



## **Scotland Bill Committee**

# **Supplemental briefing and suggested amendments on the Role of the Supreme Court**

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## **Introduction**

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists. On Scottish matters it is assisted by its Scottish Advisory Group.
2. We submit this supplemental evidence following the introduction of amendments by the Lord Advocate following the McCluskey Review final report and having followed the evidence sessions before the Committee. We reiterate our concerns and disagreement with the outcome of the McCluskey Review in relation to the procedural matters recommended therein as expressed in our written evidence of September 2011. However we continue to welcome the acknowledged role of the UK Supreme Court in adjudicating upon matters of EU and Convention law in criminal proceedings.
3. In summary:
  - We agree that the question of compatibility should relate to all public authorities acting in criminal proceedings;
  - We see no basis for a certification procedure from the High Court of Justiciary to the Supreme Court, or requirement for the same;
  - Appeals should not be limited by time limits at all, or alternatively, as drafted;
  - The necessity of a reference to the High Court or Supreme Court is a matter for the courts decide and not the Lord Advocate or Advocate General;
  - There is no logical reason to remove from the jurisdiction of the Supreme Court the power to finally dispose of an appeal

## **Clause 3 – amendment to Scotland Act**

**Substitute “1A (a)” with ‘any act’**

**After “1A(d) insert ‘of any public authority within the meaning of section 6(1) of the Human Rights Act 1998’**

4. We welcome the proposed extension to ensure all public authorities acting outwith compatibility with Convention and EU law requirements can be the subject of an appeal to the Supreme Court. The limitation of the appeal structure to acts or omissions of the Lord Advocate alone artificially widened the ambit of the Lord Advocate's responsibility past that which he ought to be held to account for, and provided immunity to other bodies where such an extension was impossible.
5. We would remove subsection 1A(a) from the amendment to Schedule 6 of the Scotland Act because, firstly, acts of the Parliament in criminal proceedings may naturally form devolution minutes in the traditional sense where an act conflicts with a reserved function. Secondly, the ambit envisaged in clause 3 would cover a devolved legislative action of the Scottish Parliament were it to impact upon criminal proceedings without express reference.

#### **Clause 8 – amendment to Criminal Procedure (Scotland) Act 1995**

**Leave out “288ZA(3)(b)”;**

**288ZA(4) - after ‘withhold’ substitute ‘a certificate under subsection 3(b)’ for ‘permission under subsection 3(c)’;**

- **after ‘under subsection 3(c) leave out ‘,but that decision is final’;**

**288ZA(6) leave out clause, or;**

- **after (b) insert ‘(c) the period of time specified in subsection (b) above may be extended at any time by the High Court and an application for such extension may be made under this subsection’**

6. Given that compatibility with Convention and EU law will no longer be termed a devolution issue it would seem sensible to include the appeals process to the Supreme Court in the Criminal Procedure (Scotland) Act 1995 as opposed to the Scotland Act.
7. Our amendments would take out the requirement for certification. We set out at length in our evidence to the McCluskey Review the history of the appellate structure in England and Wales and Scotland. From that evidence it is clear that the certification requirement from the appellate courts in England, Wales and Northern Ireland was introduced to limit the number of appeals to the House of Lords Appellate

Committee. The reason this was necessary was because the role of the Supreme Court for these three jurisdictions relates to the entire legal system, but particularly in criminal matters, substantive and procedural law. It was enacted long before international obligations placed any requirement for uniform decision making on the courts across the UK. Most importantly, as seems to be the aim of this amendment, it was not to prevent the Supreme Court exercising its judicial function over the lower courts' decisions, but to stop unmeritorious cases getting there in the first place.

8. Of crucial importance, had certification been in place since the devolution arrangements came into force, the decisions in *Holland*<sup>1</sup>, *Cadder*<sup>2</sup> and *Fraser*<sup>3</sup> would not have been heard by the Supreme Court.<sup>4</sup> The result would have been that not only would Scots law have proceeded in clear contradiction with Convention law, but that the safeguards of suspects and accused persons in the course of criminal proceedings would not be as strong, and therefore as fair, as they are today.
9. There is no reason suggested for the time limit proposed in subsection (6) other than that one applies in England and Wales. We do not see that this is a good enough reason to limit the possibility of appealing to the Supreme Court on a compatibility issue and, without evidence of a need for a specific time limitation, we would leave out the clause. Were the clause to be deemed necessary, we would at least seek to ensure that the High Court is afforded the discretion to extend or dispense with the time limit where the circumstances require it.

## **288ZB – references to the High Court and Supreme Court**

**Replace (1) with (2)**

**288ZB(2) - after 'may' replace 'require' with request'**

**Replace (2) with (1)**

**Replace (3) with (4)**

**288ZB(4) - after 'Subsection' replace (5) with (4)**

**Replace (4) with (5)**

**Replace (5) with (3)**

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<sup>1</sup> *Holland v HM Advocate* 2005 SC (PC)

<sup>2</sup> *Cadder v HM Advocate* 2011 SC (UKSC) 1

<sup>3</sup> *Fraser v HM Advocate* 2011 SC (UKSC) 1

<sup>4</sup> The speech of Lord Hope given to the Scottish Association for the Study of Offending annual conference on 19<sup>th</sup> November at pages 23 to 25 underlines this point, available at [http://www.supremecourt.gov.uk/docs/speech\\_111119.pdf](http://www.supremecourt.gov.uk/docs/speech_111119.pdf)

**288ZB(3) - after 'in pursuance of subsection (2)' insert 'or (4)'**

**288ZB(5) - after 'may' replace 'require' with 'request'**

10. Our amendments would ensure that any decision to refer a point of compatibility to either the High Court or Supreme Court is a matter for the courts to decide rather than the Lord Advocate or Advocate General alone.

### **288ZC – Powers of Supreme Court**

**288ZC(3) - Replace (3) with 'In relation to an appeal under section 288ZA or 288ZB(5), the Supreme Court has all the powers of the court below and may (in consequence of determining a question relating to compatibility) –**

**(a) affirm, set aside or vary any order or judgment made or given by that court;**

**(b) remit any issue for determination by that court;**

**(c) order a new trial or hearing'**

11. Our amendment imports the Advocate General's wording from clause 17 of the Bill at sub-clause (3), section 98A(9), which in turn reflects the current powers under the Supreme Court rules. In our view it is entirely appropriate for the Supreme Court to continue to exercise all the powers of the courts below, as it has always done in civil appeals from Scotland and as it has always done when constituted as the Privy Council for jurisdictions across the world that continue to appeal to it. It would be a remarkable delimitation of its powers to restrict its ability to finally determine the outcome of an appeal. At the Lord Rodger memorial lecture during the SASO conference in November<sup>5</sup>, Lord Hope referred to the judgments where the Court considered it appropriate to quash convictions in cases where it was clear that the trial had been unfair.<sup>6</sup> One important aspect of the review of devolution minutes in criminal appeals is the apparent delay the raising of a minute brings to the system. Where a conviction is based on an unfair trial, there is no appropriate decision but to quash the conviction. Were the Supreme Court required to remit the case back to the

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<sup>5</sup> Note 4 above

<sup>6</sup> Even so, in *Fraser* at [43] he held: I would, however, remit the question whether authority should be granted to bring a new prosecution under section 119 of the Criminal Procedure (Scotland) Act 1995 for determination by the High Court of Justiciary. As it is its practice not to quash a conviction until consideration has been given to the question whether there should be a retrial, I would remit the case to a differently constituted appeal court to determine that question and, having done so, to quash the conviction.

High Court, for determination in cases as clear as there, this would add further delay and uncertainty to the process.

12. In any event, the Supreme Court has rarely exercised its power to finally determine the consequences of an appeal, see the recent cases of *Ambrose*<sup>7</sup>, *Jude*<sup>8</sup> and prior to that *Cadder*. In all these cases, directions were given to remit to the High Court for determination. In the absence of evidence supporting the need to limit the Supreme Court's jurisdiction in a way that is not in all other aspects of its jurisdiction, we would not support the Lord Advocate's amendment.

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<sup>7</sup> *Ambrose v HM Advocate et al*, [2011] UKSC 43

<sup>8</sup> *Jude v HM Advocate et al*, [2011] UKSC 55