolution issues, does not contain any specific provisions for a hearing. The inference is that devolution issues are to be considered under the existing procedures.
…

We add a further observation. Chapter 40 of the Act of Adjournal lays down certain specific rules for handling devolution issues. Special treatment of such issues is necessary because of the various provisions in the devolution legislation for Scotland, Wales and Northern Ireland requiring notice to be given to the relevant authorities, allowing those authorities to become parties to the proceedings and so forth. To that extent such issues are distinct. And there may well be devolution issues which stand on their own and require to be given effect in a distinctive way. On the other hand it would be wrong, for instance, to see the rights under the European Convention as somehow forming a wholly separate stream in our law; in truth they soak through and permeate the areas of our law in which they apply.

On the other hand we doubt whether it is particularly helpful simply to say that cause is shown in terms of Rule 40.5 (1) when it is in the interests of justice in the particular case to depart from the requirements of Rule 40.2 (1), since all decisions correctly taken by courts in civil or criminal proceedings must by definition be in the interests of justice. Although the Advocate Depute urged us to give positive guidance about the application of Rule 40.5, we do not consider that it would be advisable to try to lay down broad statements of principle about the application of a provision of which the court has little experience. We can, however, give some limited and tentative guidance, which may well require revision in the light of experience. What the accused must show under Rule 40.5 (1) is cause for allowing the devolution issue to be raised late. In deciding whether an accused person has shown that cause, the court should have regard to all the circumstances; the mere fact that those circumstances disclose some failure on the part of the accused person or his representatives will not necessarily mean that he has not shown cause for allowing the issue to be raised late. Part of the cause for allowing an issue to be raised late may be its *prima facie* significance, particularly for the course of the proceedings as a whole."

In *HM Advocate v Headrick* (Sh Ct) 2005 SCCR 787 – which I come to later - the presiding Sherriff thought it appropriate to raise the question of the competency of a devolution being raised, despite it being a matter of agreement that such an issue did arise in proceedings. The sheriff was of the view that "It is *pars judicis* to notice any unidentified or unpleaded incompetency or irrelevancy and to act accordingly." It could be said that in not raising the question of compliance with Convention rights should such an issue arise in proceedings, the court is itself not acting in compliance with its duty as a public authority under section 6 of the Human Rights Act 1998 ("HRA")

Civil

In civil proceedings, in many thousands of writs that we as a firm have commenced on behalf of prisoners warrant is sought for intimation upon the Advocate General for Scotland because we aver in the writ that in detaining prisoners in conditions which are incompatible with Article 3 and Article 8 of the Convention the Scottish Ministers have breached Section 57(2). Just satisfaction damages are sought in terms of Section 100(3) of the Scotland Act 1998. This is a devolution issue: Schedule 6 para 1(d) of the Scotland Act 1998. As far as we are aware we have never encountered any difficulty in the raising of a devolution issue in the civil proceedings in which we are involved.

Scotland Act 1998

A devolution issue is defined in Schedule 6 of the Scotland Act 1998 as including:

(d) a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights or with Community law,

This was clearly a central feature of the legislation. That is vouched for by the Bill's proponents in their comments during the debates upon these provisions in both Houses of parliament. In the House of Commons Henry McLeish, a future First Minister said this:

"The Bill creates a carefully thought through process for settling questions about the boundaries of the devolution settlement. What we propose will ensure that any legal disputes about those boundaries can be resolved consistently and authoritatively. Schedule 6, in particular, sets out the definition of "devolution issues" and the process for resolving any legal questions that arise about them. The arrangements will provide a solid foundation for developing a common understanding of the detailed extent of the powers of the Parliament and the Scottish Executive as time passes. They form a key part of our proposals." (HC Hansard **16 Nov 1998: Column 652)**

Acts of the Prosecutor

As to the applicability of the provisions to the acts of the Lord Advocate, this was put beyond doubt in discussion in the House of Lords. Lord MacKay of Drumadoon was clearly concerned about rendering justiciable the previously unfettered discretion of the Lord Advocate:

"In the definition of devolution issues, sub-paragraph (d) of Part I of Schedule 6 states:

> "a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights".

Sub-paragraph (e) states:

> "a question whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights".

Am I correct in understanding that the use of that language covers the acts, or failures to act, of the Lord Advocate and the procurator fiscal in the carrying out of the independent functions which the Lord Advocate has as head of the system of criminal prosecution and the system for investigating sudden deaths in Scotland? It appears to me that it does. I refer to Amendment No. 145F which the Government intend to move as an amendment to Clause 53.

I am sure the noble and learned Lord the Lord Advocate understands the reason that I ask the question. If the acts of the Lord Advocate and the procurator fiscal fall within the terms of the sub-paragraphs of paragraph 1 of Schedule 6 it will mean that any final decision as to whether or not an action has been in conformity with convention rights, or is compatible with convention rights, will fall to be determined ultimately by the Judicial Council rather than by the Appellate Committee of your Lordships' House, as opposed to what will happen with other public authorities under the Human Rights Bill. (HL Hansard **28 Oct 1998: Column 1942)**

The answer from the then Lord Advocate was emphatic:

Lord Hardie The Lord Advocate is a member of the Scottish executive and would be covered by the provisions in Schedule 6, including in respect of his actions as head of the system of criminal prosecution. (HL Hansard **28 Oct 1998: Column 1944)**

Subsequent cases have not even remotely questioned the correctness of that view.

Scotland Act v. Human Rights Act

The Scotland Act is a self contained constitutional scheme in relation to the definition of the boundaries of the devolved settlement and the extent of the powers of the Executive. It contains its own series of checks and balances. It makes sense.

In the first case to deal with the construction of the provisions of the Scotland Act 1998, the Judicial Committee of the Privy Council's Scottish members of the Board were at one in their view about the import of the Section 57(2) SA: *R v. HM Advocate* 2003 SC(PC) 21

Lord Hope of Craighead:

[48] Nor, in my opinion, in cases of threatened or continuing acts by the Lord Advocate which are incompatible with any of the Convention rights is there any discretion as to the appropriate remedy. Section 57(2) says that the Lord Advocate has no power to do any such act. If he proposes to act, or to continue to act, in a way that is incompatible with any of the accused's Convention rights, the accused is entitled to apply to the court for an order that he be stopped from doing so.

Lord Clyde:

[3] The subsection relates to members of the Scottish Executive. The Lord Advocate is a member of the Scottish Executive by virtue of section 44(1)(c) and there is no doubt but that the subsection applies to him. It accordingly imposes some limitation on his powers. Omitting the references to legislation three elements require to be considered. First there must be some act of his. That is a matter of the construction of section 57(2). Secondly, there must be some particular Convention right or provision of Community law. In the present case we are concerned with a Convention right and the nature and substance of that right are to be understood in accordance with the jurisprudence of the European Court of Human Rights. Thirdly, the act must be incompatible with the Convention right or the provision of Community law. That matter, like the first, is one of domestic law. Once these three elements have been explored the effect and consequence of the subsection should follow.

Lord Rodger of Earlsferry:

The Scotland Act is a major constitutional measure which altered the government of the United Kingdom. This is reflected in the fact that, apart from section 25, the whole Act applies throughout the United Kingdom: section 131. So, not only the Union with England Act 1707 but also the Union with Scotland Act 1706 has effect subject to the Scotland Act: section 37. Sections 29(2)(d) and 57(2) of the Act put it beyond the power of the Scottish Parliament to legislate, and of a member of the Scottish Executive to act, in a way that is incompatible with any of the Convention rights. These are provisions of cardinal importance in the overall constitutional structure created by the Act. So far as section 29(2)(d) is concerned, the Law Officers are specifically empowered, of course, to refer a question to the Board under section 33 if a Bill or a provision in a Bill appears to be incompatible with Convention rights. It would, however, seem surprising if, apart from this, the Scotland Act itself did not enable proceedings to be raised where either the Parliament or a member of the Scottish Executive had overstepped the mark and had done

something that was incompatible with Convention rights even something as grave as ill-treating a prisoner so badly as to violate article 3. If that were indeed the position, then the absence of any effective public law remedies under the Scotland Act would mark it out from other constitutional documents. For the sake of brevity, I refer to *Simpson v Attorney-General (Baigent's Case)* and to the authorities cited by the New Zealand Court of Appeal, in particular by Hardie Boys J (at p 700 702).

[17] Like Lord Hope of Craighead, however, I find in section 100 of the Scotland Act the clear implication that the Act does indeed itself enable people to bring proceedings and to defend themselves where legislation or acts are incompatible with Convention rights.

In the case of *Somerville v. Scottish Ministers* the interplay between both Acts of Parliament was again thoroughly ventilated.

That case concerned the challenge by a number of prisoners to the use of segregation under the prison rules as being, *inter alia*, incompatible with their Convention rights. Each brought their challenge under the Scotland Act 1998 attacking the decision of the Scottish Ministers. One petitioner raised a fresh matter in the course of the litigation and an attack was made that this challenge was mounted too late by virtue of the application to the Scotland Act, of the Human Rights Act time bar contained in Section 7: one year.

Before the Outer House, Lady Smith agreed with the submission of the petitioners that they could seek to restrain the act of the Scottish Ministers without reference to the Human Rights Act 1998. She said

[51] At first blush, it may seem odd to the casual observer that the respondents are in a different position from other public authorities as regards the pursuit against them of remedies arising from breaches of the Convention and the availability of the one year time bar. However, it does not take very much by way of examination of the Scotland Act to conclude that Parliament intended them to be in a separate category and treated differently. The obligation to act in accordance with the Convention was imposed upon them by an Act of Parliament, the Scotland Act, in such a way as to render any incompatible act null and void, that being the effect of section 57(2). Other public authorities were affected subsequently, when the Human Rights Act came into force but not so as to render any incompatible act null and void; whilst section 6 provides that it is unlawful for a public authority to act incompatibly, it does not provide that such acts are invalid. Further the defence provided for in certain circumstances under section 6(2) of the Human Rights Act is not open to the respondents. Then, it is clear from Schedule 6 to the Scotland Act that any question of acting incompatibly in contravention of section 57(2) is a devolution issue which gives rise to the obligation to intimate the proceedings to the Lord Advocate and the Advocate General, who may become parties to the action, and to the possibility of the court dismissing the action at the outset on the basis that it is frivolous or vexatious, matters which do not arise in a claim against a public authority under the Human Rights Act. The action in respect of an incompatible act of a Scottish Minister will be treated as a devolution issue thereafter which has implications for its route through the courts, as set out in the provisions of Schedule 6, a route which is not available in the case of a claim under the Human Rights Act. In short, there is a clear constitutional framework within the Scotland Act to deal with the situation where a member of the public claims that a Scottish Minister has failed in his constitutional obligation to act in accordance with the Convention and it contains a self

contained system of checks and balances which do not apply to claims under the Human Rights Act. It is impossible to resist the conclusion that Parliament intended the two types of claim to be treated differently.

The matter was further ventilated before the Inner House of the Court of Session. The First Division disagreed with the submission of the petitioners and upheld the submission from the Scottish Ministers that the timebar contained in Section 7(5) of the Human Rights Act 1998 could be imported. To this extent, they said, the Scotland Act 1998 was not self contained and had to be seen as part of the package of measures brought into force in 1998. In arriving at this conclusion the First Division expressly departed from what they considered to be the *obiter* comments of Lords Hope and Roger in the case of *R*.

Before the House of Lords, in a split decision of 3:2 in favour of the petitioners, it was held that *R* was correctly decided and the comments of Lords Hope and Roger in relation to the scheme of the Scotland Act were correct and consequently that the First Division had fallen into error in seeing the measures as being in some way interlinked. For Lords Hope and Roger that was a conclusion that was arrived at with little difficulty. Lord Hope of Craighead stated:

[16] Fundamental, therefore, to a proper understanding of the Scotland Act is its concentration on the limits of devolved competence. There are, of course, other limits on devolved competence in addition to those that are imposed with reference to Community law and to the Convention rights. For example, as section 29(2)(a) makes clear, devolved competence is exercisable only within or with regard to Scotland. Schedule 5 contains a list of matters reserved to Parliament at Westminster, which lie outside the devolved competence of the Scottish Parliament and the Scottish Executive. The provisions about Community law and the Convention rights give effect in the devolved system to the consequences for domestic law of the European Communities Act 1972 and of the incorporation of the Convention into domestic law of the United Kingdom by means of the Human Rights Act by placing restrictions on the functions that the devolved institutions can competently exercise. So an act by a member of the Scottish Executive which is incompatible with the Convention rights is not described by the Scotland Act as "unlawful". It is described instead as "outside devolved competence" in section 54(3), and as something that he has "no power" to do in section 57(2). The machinery described in section 98 and Schedule 6 SA is available for the resolution of questions as to whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights or with Community law and any other questions as to whether a function is exercisable within devolved competence.

Lord Rodger of Earlsferry:

The Vires Controls in the Scotland Act

94. The Scotland Act confers wide, but nevertheless limited, powers on the Scottish Parliament and the Scottish Executive. Essentially, the limitations on the powers of both institutions are similar. In particular, it is beyond the competence of either to do anything that is incompatible with Convention rights. This limitation ensures that the Scottish Parliament and Ministers have no power to do anything that would put the United Kingdom in violation of its international obligations under the European Convention. The limitation also affords protection to the Convention rights of all those who are affected by the acts of the

institutions. This is important since the changes brought about by the Scotland Act are actually intended to benefit people by improving the government of Scotland.

The response of the Scottish Executive was rather overblown and as time went on was tempered. Initially they said that the House of Lords erred in that it was always the intention of Parliament for there to be a time limit in the Scotland Act 1998 (See the Statement of the Cabinet Secretary to the Scottish Parliament 11th March 2009). In retrospect it is clear that the passage of the Convention Rights (Amendment) (Scotland) Act 2009 was a matter of political convenience to limit the amount of damages to be paid out to a particular class of citizens. It changes only part of the House of Lords decision relative to timebar.

The comments of Lords Hope and Roger in *R v. HM Advocate* about the *vires* control of SA section 57(2) survive it seems, but their application to the reasonable time requirement is now no more.

In *Spiers v Ruddy* 2007 AC Lord Hope of Craighead at a para [21] seemed to think that all that had been decided was a reinterpretation in light of the intervening jurisprudence from Strasbourg as to the content of the reasonable time guarantee. The analysis of the SA survived:

[21] The following points do not seem to me now to be in issue…..

…article 13 of the Convention requires that everyone whose rights and freedoms under the Convention have been violated must have an effective remedy. Where the legislature has left it to the courts to decide what that remedy shall be, as is the case under the Human Rights Act 1998, the court has a discretion to choose the remedy for the unlawful act which it considers just and appropriate: *Attorney General's Reference (No 2 of 2001)*, paragraph 24, Lord Bingham. Third, section 57(2) of the Scotland Act 1998 does not leave it to the courts to decide what the consequences of the violation should be. It states that there is no power to do any act insofar as it is incompatible with any of the Convention rights. It is the axe that is used not the scalpel, as Lord Rodger observed in *R v HM Advocate*, paragraph 155. This point was not in issue in *Attorney General's Reference (No 2 of 2001)*. As Lord Bingham put in it that case, paragraph 30, the statutory consequence of section 57(2) is lack of power. That part of the decision of the majority in *R v HM Advocate* is not in issue in this case either.

Despite what Lord Hope attributes to Lord Bingham of Cornhill it is clear that his (Lord Bingham's) view was that the different legislative regimes did not justify a different approach, or different outcome, in England and Wales as opposed to Scotland

Lord Bingham of Cornhill in *Attorney General's Reference (No 2 of 2001)* [2001] 1 WLR 1869 said this:

Epilogue

30. Since writing this opinion, I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry, on what I have called the first point of law. Despite the care and comprehensiveness with which they have deployed their reasoning, I am not persuaded of its soundness nor of the unsoundness of

my own and I agree with the observations of my noble and learned friends Lord Nicholls of Birkenhead, Lord Hobhouse of Woodborough and Lord Millett. I cannot accept that it can ever be proper for a court, whose purpose is to uphold, vindicate and apply the law, to act in a manner which a statute (here, section 6 of the Human rights Act) declares to be unlawful. Thus a public prosecutor may pursue proceedings against a criminal defendant after the lapse of a reasonable time (in the absence of unfairness) and a court may entertain such proceedings if to do so is compatible with the defendant's Convention rights and so lawful but not if to do so is incompatible with the defendant's Convention rights and so unlawful. I cannot accept that "compatible" bears a different meaning in section 6 of the Human Rights Act and section 57(2) of the Scotland Act, even though the statutory consequence is unlawfulness in the one instance and lack of power in the other. In each case the act is one that may not lawfully be done. I do not think that my opinion in this case can be reconciled with the decision of the majority in *HM Advocate v R* [2003] 2 WLR 317. While, therefore, the House may not overrule that decision of the Privy Council, I should make clear my preference for the opinion there expressed by the dissenting minority, which I take to be consistent with my own opinion in the present case.

And in *Spiers v Ruddy* Lord Bingham said this:

[17] I do not think section 57(2) of the Scotland Act warrants any distinction between the law in Scotland and the law in England and Wales as declared in *Attorney General's Reference (No 2 of 2001),* to which I would give effect. In a situation such as this the same principles should apply on both sides of the border and it is now clear that *Attorney General's Reference (No 2 of 2001)* gives better effect than *R* to the Strasbourg jurisprudence. Once it is accepted that a breach of the reasonable time requirement does not give rise to a continuing breach, it ineluctably follows that the Lord Advocate does not act incompatibly with a person's Convention right by continuing to prosecute him after such a breach has occurred.

The Human Rights Act 1998

Section 6 of the Human Rights Act 1998 makes it unlawful for the public authority to act incompatibly with Convention rights. There is considerable litigation about this provision but, in the main, the Human Rights Act 1998 provides for just satisfaction damages to be awarded: Section 8(3) in the event of a public authority breaching its duty.

The Human Rights Act 1998 is different from the Scotland Act in that Section 6(2) provides a defence to any action of damages if the public authority is acting under the authority of the Westminster Parliament. In those circumstances the ultimate remedy, and some would say a limited remedy, is for the Court to pronounce a declarator of incompatibility in respect of those statutory provisions.

One can see that that legislative system coheres in so far as it retains the sovereignty of the Westminster Parliament to continue to legislate in a manner incompatible with Convention rights, or to fail to remedy an incompatibility. This has been the subject of criticism from the Strasbourg Court: *Hobbs v. United Kingdom* (Application no. 63684/00), 18 June 2002; *Burden & Burden v United Kingdom*, *(Application no. 13378/05)* 12th December 2006. Under the Scotland Act, convention rights compatibility is absolute. There is no power to do any act which would breach Convention rights. This, it is submitted, makes sense. If there is no section 6(2)

parallel defence then the Parliament and the Executive are duty bound to comply with their Convention (and community law) obligations. To dilute that in some way by removing the obligation incumbent for the moment on the Lord Advocate would involve a significant tinkering with the constitutional legislative scheme.

This may be a matter of some moment for the Expert group. If the distinction presently on the statute book is significant between the HRA and SA then there must, it is respectfully submitted, be cogent reasons brought to the attention of those choosing (legislators) as to why one scheme should trump the other – especially in light of (i) the certainty that now prevails as to the operation of the SA *vires* control and (ii) the uncertainty which arises as to the difference in the operation of the two schemes. If there is no difference then surely legislative change is not required. If there is a difference what is it and why should one be preferred over the other? It is unclear whether the Court would indulge the unlawful conduct of the prosecutor if declared to be in breach of Convention rights. Would the Court in some way overlook that or treat it differently from the act being beyond the powers of the Lord Advocate? It may be a matter upon which the Expert group would require to arrive at a firm conclusion upon, so integral would it be to any proposed change

What is proposed is a major constitutional change. The devolution settlement was said to be by its architects to be "a carefully thought through process". This – the resolution of averred breaches of Convention rights by any of the Scottish Ministers - was a key part of the Scotland Bill. The Lord Advocate is clearly envisaged as being caught by section 57(2) SA and any conduct said to be incompatible with Convention rights is clearly caught as a devolution issue. That has never really been challenged and one suggestion to the contrary, in the face of concessions from both sides of the bar, was disapproved: see *HM Advocate v Headrick* (Sh Ct) 2005 SCCR 787 overruled in *Goatley v HM Advocate* 2006 S.C.C.R. 463).

What then is the impetus for change? Sheriff Stoddart in the case of *Headrick* records, somewhat surprisingly in the course of his judgement, that:

"I concur wholeheartedly with the view that Section 57(2) has no further place on the statute book, a view which has been repeatedly advanced in a number of different quarters".

Sheriff Stoddart's comments are weakened by his holding (erroneously) that in extradition proceedings section 57(2) SA had no application by virtue of the operation of Section 57(3). For a Sheriff to record his personal view about legislation on the statute book is startling. Lord Bingham has remarked that the price to be paid for judicial independence was "that judges do not comment on the policy of Parliament, but administer the law, good or bad, as they find it." (*Judicial Independence,* Judicial Studies Board, 5 November 1996 quoting Sir Hartley Shawcross).

Lord Bonomy in his report on High Court procedures: "Improving Practice: 2002. Review of the Practices and Procedure of the High Court of Justiciary" concluded, not for the removal of section 57(2) SA entirely, but that the Lord Advocate's conduct *qua* prosecutor should be excluded from the definition of a "devolution issue". His Lordship's basis for this view was that the categorisation of the impugned conduct of the Lord Advocate as a devolution issue was only intended to operate in the interim

period, prior to the implementation of the Human Rights Act. Lord Bonomy was clearly influenced by what he considered to be the disruption ensuing from the delay in determination of devolution issues [See paras.17.10 – 17.14].

That view, of the disruption to criminal business by the delay in resolution of devolution issues, is shared by a reviewer in 2008 SLT (News) 182.

That in turn was repeated in a response from judges of the Court of Session to the Commission on Scottish devolution, see paragraph 13. Their Lordships were clearly of the view that trials and appeals were being held up. Their Lordships supplemented the views of the previous commentator by pointing to the jurisdiction of the Judicial Committee of the Privy Council as being a significant contributor to the delay occasioned in criminal business.

A senior member of the Scottish Judiciary, participating in a series of seminars about the setting up of the United Kingdom Supreme Court (*Six seminars about the UK Supreme Court at the School of Law, Queen Mary, University of London*) also spoke to the inordinate delays in the criminal appeal system and the lengthening of trial process by one complete day. Blame for this was laid squarely at the door of the devolution jurisdiction. The necessity of such a jurisdiction was questioned "now that human rights are better understood and all the main human rights issues in relation to criminal trials have at least been canvassed if not fully resolved". In that seminar the judge was of the view the matter would be looked at by the Calman Commission. He suggested a number of other possible resolutions including the possible setting up of a Scottish Supreme Court.

In *Fraser v HM Advocate* 2008 SCCR 407 Lord Osborne recorded his view that the Judicial Committee of the Privy Council exercised a wholly different jurisdiction in determining appeals under Schedule 6 of the Scotland Act 1998, from that of the High Court of Justiciary: see para.220.

There is a clear unanimity amongst members of the judiciary that disruption alone has been the legacy of human rights, and in particular the devolution jurisdiction created by Section 57(2) and schedule 6 SA. Leaving aside that one of its sponsors in parliamentary debates, now as judge, may share that view, it is difficult to see, at least in the published information, the empirical basis for such a view. To a large extent much of the "disruption" reported is anecdotal. Surely the inability of the court system to deal with the points arising begs the question.

What is perhaps saddening is the suggested solution, and the sole solution upon which consultation is sought by the Advocate General for Scotland, namely the removal of prosecutor from the provisions of Section 57(2) of the Scotland Act 1998.

Ballast Plc v Burrell Co (Construction Management) Ltd, 2001 SLT 1039, was a case concerning the refusal of an adjudicator to reach a decision parties had referred to him. The parties agreed to be bound by his decision. Lord Reed thought that the refusal of the adjudicator to carry out his task was fundamental and a failure to do so rendered his decision ultra vires. He talked of the delay and expense concomitant upon a referral of the matter to court, but nonetheless recognised the importance of the fundamental protection– where there was an attack going to the root of the

decision of the adjudicator – of referring the matter to the court. In talking of the capacity of the Scottish legal system to deal with applications to the supervisory jurisdiction of the Court of Session he recognised:

"Where it is important to avoid delay in the application of decisions (e.g. decisions of general importance taken by central or local government) the law does not dispense with judicial protection …."

What is countenanced on behalf of the judiciary in the Court of Session and perhaps beyond, in the proposals upon which consultation is sought, is removal of what can be reasonably described as a form of judicial protection for the vindication of Convention rights. As mentioned above, that proposed removal or weakening requires to be precisely defined and convincingly justified. From the parties described above as motivators or persuaders for change it is said to be justified because the system of trials and appeals is delayed by those appearing before it invoking those rights and seeking the courts protection of them.

One need only look at the advantages which have accrued as a result of this important jurisdiction; an important jurisdiction which both sides of the criminal bar have invoked.

But for the availability of a right of appeal in respect of Convention rights:

1. Drivers in Scotland would not be required to respond to the enquiry made of them under Section 172 of the Road Traffic Act 1988. This was the direct effect of the application of the decision from the High Court of Justiciary in the case of *Brown v. Stott* 2001 SC (PC) 43.

2. The case of *McIntosh v. HM Advocate* 2001 SC (PC) 89 would have prevailed in the decision of the Appeal Court in connection with the presumption, said to conflict with Article 6(2) of the Convention, applying under Proceeds of Crime rendering the position different from England & Wales.

3. The "revolution in disclosure" brought about by the decisions of the Board in *Sinclair v. HM Advocate* 2005 1 SC (PC) 28 and *Holland v. HM Advocate* 2005 1 SC (PC) 3 would not have taken place. The High Court decisions would have left accused persons at a great disadvantage compared to those in the rest of the United Kingdom, and would have questionably brought the United Kingdom in breach before Strasbourg Court.

4. The routine use of dock identification as countenanced by the High Court of Justiciary in its decision in *Holland v. HM Advocate* 2003 S.C.C.R. 616 would still prevail.

5. Although not yet known, it is widely predicted that the United Kingdom Supreme Court will overturn the unanimous seven bench decision in the case of *HM Advocate v McLean* [2009] HCJAC 97, 2010 SLT 73 and offer, in line with the Grand Chamber authority (*Salduz v Turkey* (2008) 49 EHRR 421), the protection to suspects of the presence of the solicitor during police interview (*Cadder v HM Advocate*).

6. Those persons convicted before a Tribunal lacking in the necessary independence and impartiality would have been held to waive that important right if the decision of the High Court of Justiciary had been unappealable: *Millar v. Dickson* 2002 SC (PC) 30

7. In the case of *Spiers v Ruddy* [2008] 1AC 873 the case law from the European Court of Human Rights would not have informed the change in practice in relation to the remedy now offered for a breach of the reasonable time requirement. In that case the Lord Advocate required the Sheriff at Airdrie to refer a devolution issue directly to the Judicial Committee of the Privy Council.

Both sides of the bar have invoked the devolution jurisdiction of the Judicial Committee of the Privy Council for its own benefit and arguably for the benefit of the citizens in Scotland. The United Kingdom, as signatory to the European Convention on Human Rights, and a party to community law obligations, benefits too in avoiding adverse Strasbourg decisions. One need only consider the problems being stored up by the UK Government in failing to deal with the exclusion of prisoners from the franchise at a domestic level. The Committee of Ministers has delivered increasingly more shrill denunciations which may well lead to unprecedented enforcement action. The HRA scheme is doubtful in its implementation of an Article 13 compliant remedy where only a declarator of incompatibility may be pronounced: see *M.W. against the United Kingdom,* (Application 11313/02), 23 June 2009.

Conclusion

Given the centrality of this feature of the devolution settlement to legislators it is difficult to see that the justification proposed for its removal is sufficient. Displeasure with the manner in which these issues are dealt with, and consequences for Court administration as to the conduct of criminal business is, it is submitted, insufficient to justify this tinkering with one of the main tenets of the Scotland Act 1998. If empirical research were undertaken which, for example, provided a basis for saying that the disruption caused far outweighed the significance of points raised and the vindication of Convention rights in Scotland, that may provide a basis for interfering subsequently with the well settled and understood manner in which the devolution settlements works. Given the significance of the matters determined upon by the Judicial Committee of the Privy Council in exercising its devolution jurisdiction there is much to be said for its continued retention rather than its dilution.

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