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The Scottish Government

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Dear Jim

DEVOLUTION ISSUES AND ACTS OF THE LORD ADVOCATE

I am grateful that your officials sent me a copy of the above informal consultation in advance of its publication on 27 September. As you know the consultation deals with one of a number of related issues which might usefully be considered together, and the First Minister wrote to you on 9 October outlining the Scottish Government's position. He advised that we would respond further on the detail of your consultation.

It is important to state at the outset that the issues addressed by your consultation, and those raised by the First Minister in response, have major implications for the way that the devolved system of justice in Scotland operates, as well as for the responsibilities devolved to the Scottish Government. For this reason, the Scottish Government sees itself as having a very significant stake in any decisions that are made and it will therefore be important that any action in this area has the support of both the UK Government and Scottish Government. As you envisage possible changes to the current Scotland Act, I assume that the outcome of the consultation, and the report of the Expert Group, will be addressed in your forthcoming Scotland Bill. Given the timescale for that Bill, discussions between our respective officials will be a matter of urgency.

In considering the issues discussed in the informal consultation, you may wish to examine Professor Neil Walker's report on final appellate jurisdiction in Scotland. The Scottish Ministers have not yet taken a position on this report, but it may be found at:-
http://www.scotland.gov.uk/Publications/2010/01/19154813/0

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The Scottish Government has serious concerns about the way that ECHR applies through the Scotland Act in criminal matters. As the Lord Advocate observes in her response, virtually any objection, challenge or point of law can be characterised as a devolution issue, potentially giving rise to a right of appeal to the Supreme Court. This has inadvertently led to the Supreme Court effectively becoming an additional appellate court on a wide range of criminal matters in Scotland. I do not believe this is what was intended at the time the Scotland Act was passed and I believe urgent action is now needed to correct the problems that have arisen. I also share the Lord Advocate's concerns about an "industry" having developed within the legal profession to raise devolution challenges, resulting in a level of uncertainty and cost that is extremely unhelpful.

Further, I have major concerns that we have been left in a position in recent cases, most notably *Cadder vs HMA*, where Scotland is unable to put distinctive Scottish interests directly to the European Court of Human Rights.

In their response to the Calman Commission, the judges of the High Court of Justiciary noted other problems with the present system. These were particularly the delay in the holding of trials, and the development of two streams of jurisprudence, with Scottish courts considering human rights issues alongside wider questions of Scots law and practice, while the Supreme Court only considers human rights issues in isolation. The Lord Advocate also touches on these issues in her response and the Scottish Government shares the perception that there are significant difficulties with this aspect of the current system.

Turning to the detail of the consultation, the question about what difference would be made if the *vires* control in section 57(2) of the Scotland Act 1998 were removed, and the regime applied by the Human Rights Act 1998 substituted, is an important one. Judicial comment is divided as to whether the difference would be significant, and therefore further consideration of whether an approach based on section 57(2) alone would be effective in achieving the objectives you have set out is needed. As an example, had this change been made prior to the temporary sheriff decision in *Starrs v Ruxton*[1] in 2000, it would be unlikely to have materially affected the extent to which an act of the prosecution might ultimately render convictions unsafe for breach of Article 6 fair trial rights under the Convention where no legislative provision is directly at issue.

It does, however, seem possible that the existence of section 57(2) might disadvantage the prosecution in practice in Scottish Article 6 "fair trial" criminal cases, as it may imply that even one specific failure is likely to undermine the case (though the prosecution will equally be a public authority under the Human Rights Act).

As the paper notes, devolution issues in criminal matters do not arise from the exercise of the Lord Advocate's functions alone. For this reason, and because of the presentational issues associated with having separate arrangements for the Lord Advocate, I believe there are arguments that any exclusion from section 57(2) should be extended to the Scottish Ministers as a group.

As highlighted in the First Minister's letter, however, the Scottish Government believes that a wider view needs to be taken of the problems arising from the way ECHR applies through the Scotland Act, and also of potential solutions to those problems that would go beyond consideration of section 57(2). As an example, the justiciability of Acts of the Scottish Parliament in terms of legislative competence – specifically, in this matter, because of

[1] 2000 JC 208.

section 29(2)(d) of the Scotland Act – may result in more significant differences between the position in Scotland and that in England. I wrote about this in a letter to the Lord Chancellor of 13 October.

Further, the recent judgement in Cadder v HMA makes reference to the current constitutional position, most notably at paragraph 57 where it sets out limitations of the current devolution settlement arising from the lack of any explicit statutory power to limit the retrospective effect of the judgement. While the Supreme Court found other means to limit the retrospective effect, this nevertheless left issues that needed to be resolved through emergency legislation in relation to common law routes of appeal. The judgement also refers, at paragraph 49, to international responses to the judgement of the European Court of Human Rights in Salduz v Turkey, notably that of the French courts, which were able to delay the effect of their decision to allow the legislature to act. This once again leads us to the conclusion that Scotland is in a more unfavourable position than other jurisdictions in relation to the way ECHR applies in domestic law, and I believe explicit provision for such an approach also merits serious consideration.

To sum up, we believe that it is wrong in principle that the decisions of the High Court of Justiciary should be challengeable in a way which was not possible before devolution, and we are concerned about the problems this process of challenge is creating for the Scottish courts. The Scottish Government therefore wishes to restore the position in criminal cases prior to devolution and to stem the flow of criminal cases raising devolution issues to the Supreme Court. As the First Minister indicated, the High Court should be the highest criminal authority in Scotland, as it was prior to devolution. While we are open minded as to the solution to achieve this aim, we note that your paper posits the removal of devolution issues arising in criminal matters from the jurisdiction of the Supreme Court. We believe this would be a major step towards legal certainty, reduce the potential costs of prosecution and defence alike, and remove a significant burden on the UK Supreme Court. However, as the First Minister has made clear, this is a subset of a wider issue and we believe it as important that we establish a wider framework within which more detailed decisions about criminal appeal matters can sit.

I note your response to the First Minister's letter of 9 October and, while I appreciate the Committee you have established may want to focus on narrower issues, there must be a means of progressing the wider points. I believe that, as a first step, there would be benefit in an urgent meeting between our officials. Once that has taken place, I believe there would also be value in a Ministerial meeting to discuss these weighty and important matters.

Kind regards

Kenny

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