Response to the informal consultation on Devolution issues and acts of the Lord Advocate

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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. On Scottish matters it is assisted by the JUSTICE Advisory Group, Scotland. It is also the British section of the International Commission of Jurists.

2. An Expert Group, as we understand it, has been convened by the Office of the Advocate General for Scotland with the remit of reviewing the role of the Lord Advocate as it pertains to devolution matters. We are unclear as to why an expert group has been convened by the Advocate General to inquire into what ostensibly seems to be the role of the Lord Advocate, founded, it appears, solely on a submission from members of the Court of Session.

3. Nevertheless, with respect to the operation of section 57(2) in conjunction with Schedule 6 to the Scotland Act 1998 (SA), the Expert Group has been tasked to consider whether the current system causes problems for the operation of the courts or system of criminal justice in Scotland. We welcome the consultation exercise convened by the Expert Group. We do however think that the period offered for consultation is far too short to ensure that full and proper scrutiny of the questions from a wide section of civil society and legal associations can take place. We hope that there will be further opportunity for consultation should it be considered that there is any merit in the reform proposals, on specific and relevant aspects of any proposals taken forward.

4. Because of the short consultation period, we seek to briefly raise our concerns as set out below, rather than provide an extensive submission. We can prepare such a response in due course, should this be necessary. In summary, our answer is that we do not believe the current system in fact causes problems in the administration of justice. As a result we do not believe any reform of the system in the way proposed by the Consultation Paper is appropriate or necessary.

5. We have seen no empirical research to support such a contention. Furthermore, we are concerned that by approaching an inquiry from this starting point, the Expert Group risks ignoring the crucial protection of Scottish citizens' Convention rights

offered by the section 57(2) and Schedule 6 Scotland Act provisions, in particular those facing prosecution. As Lord Hope said in the case of *R v HMA* 2003 SC (PC) 21 (28 November 2002), there is nothing in the jurisprudence of the European Court to prevent a contracting state from laying down a scheme within its own domestic order for the protection of a person's Convention rights which imposes sanctions for their violation which are more severe than would be necessary to meet the standards which that court applies when it is considering whether or not there has been just satisfaction. To ask whether such a key mechanism is problematic is unfortunate, particularly since the Coalition Government and Scottish Parliament have reiterated the importance of ensuring the protection of human rights and civil liberties of the British public.

6. The issues raised as to the application of the devolution minute procedure are premised on a presumption that there are problems inherent with the system as enacted. We do not consider that these are sufficiently made out to contemplate amendment of the constitutional principles underpinning the legislation. Specifically:

Paragraph 9

7. The Consultation suggests that difficulties have arisen in attempting to understand the connection between the provisions in the SA and the corresponding sections of the Human Rights Act 1998 (HRA). We do not consider that any such obstacle exists for parties attempting to bring devolution minutes. Firstly, this is borne out by the number of cases, identified in the Consultation as some 10,000. Secondly, the provisions have been in force for ten years and, had any initial concerns existed about which route to follow, practitioners have resolved these as the SA has bedded down. Thirdly, had any lingering doubt existed, this was resolved in *R v HM Advocate* 2003 SC (PC) 21*, Somerville and others v Scottish Ministers* [2007] UKHL 44, again as recognised in the Consultation**.** Finally, the procedure for Scottish cases is clearly laid out in the Act of Adjournal. If there were any outstanding difficulties with procedure, these should be resolved by clarificatory amendment to the Act of Adjournal.

Paragraph 10

8. The consultation suggests that with respect to remedies, the HRA may give greater flexibility. This issue does not appear to fall within the remit of the Expert Group's consideration. Nevertheless, we do not consider that the HRA offers greater flexibility by reviewing acts of public authorities under the auspices of lawfulness rather than a *vires* control. On the contrary, it is likely that it offers *less*. This is because an act which is declared unlawful does not void the act. The remedy can only sound in damages, which are invariably conservative. In contrast, a decision that an act is *ultra vires* will void it in its entirety, placing the parties in the position they held prior to the act. The consequential effect may require additional remedies and consideration of the retrospective application of the finding, as well as limitation on future acts so as to remain within the *vires* control. Courts are required to make these findings. In reality, the difference between the HRA and SA mechanisms is negligible due to the operation of section 6(2) with respect to primary legislation and its corresponding application in section 57(3) SA.

Paragraph 11

9. The Consultation refers to the obligations incumbent upon the Advocate General in respect of a devolution minute to receive intimation in each case. Since the Expert Group has been convened by the Advocate General, this issue falls squarely within the remit of the consultation. Consequently we wonder whether it would be more appropriate for the Group to concentrate its efforts on the performance of this function rather than the obligations upon the Lord Advocate. On this question however, we are not aware that the Advocate General has raised any indication that the process is proving too burdensome; out of 10,000 applications he has sought to intervene in but thirty five.

10. Conversely, that so many devolution minutes have been raised could be seen as an indication that Scottish practice and procedure is not in all respects in conformity with the Convention. A prime example is that, as the Consultation demonstrates, 3,000 of these minutes have been raised in relation to access to a legal representative in the police station alone. The reason so many minutes have been raised is because the European Court of Human Rights (ECtHR) has unequivocally held that there is a right of access to legal advice upon arrest in the police station and during interrogation (*Salduz v Turkey* (2009) 49 EHRR 19*; Brusca v France* (judgment

delivered 14th October 2010, unpublished), yet, until precautionary Guidelines were issued by the Lord Advocate pending the Cadder decision (*Cadder v HMA* [2010] UKSC 43 (judgment pending 26th October 2010), Scotland did not afford this right.

11. It is right that the Advocate General be made aware of these complaints, as the representative of the UK government on matters of Community and Convention law. Many of these claims will be repetitive and require little additional work. If there is any argument to be had about unnecessary burdening of the Advocate General, this should concentrate on the provisions in the Act of Adjournal requiring intimation in all cases, and review whether it is necessary to intimate at first instance in all cases.

Paragraph 12

12. The Consultation again appears to raise an issue which is extraneous to the purposes of the consultation exercise. We would observe, however, that if the jurisdiction of the Scottish courts were extended to make it possible for a judge to raise a devolution issue in the course of a case, this would not only require careful consideration of the traditional role of a judge as an arbiter, but would *add* to any perceived increase in workload and delay in proceedings.

Paragraph 13

13. Bullet point one asserts that the UKSC now has jurisdiction over Scottish matters. We would respectfully suggest that this jurisdiction operates only where a devolution minute is raised, which in the context of criminal matters is almost exclusively due to an alleged breach of the article 6 ECHR right to a fair trial, and sometimes engaging article 3 ECHR prohibition on torture and article 5 ECHR on the right to liberty. Given that the UKSC has heard so very few of these cases since the SA came into force**,** we cannot think what the cause for concern is. The jurisdiction of the UKSC may be wider in some respects than that of the High Court of Justiciary. However, as a constitutional court it is necessary for it to have a full armoury to ensure uniform application of the Convention rights across its four jurisdictions. In any event, the perceived conflict and extent of the UKSC's remit was treated very carefully by the UKSC in *McInnes v HM Advocate* 2010 SCCR 286.

14. Bullet point 2 suggests that it was far from clear that the drafters of the SA envisaged that devolution issues would be raised as often as they have been. Section 57(2)

could not be clearer in its terms: Ministers are not to do anything that would be incompatible with Convention rights. We would respectfully suggest that the whole point of legislating Convention compliance into UK law was to ensure that Convention rights were robustly protected without individuals having to petition the ECtHR; If the drafters did not realise that there were so many acts, subordinate laws or procedures potentially in breach of the Convention that is no reason to limit the application of the legislation Parliament enacted. On the contrary, it is an indication that the mechanism is operating successfully and that there is much work to be done by the Courts in protecting fundamental rights.

15. The second bullet point goes on to suggest that the method of raising a devolution minute has arguably contributed to delay in the handling of criminal trials. We are not aware that this is the case; we have not had sight of any statistics to suggest that there is undue delay on this ground. In most cases we are aware that a devolution minute is summarily dealt with by the sheriff court. Whilst an issue might be preserved for appeal, there are many reasons why criminal trials are delayed, amongst them limitations on disclosure of evidence and court time, rather than devolution minutes. With respect to the system in the courts applying the HRA in other parts of the UK, an alleged breach of a Convention right must be raised in a similar way at first instance, and then where necessary, a stay of the trial must be sought whilst the matter is appealed to the High Court for consideration, or the matter preserved on appeal. The process is no less arduous than that under the SA in conjunction with the Act of Adjournal. Indeed, any limitation of the SA mechanism would only engage the HRA mechanism in its place.

Options for Reform

16. Since we do not consider that the premised areas of concern have actually arisen, we see no merit in any proposed reform. However, the options that the consultation suggests do give rise to concern:

17. Paragraphs 17 and 18 may appear relatively innocuous, particularly as the preceding paragraph suggests that the Expert Group will only have a remit in procedural reform through technical change. However, the proposed amendments given in paragraphs 17 and 18 are to remove the *vires* control upon the Lord Advocate, to afford an inherent jurisdiction of the Courts over Convention obligations, and/or to remove the

remit of the UKSC to consider devolution issues. All of these suggestions would have substantial constitutional implications for the protection of Convention rights and access to justice in Scotland. This does not seem to be a logical response to the perceived delays in the court process, if that is the reason for the consultation exercise. We can see no explanation as to why devolution minutes in criminal matters should be removed from the jurisdiction of the UKSC in the Consultation.

18. Furthermore, paragraph 17 in our view wrongly presumes that acts of the Director of Public Prosecutions are not open to HRA claims. The limitation on review is the same as that which exists for the Lord Advocate pursuant to section 57(3) SA, in application of section 6(2) HRA. But outside of such limitation, his actions as a public authority are fully open to review for Convention violations and have been subject to such claims.

Issues for consideration

(1) Would the removal of prosecution functions from the scope of section 57(2) have any impact on that constitutional significance?

19. Yes, a significant impact. The Lord Advocate is a Minister under the devolution settlement and subject to the same constraints as other ministers. The fact that the Lord Advocate is subject to the *vires* control operates to ensure that the Crown acts within the obligations of the Convention. Without an explicit requirement to do so, the Lord Advocate would have the least scrutiny of all Government authorities, in the area of most interference by the state into the affairs of the individual. Pragmatically, there would be far more challenges made to the method of prosecution after the event without the control.

(2) Which functions of the Lord Advocate should be covered by any reform: just those as head of the system of criminal prosecutions, or other 'retained functions' carried forward from the pre-devolution role of the Lord Advocate, such as investigation of deaths?
(3) Would any reform deal solely with Convention rights, or other current restrictions (ie Community law)?

20. We do not believe any functions should be subject to reform. Were there to be reforms, any limitation of the *vires* control would have to be justified for all areas of

the Minister's functions. Since Community Law in some respects is directly effective and in others implemented by domestic law, it would be very difficult to limit the Lord Advocate's responsibilities to ensure conformity with such laws. Were such a step to be taken, the consequences would likely be greater litigation domestically and possibly infraction proceedings brought by the European Commission in the Court of Justice for the European Union, if an applicable part of the EU *acquis* were engaged. It should further be noted that as a result of the Lisbon Treaty, the EU Charter on Fundamental Rights (which takes Convention rights as a *minimum*) would apply to any act within the scope of the EU, irrespective of limitation of *vires* control in relation to Convention rights. Thus, the proposed restriction would have a negligible effect on the obligations of the Lord Advocate.

(4) Parliament, through Schedule 6 to the Scotland Act, has given the Supreme Court… jurisdiction in relation to devolution issues arising in criminal proceedings. It has been suggested that this was to ensure that a consistent and coherent view upon them could be given across the UK. To what extent would any reform which impacted on the Supreme Court's jurisdiction undermine this?

21. Removing the final constitutional appeal from Scotland to the UKSC would prevent the possibility of the UK uniformly complying with its Convention obligations. Without this review mechanism, the rights of British citizens are limited by their geographical location. *Cadder* is a prime example of this; in all other UK jurisdictions suspects in police stations have the opportunity to seek advice and representation from a legal representative. The High Court of Justice and consequently all lower Scottish courts do not believe this to be necessary, despite clear instruction from the ECtHR. Without the opportunity to appeal to the UKSC, the only mechanism to resolve this would be to petition the ECtHR, with all the ensuing delay and costs, without any guarantee that Parliament would in fact legislate once a violation of article 6 was found.

22. More particularly, the UK when acting as a member state of the EU is one jurisdiction. The EU is taking an increasing role in ensuring procedural safeguards for suspects in criminal proceedings[1]**.** The European Justice and Home Affairs Council and the European Parliament are currently considering legislation on notification of

[1] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4.12.2009, p. 1

rights and information about charges. The European Commission is preparing a proposal for a directive that will require member states to allow legal representation as from the police station stage. The UK must uniformly enact such legislation in order to comply with its Community obligations.

23. The UKSC is the natural independent and objective arbiter for the UK's international obligations. Limiting its remit to exclude all criminal matters from Scotland will substantially impact on this expert review mechanism, without which the consequence will be more litigation before the European Courts, resulting in further delay and expense. It is worth recalling that before European courts not only is the review carried out in the absence of Scottish Justices, as distinct to the position on the UKSC, but by Justices who are significantly less familiar with the common law tradition.

24. We trust that the Justices of the UKSC have been asked to comment on the effect upon their jurisdiction for the purposes of this consultation, in particular since the concerns with which it is engaged have been raised by the members of the Court of Session.

(5) In what, if any, circumstances is it necessary or appropriate for the Advocate General (as a Law Officer in the UK Government) to be entitled to be informed of and take part in proceedings relating to prosecutions in Scotland

25. The Advocate General is responsible, by way of intervention, for advising on the position of the UK in any proceedings, as pertains to obligations arising under international matters. As indicated above, in Convention and Community matters, the approach of the UK must be uniform in the EU and Council of Europe. The Advocate General's duty is to inform the courts of what obligations and responsibilities the UK has accepted internationally. As such, we consider the general requirement of intimation is a logical and necessary one. There may be scope to limit the requirements in first instance matters, as indicated above, but this would need further consideration and scrutiny of the actual burdens the Office for the Advocate General faces.

(6) Devolution issues may be raised in criminal proceedings in relation to matters other than acts of the prosecution. For example, an argument may be raised that the Act of the Scottish Parliament creating the offence or penalty in question is outwith the legislative competence of the Scottish Parliament because it relates to reserved matters. Are the considerations as to the role of the Supreme Court and/or Advocate General any different in relation to such proceedings when compared with proceedings concerned with acts of the prosecution?

26. Again, we wonder how the question relates to the composition of the Expert Group and its terms of reference. Notwithstanding, engaging in litigation on the question of whether an act is reserved will entail complex consideration of the devolution framework. The role of the Advocate General in its advisory capacity, and the jurisdiction of the UKSC to ensure a uniform and objective approach, are equally applicable as they are with respect to the Convention and Community obligations outlined above.

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