



**JUSTICE written evidence to the
Scotland Bill Committee**

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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 (Advisory Group).

Evidence – Question 10

2. The Scotland Bill Committee has sought evidence in relation to the amendments to the Scotland Bill, now at Committee Stage in the House of Lords. Our evidence relates solely to question 10 of the Committee’s Consultation Document:

10. The Session 3 Scotland Bill Committee could not comment on the recommendations of the expert group set up by the Advocate General for Scotland, Lord Wallace, relating to the role of the UK Supreme Court in considering matters relating to the conduct of criminal proceedings in Scotland, as the Committee had not had adequate time to scrutinise the proposed amendments. What is your assessment of the various proposals relating to the final court of appeal in these criminal cases?

3. The Secretary of State for Scotland introduced amendments to the Scotland Bill following a review conducted for the Advocate General, chaired by Sir David Edward at the end of last year. The amendments at clause 17 aim to remove undue burden from the Office of the Advocate General but retain the essential safeguard of appeal to the Supreme Court where an incompatibility with the European Convention on Human Rights (ECHR) or European Community (EU) law has occurred through an act of the Lord Advocate.
4. Sir David Edward chaired this expert group on the role of the Lord Advocate as it pertains to devolution matters in criminal proceedings in Scotland. We responded to the Expert Group’s consultation in October 2010, concluding that we did not believe

any reform of the system was appropriate or necessary, at least in the way proposed by the Consultation Paper.¹

5. However, the recommendation of the Expert Group to remove the acts of the Lord Advocate (in her capacity as head of the systems of criminal prosecution and investigation of deaths) from the devolution minute procedure *but* create a distinct mechanism for challenge seems sensible. This is to resolve any existing anomaly and to reduce delay, where any is caused, by the raising of devolution minutes in Scotland with respect to criminal appeals. Most importantly, we welcome the conclusion of the Expert Group and the Advocate General that the Supreme Court plays an important role both constitutionally and to ensure consistent adherence to international obligations in the European Convention on Human Rights and EU law across the UK.

Amendments

6. The amendments in clause 17 seek to retain the role of the Supreme Court as final arbiter on Convention and EU law compatibility questions. They simply remove the jurisdiction from the operation of devolution minutes, which it is anomalous to continue for this power. We welcome the amendments and think that they should be passed.

View of the Scottish Government

7. However, the Scottish Government has indicated its displeasure at the power of the Court to rule on Scots cases and is now considering restricting or even removing the jurisdiction. JUSTICE considers such a move would risk creating a worrying limitation on the ability of individuals in Scotland to vindicate their rights. The move is as a result of two recent decisions of the UKSC. In June the Court decided that the conviction of Nat Fraser should be quashed.² *Fraser* follows the seminal case of

¹ The response is available here: http://www.justice.org.uk/data/files/resources/280/JUSTICE-Response-to-the-AGs-consultation-on-s57_2_.pdf

² *Fraser v HM Advocate* [2011] UKSC 24

Peter Cadder³ where the Supreme Court also overturned the decision of the Scottish High Court.

8. The Scottish Government has set up a second enquiry, the Supreme Court Review, chaired by Lord McCluskey to consider the ongoing role of the UKSC. The initial indications of the Review suggest that whilst it also agrees with the Expert Group that the Court continues to have a role as a final appellate court to consider Convention and Community rights in criminal cases, it will recommend procedural changes ought to be made to the mechanism of appeal. The possible changes include creating a leave requirement, removing the role of the UKSC in providing a remedy, restricting appeals to those which are complete rather than allowing references during proceedings and enabling the UKSC to sit in Scotland.
9. Fundamentally, we do not agree with the purpose for the Review, which is founded upon the suggestion made by Government and elsewhere that there has been 'interference' by the UKSC in Scots criminal law. By incorporating EU law and the ECHR into domestic law, Scots criminal law has necessarily had to adapt and develop in order to ensure compatibility. Such changes inevitably arise – whatever Court enforces them. The UKSC has simply applied, and is obligated to apply, the minimum requirements of Convention rights to our law and procedures.
10. We also consider that the Review Group's initial conclusions are incoherent in that they recommend unifying leave to appeal across all UK jurisdictions, yet also recommend the creation of specific procedures in relation to such appeals to the UKSC solely for Scotland.
11. Notwithstanding that the Appellate Committee of the House of Lords has long since been the final court of appeal in civil cases from Scotland, the Supreme Court is **not** a final appeal court in all criminal cases. As a result of devolution, the UKSC now exercises a vital role in safeguarding the rights of Scottish individuals. The Court can only hear cases where the ECHR is said to have been breached, or matters of EU law are in issue. The Court ensures that all UK citizens can benefit from the same protections wherever they live and that all UK authorities conform equally to our international obligations.

³ *Cadder v HM Advocate* [2010] UKSC 43

12. The cases of *Cadder* and *Fraser* involved fundamental breaches of the right to a fair trial – the former being lack of access to a lawyer when being interviewed by the police (a safeguard not available in Scotland until the UKSC ruling), and the latter, withholding evidence which would have crucially affected the way the case was decided by the jury.
13. Furthermore, the UKSC hears very few cases from Scotland, and very rarely finds that the Scottish courts have ruled wrongly. Since the Human Rights Act and the Scotland Act came into force, the Judicial Committee of the Privy Council, and subsequently the UKSC, have only heard twenty three cases, of which five were brought by the Crown. This number produced an average of two or three cases a year. Last year, the only case heard was *Cadder*. Of these cases, fourteen were dismissed, limiting the opportunity to bring similar points back before the Court. Only nine appeals were allowed, four of which were in favour of the Crown.⁴ There is no evidence from these appeals and the judgments handed down that the UKSC has extended its jurisdiction or heard cases it ought not to. Indeed it appears to us that the UKSC operates entirely within its special jurisdiction, and appropriately respects the position of the High Court of Justiciary, the final court of appeal in Scotland.
14. This is because leave of the High Court is already required, which if not granted, requires special leave of the Supreme Court. This is not given lightly and operates to ensure that only ECHR or EU law issues are heard, as the reasons given for refusals of leave have shown. If leave is granted, the Court is slow to overturn decisions of the Scottish courts. In particular, in dismissing the appeal in *McInnes v HM Advocate*⁵ their Lordships made clear that its remit and treatment of Scottish matters is very narrowly defined. Furthermore, the Court's own practice directions require it to consider whether there is a point of general public importance before it will hear a case.⁶
15. Lord Hope made plain in his recent speech to the Scottish Young Lawyers Association⁷ that, despite the jurisdiction being newly created upon devolution, the

⁴ Information gained from the Privy Council and Supreme Court websites and online case search resources.
Correct to June 2011.

⁵ 2010 SCCR 286.

⁶ Practice Direction 3.3.3.

⁷ 1st April 2011, available from http://www.supremecourt.gov.uk/docs/speech_110401.pdf

treatment of criminal cases is no different to that of civil matters which have historically been heard in London. Whilst there are similarities in civil law between the UK jurisdictions, there are also marked differences. The judges of the Court have coped with these differences, as they have with areas of law in English or Commonwealth appeals with which they are less familiar. They have ensured that Scottish judges make leave decisions and that Scottish judges sit on Scottish appeals, leading the debate between the panel members and invariably giving the majority judgments.

16. As a result of the heated debate and rhetoric that the Scottish Government's disapproval generated, we issued a press release which set out what we thought were the myths being circulated about the role of the Supreme Court.⁸
17. We also responded in detail to the Supreme Court Review, chaired by Lord McCluskey, explaining why we thought the need for a leave requirement is misconceived and that in our view the remaining anomaly with clause 17 is that there is no power to bring proceedings for breach of the ECHR by a court, contrary to section 6 of the Human Rights Act 1998.⁹
18. We would be very happy to assist the Committee with further written or oral evidence should this be required.

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⁸ Which can be accessed here: <http://www.justice.org.uk/resources.php/272/the-uk-supreme-court-has-a-proper-role-in-scottish-appeals>

⁹ Our response to the McCluskey Review can be accessed here:
<http://www.justice.org.uk/data/files/resources/298/JUSTICE-Response-to-McCluskey-Consultation.pdf>