FINAL REPORT OF REVIEW GROUP

EXAMINATION OF THE RELATIONSHIP BETWEEN THE HIGH COURT OF JUSTICIARY AND THE SUPREME COURT IN CRIMINAL CASES

Group members: Lord McCluskey (Chair), Sir Gerald Gordon, Sheriff Charles Stoddart and Professor Neil Walker.
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
<td>1</td>
</tr>
<tr>
<td>Introduction</td>
<td>3</td>
</tr>
<tr>
<td>Retaining a Jurisdiction in the Supreme Court</td>
<td>5</td>
</tr>
<tr>
<td>Amendments to the Scotland Bill by Clause 17</td>
<td>6</td>
</tr>
<tr>
<td>Certification</td>
<td>13</td>
</tr>
<tr>
<td>Outstanding Questions</td>
<td>18</td>
</tr>
<tr>
<td>Appendix</td>
<td>20</td>
</tr>
</tbody>
</table>
EXECUTIVE SUMMARY

1. We remain of the view that the Supreme Court should continue to have an appellate jurisdiction in relation to issues of Convention rights arising in Scottish criminal cases. However, we consider that its jurisdiction should be clearly defined and limited (para 8).

2. Subject to that limited jurisdiction, the High Court of Justiciary should remain as the final court of appeal in Scottish criminal cases (para 9).

3. The jurisdiction of the Supreme Court in Scottish criminal cases should go no further than is necessary to ensure that Convention rights are clearly defined so that they may be applied consistently by courts throughout the United Kingdom (para 10).

4. The legislative changes proposed in Clause 17 of the current Scotland Bill improve on the existing system, but only insofar as they remove from the definition of “devolution issues” the acts of the Lord Advocate in relation to criminal proceedings. Otherwise, the new system introduced by Clause 17 (3) is seriously flawed (paras 12-13).

5. We do not consider that the provisions for an appeal to the Supreme Court in respect of Convention rights should be limited to the acts or failures to act of the Lord Advocate, as suggested in Clause 17 (paras 26-29).

6. Subject to what we say below about certification, an appeal from the High Court to the Supreme Court ought to be open to any accused person claiming to be a victim of any violation of his or her Convention rights under the ECHR in relation to criminal proceedings irrespective of which “public authority” is alleged to have caused such violation (paras 27-30).

7. An appeal to the Supreme Court should be competent only where the High Court has granted a certificate that the case raises a point of law of general public importance. Such a certificate will set out the terms of the question(s) for the Supreme Court to answer (paras 45-47). However, in any appeal proceeding before it, the Supreme Court should have power to re-formulate the question(s) of law set out in the certificate and to address the questions as reformulated (para 53).

8. In disposing of an appeal or reference to it, the power of the Supreme Court should be limited to declaring whether or not there has been a breach of a Convention right and, if there has been, to saying why this is so. If there has been such a breach, the Supreme Court should simply remit the case to the High Court to allow that court to determine the appropriate disposal in the light of its existing powers. In particular, the Supreme Court does not need and should not have all the powers of disposal available to the High Court (para 50-51).
9. It is not appropriate that the Supreme Court should be required by statute to apply the test of "miscarriage of justice" in Scottish criminal appeals (paras 31-32).

10. In the normal case, an appeal to the Supreme Court should be competent only after the conclusion of all proceedings in the courts below. In exceptional circumstances the High Court should continue to have power to refer to the Supreme Court prior to trial a point of law based on an alleged or apprehended breach of a Convention right and to seek a ruling on it (para 52).

11. The current powers of the Lord Advocate and the Advocate General to refer or require the High Court to refer devolution issues to the Supreme Court should continue and be extended to compatibility issues (para 47).
INTRODUCTION

1. On 27 June 2011 we published a First Report\(^1\) containing our first thoughts on the matters in our Terms of Reference, which were essentially concerned with the mechanisms that existed for dealing with human rights issues in Scottish criminal cases and the legal relationship that has developed since devolution between the High Court of Justiciary (the High Court) and the Supreme Court. Though addressed to ministers, we understood that it would be available to MSPs, who were due to debate the issues in the Scottish Parliament on 30\(^{th}\) June 2011.

2. The views (some necessarily provisional) that we expressed following consideration of the material referred to in the report were summarised as ADVICE; for convenience, it is repeated in the Appendix, Item 1. The key points at that stage were (i) that there should be a continuing role for the Supreme Court in criminal appeals raising human rights issues, but that (ii) it should not be possible to appeal unless the High Court certified that the case raised a point of general public importance, and that (iii) the role of the Supreme Court should be limited to addressing the point or points certified, with final disposal left to the High Court.

3. Two of our number attended the parliamentary debate on 30 June and we have taken account of the views expressed by the MSPs. We followed up our report by sending out letters to all who had responded to the Advocate General’s Expert Group. Those letters invited the addressees to respond to questions derived from the ADVICE. The questions are set out in full in the Appendix, Item 5. The questions were also posted on the Review Group’s website and any interested party was able to respond.

4. The written responses that we received to those invitations and other written comments that were sent to us have been published separately\(^2\). We are most grateful to all who responded\(^3\), especially given the many difficulties that had to be faced at this time of year and the short time they had available for consulting with others interested.

5. Some of those who responded met us to discuss both the issues identified in the First Report and other matters raised in the public and parliamentary discussions or emerging from our own consideration of the written representations that we received. We also took account of the fact that, on the eve of the publication of our First Report, the government minister, at the third reading of the current Scotland Bill in the House of Commons, moved a series of amendments (Clause 17 of the current bill) relating to the issues under consideration. Clause 17 does two main things: (i) it removes from the ambit of devolution issues “acts” and “failures to act” by the Lord Advocate, and (ii) it reformulates and restates the jurisdiction and

\(^{1}\) [http://www.scotland.gov.uk/About/supreme-court-review](http://www.scotland.gov.uk/About/supreme-court-review)

\(^{2}\) [http://www.scotland.gov.uk/About/supreme-court-review/Consultation](http://www.scotland.gov.uk/About/supreme-court-review/Consultation)

\(^{3}\) Listed in Appendix, Item 6
powers of the Supreme Court in a criminal appeal raising an issue of compatibility with human rights”.

6. We shall deal later specifically with each of the ADVICE points that we raised, in the light of the questions asked, the responses and our further conclusions on these issues.

7. We were again particularly well served by the officials who were allocated to assist the Review Group. We owe them a debt of gratitude for their thoroughness, diligence and tolerance, especially under pressure.
RETAINING A JURISDICTION IN THE SUPREME COURT

8. We remain of the view that the Supreme Court should retain a jurisdiction in respect of appeals in criminal cases from Scotland when those cases raise questions of compatibility with Convention rights and leave has been given for the appeal.

9. It appears to us that at least some of those who are satisfied with all or most of the procedures that were based on the provisions in the Scotland Act 1998 - or, at least, with the recommendations of the Expert Group to the effect that there should be no reduction in the discretion of the Supreme Court to decide which cases to hear - assume that the more layers of appeal there are the greater the protection afforded to individual rights. In our view, given that the High Court has been the apex, or final, court in Scottish criminal cases for centuries, the better assumption is that that court is perfectly capable of continuing to act as the final court in Scottish criminal cases, in which capacity it is bound to ensure that the rights of the accused are fully respected, and that any appeal from it to a new court needs to be justified – whatever other justification there may be for having a supreme court dealing with other matters.

10. As we have already reported, there is indeed in our view some justification for allowing an appeal to the Supreme Court on the new matter of compliance with the Convention rights specified in the Human Rights Act 1998. What our proposals are designed to achieve is that the jurisdiction exercised by the Supreme Court in such cases does not go beyond what is necessary to ensure that Convention rights are defined and understood by courts in the same way throughout the United Kingdom. We develop this reasoning later. We also see a necessary role for such a court to continue to deal with what are essentially constitutional matters concerning the proper allocation of powers between different levels of jurisdiction in the United Kingdom.

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4 See paras 47 – 56 of our First Report
5 This report uses the term “leave” as that is the term used in most decided cases; the term “permission” was introduced by Section 40 of the Constitutional Reform Act 2005 and is now used in place of “leave”.
AMENDMENTS TO THE SCOTLAND BILL BY CLAUSE 17

Section 57 as amended

11. The amendments referred to in paragraph 5 above were moved and accepted without explanation or debate in the House of Commons. However, they were clearly intended, at least in part, to give legislative effect to recommendations contained in the Expert Group Report. The amendments took no account of anything contained in our First Report. The Scotland Bill, as so amended, was given its First Reading in the House of Lords on 22 June 2011.

12. The new statutory formulation, contained in Clause 17 of the current Bill as read for the first time in the House of Lords, amends certain provisions of the Scotland Act 1998. In particular, section 57(3) of the 1998 Act, and paragraph 1 of Schedule 6 (devolution issues) are amended so that no “act of the Lord Advocate (a) in prosecuting and offence, or (b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland” is to fall within the provisions of subsection (2) of section 57. The result, in short, is that any such acts of the Lord Advocate are no longer to be treated as “Devolution Issues” and cannot be challenged by the devolution minute procedure that has been in use since the relevant provisions of the 1998 Act came into force.

13. We are in complete agreement with these statutory changes, insofar as they remove what the Expert Group rightly described as the “constitutionally inept” mechanisms for applying the convention rights provisions of the Human Rights Act to criminal proceedings in Scotland. The 1998 Act arrangements, “clumsy, bureaucratic and productive of delay”, are to be ended. The “constitutional error” is removed.

14. In our view, in order to achieve fully what was intended in this regard, it is also necessary for the UK Government, UK Parliament and the Scottish Parliament to appreciate the need to amend Schedule 6 to the Scotland Act. Paragraph 1 of Schedule 6 should make it unmistakably clear that the Lord Advocate when exercising his retained functions is not a member of the Executive for the purpose of Convention compatibility.

Replacing the Section 57 system

15. As the Expert Group explained, it is also necessary to replace the old mechanisms with a new procedure that properly reflects the Government’s acceptance of the thinking that led to the Expert Group’s recommendations. In short, that thinking was that a new self-standing provision was appropriate.

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6 The Second Reading took place on 6 September 2011. Dates for Committee proceedings had not been announced at the time of writing.
7 These functions are usually referred to as “the retained functions” of the Lord Advocate.
8 ‘Acts’ include a failure or omission to act.
9 See para. 4.22 of the Expert Group Report.
10 See para 4.27 of the Expert Group Report
“to make explicit, and put beyond doubt, the nature and limits of the jurisdiction of the Supreme Court in relation to criminal proceedings, and (if necessary) the investigation of deaths in Scotland”\(^\text{11}\). The new provision, the Expert Group concluded, “should make it clear that the purpose of the jurisdiction is (and is only) to ensure compliance with the international obligations of the United Kingdom with particular reference to Convention rights and EU law.” They added that “the new statutory formulation should be such as to concentrate attention on the compatibility with Convention rights of the criminal proceedings as a whole”, which they emphasised was plainly the intention of the Strasbourg Court. That approach has also been accepted repeatedly by the Judicial Committee of the Privy Council (JCPC), and by the Supreme Court as its successor. We have already made it plain that we agree completely with the foregoing recommendations of the Expert Group. We have, however, concluded that the new self-standing provision does not properly achieve what is necessary to give effect to the thinking that we have outlined. The new self-standing provision\(^\text{12}\) takes the form of a new section to be added to the Scotland Act 1998: “98A The Lord Advocate and Convention rights etc. criminal appeals”. The full terms of that new section, which we look at later in paragraphs 27-30, are set out in the Appendix, Item 2.

The wider constitutional framework

16. Before we proceed to develop our alternative approach, we seek to emphasise that this Report is concerned only with the reform of the system for dealing with compatibility issues related to statutory Convention rights arising in the course of criminal proceedings in Scotland and not with normal vires issues relating to legislation or administrative acts.

17. In particular, we endorse the general propriety and appropriateness of the existing system for dealing with vires issues that might arise now and in the future between Scotland and the UK government. In the context of the 1998 devolution settlement: they are truly “devolution issues” and should continue to be treated as such. They are properly to be understood as constitutional issues concerning the division of powers between different levels of legislature and administration within the United Kingdom, as distinct from human rights issues.

18. The Supreme Court, when dealing with such vires issues is acting as a constitutional court in a manner familiar to many federal or otherwise multi-level jurisdictions, as was the JCPC between 1999 and 2009. Nothing that we say about human rights issues and compatibility with Convention rights arising in criminal proceedings in Scotland is intended to challenge that view. To put it another way, the competence newly vested in the JCPC in 1998 was thought to be necessary because the nature of devolution made it essential to have vires matters reviewed in what was essentially a constitutional court. The vires jurisdiction pertaining to Scotland’s new parliamentary and

\(^{11}\) We shall not deal separately with the investigation of deaths.

\(^{12}\) Contained in Clause 17(3) of the Scotland Bill now before the House of Lords
The purpose of the new appellate jurisdiction; revisiting the historical record

19. Before we examine the weaknesses of the new procedures introduced by Clause 17, we shall outline the basic principles that should help to determine the role of the Supreme Court in relation to criminal cases from Scotland. In developing and justifying our approach, it is also, in our view, helpful to have regard to the circumstances in which the previous system came into existence. The Expert Group decided not to examine these circumstances\(^1\). However, some consideration of them is helpful to an understanding of the thinking that must have been behind the creation of the procedure now seen to be clumsy, bureaucratic and constitutionally inept. That thinking was not satisfactorily explained in the Commons or the House of Lords when the Scotland Bill was before Parliament in 1997/8. Some reference to those circumstances is made in the Appendix\(^2\).

20. It is a basic and uncontroversial feature of mature appeal systems that when there are two or more levels of appeal courts, the court at the highest level does not exist simply to repeat the work of the courts below. We do not attempt any examination of appellate jurisdiction in general; but, in the present context – that created by the passing of the Human Rights Act 1998 and the creation in the Scotland Act 1998, for the first time, of a right to appeal from the High Court to a higher court\(^3\) on certain limited aspects of criminal cases in Scotland - it is clear that it was not intended that the Supreme Court should have a jurisdiction to review the decisions of the Scottish criminal courts as if it were a new and final court of appeal in Scottish criminal cases.

21. We repeat, because we fear that it is insufficiently recognised, that there was no intention to create for the first time since 1707 a broad right of appeal from the High Court in criminal cases. That view is echoed very clearly in the Expert Group report. The new right of appeal to the JCPC in Scottish criminal cases, in relation to human rights issues, was solely intended to ensure that in such cases the Convention rights made part of our domestic law by the Human Rights Act 1998 were effective. While that objective might have been sought by leaving these matters to the Scottish courts, notably the High Court, the decision was taken to allow cases to go to the JCPC as a means of ensuring that the Convention rights were interpreted and understood on the same basis throughout the United Kingdom. So the decision to create the jurisdiction in the JCPC rather than the House of Lords

\(^{1}\) See para. 4.8 of the Expert Group Report
\(^{2}\) Item 2
\(^{3}\) The Judicial Committee of the Privy Council (JCPC), now the Supreme Court. We shall hereinafter usually refer to the Supreme Court.
reflected and did not seek to disturb the settled constitutional position\textsuperscript{16}, namely that the High Court was the final court for criminal cases in Scotland, and was to remain so, subject only to the limited new jurisdiction of the JCPC. Although the JCPC was a different body from the Appellate Committee of the House of Lords, its membership was seen for all practical purposes in this context to be the same as that of the Appellate Committee\textsuperscript{17}. This matter is dealt with more fully in the Appendix, Items 3 and 4.

22. This device of using the JCPC, having been selected and universally welcomed in the earlier and unimplemented devolution scheme under the Scotland Act 1978, was adopted without much further exploration or explanation in 1998 and does not appear to have aroused any significant opposition then either. The Constitutional Reform Act 2005 transferred this new limited jurisdiction to the Supreme Court, but effected no material change in the character and extent of the jurisdiction itself. The judges dealing with the jurisdictions inherited by the Supreme Court from the Appellate Committee of the House of Lords and the JCPC were the same people, the Justices of the Supreme Court.

23. For our purposes the relevant Convention rights made part of our domestic law by the Human Rights Act 1998 are the right to a fair trial (Art.6), the right to liberty and security (Art. 5) and the right to no punishment without law (Art. 7), and of these the most important and the most frequently invoked is the right to a fair trial. As these rights were to be enjoyed by “everyone” and were to be applied equally throughout the United Kingdom - whatever ‘local’ jurisdiction any particular accused person was subject to – the role of the Supreme Court was to determine the meaning and extent of the relevant Convention rights in the light of the relevant European jurisprudence, to articulate them against the background of the facts of the case before the Court and to decide if any of the accused’s Convention rights were being denied in such a way as to constitute a violation of them.

24. The principal purpose of imposing this task on the Supreme Court was to ensure that the Convention rights were interpreted and understood in the same way throughout the United Kingdom. The Supreme Court was particularly qualified to fulfill this role both because of its collegiate knowledge of the distinct feature of the various different jurisdictions, and because of the developing expertise of its members in the jurisprudence of the European Convention on Human Rights. The first task for the Supreme Court in each appeal was therefore to identify the precise legal (Convention) right that was alleged to be violated in the criminal proceedings. The next task was, in effect, to consider whether or not that right had indeed been denied in those criminal proceedings.

\textsuperscript{16} Also reflected in S124 of the Criminal Procedure (Scotland) Act 1995 as amended by the Scotland Act 1998 to make reference to paragraph 13(a) of Schedule 6 to the Scotland Act

\textsuperscript{17} Lord Wilberforce accurately referred to members of the Board of the judicial committee as “the same five old gentlemen Members of the House of Lords Appellate Committee sitting in a different place”: Lords Hansard, vol.389, col 1393.
25. That clearly did not mean that the Supreme Court was to consider all the issues afresh. The issue before the Supreme Court was not, “Did the court below come to the right answer?”. Its task was to ensure that the court below paid due regard to the relevant Convention right(s). So the true issue was “In light of the applicable Convention right(s), has the court below asked the right question(s) and identified the correct test to be applied?”

26. This was expressed most clearly by Lord Hope in *McInnes v Her Majesty’s Advocate* (2010 UKSC 7, 2010 SCCR 486):

> “18. The question for this court, given that there was a failure in the duty of disclosure, is what the correct test is for the determination of the appeal. It does not extend to the question whether the test, once it has been identified, was applied correctly. This is because section 124(2) of the Criminal Procedure (Scotland) Act 1995, as amended by the Scotland Act 1998 (Consequential Modifications) (No 1) Order 1999 (SI 1999/1042), provides that every interlocutor and sentence pronounced under Part VIII of the Act, which deals with solemn appeals, shall be final and conclusive and not subject to review in any court whatsoever except for the purposes of an appeal under para 13 (a) of Schedule 6 to the Scotland Act 1998. The application of the test to the facts of the case was a matter that lay exclusively within the jurisdiction of the appeal court. But, as the appeal court itself recognised when it gave leave in this case, the question as to what the correct test is forms part of the devolution issue. It is properly the subject of an appeal under para 13(a) of Schedule 6 and is open to review by the Supreme Court.”

**Weaknesses of the proposed new provisions**

27. It follows that the true focus of the Supreme Court’s exercise of jurisdiction in this context is the relevant Convention right, not – as section 57 of and Schedule 6 to the Scotland Act had made it – the ‘act’, or failure to act, of the Lord Advocate. Indeed, that statutory mechanism erroneously narrowed the focus, taking it away from the real issue, namely whether or not a Convention right was being or had been violated. If a Convention right, properly understood, has been violated, that violation may have been perpetrated by the Lord Advocate or by another quite separate public authority involved in the criminal process - such as the court itself, the prison service, the police, a branch of Social Services or even, peripherally, the BBC by, for example, reporting the background to the case in a way that amounted to a serious contempt of court. It is not difficult to think of ways in which such a denial or violation of a Convention right might occur without any “act of the Lord Advocate” being truly causative of that denial. So a serious weakness of the 1998 system was to omit to provide for ways in which the

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18 i.e. the High Court of Justiciary
19 Assuming it to be a public authority within the terms of the Human Rights Act.
courts, in criminal proceedings, might consider if a Convention right has been violated in some way other than by act of the Lord Advocate. The new statutory formula proposed repeats that omission.

28. In summary therefore:

(a) We agree that the Lord Advocate in his role as prosecutor should be removed from Section 57 of the Scotland Act, that Schedule 6 should be carefully amended to reflect that essential and important change, and that human rights (Convention rights) should no longer be treated as devolution issues.
(b) We do not consider that the provisions for a specific appeal to the Supreme Court on Convention rights in Scottish criminal cases should continue to be limited to acts or omissions of the Lord Advocate. As noted above, in our view the true distinction that the statute must reflect is the distinction between Convention rights and real *vires* devolution issues, i.e. disputes as to whether legislative or executive acts are *ultra vires* because they are outwith the competence of the Scottish Parliament*20* or Executive*21*.

29. We accordingly consider that the reference to “an act or failure to act of the Lord Advocate” should be replaced by an appropriately worded reference to any appeal to the High Court based on breaches of any of the Convention rights. This would provide a transparent method of avoiding the anomaly whereby breaches of Convention rights by, for example, judges could be dealt with only under the Human Rights Act 1998 while similar breaches for which the Lord Advocate is, or is deemed to be, responsible would be dealt with as if they were devolution issues. The recognition of just that kind of anomaly and the wish to provide for some way in which the Supreme Court could, in a Scottish criminal case, take note of, and remedy, an incompatible act that was really the act of a court or any public authority (other than the Lord Advocate) may account for the very wide definition which the courts have given (with, it should be said, the consent or even the encouragement of the Crown) of ‘acts of the Lord Advocate’. But the stretching of terms this promotes is inherently unsatisfactory, leading to convoluted reasoning and unpredictable results. For example, it is straining language to hold that, if the Lord Advocate continues a prosecution following a court ruling with which he disagrees, the continuing of that prosecution amounts to an unlawful and *ultra vires* act of the Lord Advocate.

30. The new Section 98(A), contained in Clause 17 of the current Scotland Bill, does not do what is necessary. In subsection (1) of the new section the focus for an appeal to the Supreme Court on incompatibility with Convention rights remains exclusively on any “act or failure to act of the Lord Advocate – (a) in prosecuting any offence, or (b) in the capacity of head of the system of criminal prosecution in Scotland”. It appears to us that the principal effect of

*20* Martin v H M Advocate [2010] UKSC 10, 2010 SCCR 401
*21* Bearing in mind the clear distinction between the Lord Advocate’s acts in pursuit of his retained functions and the normal administrative acts of members of the Scottish Executive.
creating the new system would be that procedure by way of Devolution Minutes would simply be replaced by procedure by way of incompatibility minutes. The straightjacket of “the act or failure to act of the Lord Advocate” would remain. The paperwork would be changed in form but the substance would hardly be improved. What is required is more than a change in the paperwork. The system needs more radical surgery than Clause 17 provides.

Miscarriage of justice and fresh evidence

31. Additionally, we have difficulty in understanding why the Supreme Court should be required (as proposed by the new section 98A(7)) to apply the criterion of “miscarriage of justice” when its function is to determine if the court below has properly understood the law contained in the relevant Convention right, e.g. the right to a fair trial in Article 6 cases and has applied it. The Supreme Court has to apply the “fair trial” test. Either “miscarriage of justice” is now the same test or it is different. If it is the same, then the reference to it is superfluous. If it is a different test, then its use is likely to cause confusion. Indeed, the term “miscarriage of justice” is not, as we understand it, a term of art in the rest of the United Kingdom; so this provision seems to obligate the Supreme Court to apply at least a differently worded criterion in determining Convention right cases if they come from Scotland. That could lead to the Supreme Court’s examining how the term “miscarriage of justice” had come to be understood before it was inserted into the new Scotland Bill, as an aid in ascertaining its present meaning.

32. Apart from creating confusion in the test or tests to be applied, the propriety of legislating in this way, by directing the Supreme Court how to interpret and apply the concepts and rules contained in, for example, Article 6, is surely constitutionally questionable.

33. We also have difficulties with the requirement that the Supreme Court should apply the rules regarding fresh evidence, which are laid down in the 1995 Act. We express no opinion on the compatibility of those provisions with the Convention generally but the decision of the Supreme Court in Fraser v HM Advocate 2011 SCCR 396 suggests that it may not be appropriate to apply the fresh evidence rules in cases when disclosure is in issue.

34. The criticisms contained in the previous paragraphs appear to us to point to the need for a fresh approach to the drafting of the new proposed Section 98A. The correct approach is to start by directing attention to the alleged violation, whoever is said to be responsible for it, and then determining if a Convention right, properly understood, has been denied. The different roles of the High Court of Justiciary and the Supreme Court in this process have already been discussed.

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22 We do not think that this idea derives from the Expert Group Report.
23 Section 98A, (5) to (8)
35. This was the key matter upon which we sought the views of consultees. Some of the responses to our first report have pointed out that the use of certification – as a pre-condition of leave to appeal to the Supreme Court - is more limited in the rest of the UK than our report might suggest. We do not dispute the need to examine the particular limitations that obtain in the rest of the UK in relation to certification and, as far as possible, to replicate them for the Scottish situation, mutatis mutandis. However, the central point is that, subject to those exceptions, allegations of Convention rights incompatibilities occurring in criminal proceedings elsewhere in the UK do not reach the Supreme Court unless there is a certificate of the kind desiderated.

36. Respondents have also pointed out that the process of certification as it operates in English criminal appeals has itself been subject to criticism. That is true; indeed there has been criticism of it for some years; but there has been no effective attempt in Parliament to abolish the requirement for certification. If the criticism came to be accepted for the rest of the UK and certification were to be ended or amended, then that would surely be the appropriate time to consider whether or not the requirement for certification by the High Court should be altered. But, as we say at paras 39-42 below, there are reasons other than comparability with England for providing a system of certification in the case of appeals from the High Court.

37. It has also been pointed out that, if an appeal is taken from the Court of Appeal (Criminal Division) in England and heard in the Supreme Court, then the Supreme Court acts as a court of criminal appeal. That however, merely reflects the traditional historical position elsewhere in the UK, namely that the House of Lords could always hear criminal appeals if the necessary certificate was granted. As that was never so in respect of Scotland, this English tradition is not a relevant consideration when considering the way in which the Supreme Court’s jurisdiction should be exercised in criminal cases from Scotland. When the Human Rights Act was passed in 1998, the decision was implicitly taken that certification, required in most criminal proceedings, was still to be required in English cases even when the issue in the proposed appeal was one of compatibility with convention rights. There is no comprehensible reason for making the position about certification different in respect of the High Court.

38. Some respondents argued that the requirement of certification based on the concept of points of law of general public importance takes insufficient account of the right of the individual to have his rights determined in the context of his particular case, whether or not they raise questions of general public importance.

24 We deliberately chose not to go into the complexities of the exceptions to the general rule requiring certification: we were concerned with the principle.
25 The limitations referred to appear to include contempt of court cases, court martial appeals and habeus corpus issues.
26 Supreme Court Practice Direction 12 http://www.supremecourt.gov.uk/procedures/practice-directions.html
importance. That criticism is not warranted. The individual is not prevented from having his rights determined by a competent court, wherever in the United Kingdom his case is heard: in Scotland that has always been the High Court. What lies behind the requirement for certification in England must include the assumption that the Court of Appeal, Criminal Division, in England and Wales is competent to determine those rights. There is no reason to suggest that the High Court is not equally competent, given that it has always been the final court in criminal matters in Scotland. Unless the certification requirement were introduced for Scottish cases, the anomaly would remain that accused persons in England, Wales and Northern Ireland, but not those in Scotland, would, in the normal case, have their Convention rights determined not by the Supreme Court but by the appropriate ‘local’ court of appeal. An appeal allowing for that determination to be reviewed by the Supreme Court would not be possible - unless that ‘local’ court granted the essential certificate.

39. One submission made by respondents was that the introduction into Scotland of certification procedure such as that in use elsewhere in the United Kingdom would itself have some anomalous results by disturbing the symmetry of the various devolution settlements in the context of the UK as a whole. Apart, however, from the point that we have already acknowledged – that a provision for certification by the High Court should include restrictions similar to the few statutory restrictions applicable in England and Wales and Northern Ireland – we consider that the suggested anomalies do not exist once it is appreciated that, as we have sought to make clear both in this report and in our First Report, questions of *vires* such as that raised in *Martin v HM Advocate* ([2010] UKSC 10) will continue to be treated as devolution issues. Certification would not be required in such cases. The exercise by the Lord Advocate of his retained prosecution functions does not raise devolution issues any more than does the exercise of the Director of Public Prosecution of his prosecution functions.

40. While we drew attention in our First Report to the anomalous distinction between the position in Scottish and other UK appeals from criminal courts to the Supreme Court in relation to certification, we accept that the nature of the British constitution, and the separate position of Scots law in general (and Scots criminal law in particular) means that some asymmetries are unavoidable. For example, the law relating to *habeas corpus* does not apply in Scotland, which has its own long-standing law in this area. It is important to reduce these asymmetries, but only where it is appropriate to do so, notably when they are unintended or lack any justification in terms of historical distinctiveness or current rationale.

41. It is with that qualification in mind that we have been anxious to ensure that the new statutory provisions – which may endure for decades - preserve the special constitutional and historical position of the High Court as the final court of criminal appeal in Scotland, an historical and constitutional fact that

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27 In the Council of Europe countries that accept the European Convention on Human Rights it is Article 5 (right to liberty and security) that governs this matter. In England and Wales, that basic right is derived from *habeas corpus*. 
distinguishes it from the Court of Appeal in England and Wales or Northern Ireland. In particular, we seek to ensure that the Scottish criminal justice system, unique amongst the constituent systems of the UK in its historical independence from the apex criminal appeal court for the rest of the UK, should not now, in the area of Convention rights, become more subject to interference from that apex court than the courts of these other systems.

42. In summary, the system for dealing with Convention rights in criminal proceedings in Scotland must rest on that foundation. Apart from the need to be able to review at a UK level the vires of legislation etc of the devolved legislature and administration, the only reason in 1998 for creating an entirely new right of appeal from the High Court in criminal cases was to enable alleged violations in Scottish criminal courts of the newly enacted Convention rights to be brought to the attention of the same judges who were to have the responsibility for interpreting throughout the rest of the UK the true meaning of any Convention right allegedly violated.

43. Against this whole background, we remain of the view expressed in our First Report that the appropriate form of appeal from the High Court to the Supreme Court should involve a procedure in which the superior court is asked to answer specific questions, rather than that of a normal criminal appeal. We also continue to be of the view that in order to preserve the position of the High Court, consideration of appeals by the Supreme Court should, as is the case for all the other UK jurisdictions, be limited to cases where the ‘local’ court has certified points of law of general public importance. We do not seek to change the current law, which requires an appellant to obtain leave to appeal from the High Court. We also accept that the Supreme Court should have power to grant or refuse leave; but that the Supreme Court should have no power to consider granting leave unless a certificate has been granted by the High Court.

44. We readily acknowledge that both the Scottish and other members of the Supreme Court have been at pains to stress the absence of any power or desire in that court to act as a Scottish criminal appeal court, but the very fact that it has been thought necessary to stress this suggests that there is always a possibility that if the Supreme Court were to retain its present jurisdiction it would be tempted to deal with appeals on an assumption, which the House of Lords was from time to time inclined to make, that ‘they order this matter better” in England, and that the Scots system should have the same ‘benefits’ as the English.

45. In restating these conclusions, we acknowledge the concern expressed by some of our respondents that the introduction of a certification process might frustrate consideration by the Supreme Court of the need for consistent interpretation of Convention rights, which is its proper role. However, we are satisfied that, under our proposals, there is no danger that the development and retention of a consistent Convention rights jurisprudence will be

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28 We find it somewhat odd to describe that separate position, derived directly from the Union of 1707 as an “anomaly”, as the Expert Group does in its response to our First Report: it was surely a fundamental feature of the Union settlement.
compromised. Indeed, we believe that our proposals are better equipped to achieve this objective than others that have been suggested. Of key importance here is the development of the test of “general public importance”. On the one hand, we disagree with those who consider the test redundant on the grounds that any case which goes to appeal on a question of the meaning of Convention rights in a constitutionally devolved jurisdiction is bound to satisfy that test. We do not believe that every matter which has been or could be appealed to the Supreme Court does in fact satisfy the test. At the very least, there may be room for disagreement as to whether the relevant issue raises a point of law sufficiently unsettled and of sufficient significance for the consistency of the system as a whole to constitute a matter of “general public importance”. A filter is necessary. On the other hand, however, the fact that the filter is controlled by the referring court does not in our view provide that court with undue power; for the test of “general public importance”, and the need to justify any decision not to refer in terms of that test, also act as constraints upon the referring court and as an invitation to develop a considered jurisprudence on the meaning of that term.

46. Taking rights seriously, in our view, is not about maximising the scope for appeals to be heard before the Supreme Court, as the UK’s highest “constitutional” court. Rather, it is about ensuring the optimal division of labour between courts, and the best procedures for ensuring that different courts carry out their functions as effectively as possible and in a complementary fashion. In our view, the best way of achieving this result would be to adopt a procedure that accepts (a) that the High Court normally has the final word on matters of criminal jurisdiction in Scotland, including the questions of the proper consideration of the rights of the accused that arise in every case before it, and (b) that the Supreme Court’s authoritative intervention should be sought only in those matters of general public importance where consistency in general standards of protection of Convention rights is at stake.

47. In any event, the concern about the need for consistency across the UK can be met by extending to compatibility issues the current powers of the Lord Advocate and Advocate General to refer, or require a court to refer, devolution issues to the Supreme Court29.

Sifting procedures

48. On a more technical matter, the case of Cadder v HM Advocate (2010 SCCR 951) illustrates a problem about the relationship of the Scottish appeal sifting provisions to the right of appeal to the Supreme Court. That case raised a legal issue which we think is generally accepted to have been a question of a point of law of general public importance. Cadder’s initial appeal to the High Court was rejected by the sifting judges because they took the view, inevitably, that in light of earlier decisions of the High Court30, there was no prospect that a new appeal to the same forum would be successful. This

29 We do not know why these powers appear largely to be removed as a result of Clause 17.
problem would need to be addressed, presumably by Act of Adjournal or Practice Note to ensure that proper consideration was given to the question whether or not the proposed appeal raised a point of law of general public importance.
OUTSTANDING QUESTIONS

Unanimity and leave to appeal

49. We also raised, both in our First Report and with those whom we met
the possibility that when it came to taking any decision as to certification the
High Court might be required to certify if the bench constituting the court was
not unanimous. Similarly we sought views on the possibility that, before
deciding whether or not a case involved a point of law of general public
importance, the court that was faced with an application for permission to
appeal to the Supreme Court might consult other judges. There was little or
no support for these suggestions. We recognise that, as others reminded us,
it is standard practice in Scotland for the issue of discretionary leave to appeal
to be left to the court making the decision against which an appeal is sought.
We are persuaded that the right course is to leave this matter to judicial
discretion. There has been no widespread dissatisfaction with this practice.
Furthermore, to introduce such a rule in Scotland would create a new
anomaly in practice compared with the rest of the UK. In the circumstances,
we do not recommend any change in this respect.

Unnecessary powers in Section 98A(9)

50. As noted above, in the light of our discussion of the true role of the
Supreme Court in Scottish criminal cases, we consider that the provision in
subsection (9) of the proposed Section 98A is much too wide. It provides that
the Supreme Court has all the powers of the court below and may (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.

51. We refer to Para 26 above. As noted, Lord Hope’s words included the
sentence, “The application of the test to the facts of the case was a matter
that lay exclusively within the jurisdiction of the appeal court”. Once the
Supreme Court has addressed the issue posed by the court below (reformulated if necessary), it should be enough for the Supreme Court to
remit the matter to the court below to proceed as accords. It is properly the
task of the High Court, not of the Supreme Court, to apply the correct test, as
defined by the Supreme Court, to the facts of the case and to decide on the
consequent future disposal of the case. The Supreme Court is less
experienced than the High Court in such matters, which are regulated by
Scottish procedures. As noted in paras 43-44 above such a formulation of the
power of the Supreme Court would reflect the traditional role of the High
Court. The wider powers that the Supreme Court may exercise when dealing
with appeals in criminal cases from elsewhere in the UK are presumably
appropriate in terms of the traditions and roles of the Supreme Court, or its
predecessor, in relation to such appeals from other courts; but given the
different history and role of the High Court they are not appropriate for
Scotland.
Reference to the Supreme Court before trial

52. As the present law allows, there may occasionally be exceptional circumstances in which it would be desirable to have a compatibility issue settled by the Supreme Court before trial: the “temporary sheriffs” and “temporary judges cases” are a good example. The High Court should properly continue to have a discretion to refer the issue – a point of law - for decision to the Supreme Court. Once the issue had been decided the Supreme Court would then remit to the High Court for further procedure.

Powers of Supreme Court to re-formulate the issue

53. In the normal case we would expect the Supreme Court to consider the questions of law contained in the certificate granted by the High Court and to answer those questions. However, the Supreme Court might conclude that the questions were not fully or properly focussed on the issues arising in the case. In such circumstances, we are of the view that the Supreme Court must have the jurisdiction to re-frame the question(s).

Composition and Seat of the Supreme Court

54. We asked if there would be value in providing, whether by legislation or by convention, that the Supreme Court should sit in Scotland in Scottish cases and/or have a majority of Scots on the bench in such cases. Our respondents have made it clear that the resource implications of having the Supreme Court sit in different parts of the UK, and the resultant interference with the behind-the-scenes work of the Justices and their support staff would be considerable and probably unjustified. Furthermore, the proceedings of the Supreme Court can be televised, and watched by those interested: that facility could be extended if thought necessary. Having regard to these considerations, and the lack of support for the idea, we conclude that there would be no advantage in legislating on this matter.

55. There has been little criticism of the work of the Supreme Court or its predecessors on the ground that there were too few Scots judges sitting in Scottish cases. It could sometime be difficult finding extra Scottish judges to undertake this work. The timetables of the different courts could cause problems. In the past, it has been possible to bring in an extra Scottish judge if it was thought to be necessary. We see no good reason to make provision for any possible change in practice.

JOHN McCLUSKEY
Chair, Review Group

31 Starrs v Ruxton 2000 JC 208; 1999 SCCR 1052 and Kearney v H M Advocate 2006 SC (PC) 1; 2006 SCCR 130
APPENDIX

ITEM 1. SUMMARY OF ADVICE FROM FIRST REPORT

1. We agree with the Expert Group that serious problems have arisen - in relation to the jurisdiction of the Supreme Court in criminal cases involving human rights issues - because the statutory basis in the Scotland Act 1998 for that jurisdiction is unsatisfactory (cf. paragraphs 42 and 43). We do not suggest that the jurisdiction of the Supreme Court should be ended.

2. We endorse the general solution proposed by the Expert Group and adopted by the House of Commons on 21 June 2011 to create a different procedure for human rights appeals, but we advise consideration of a new provision governing permission to appeal to the Supreme Court from a determination by the High Court of Justiciary of any question of “compatibility”, as defined in the new Section 98A (2) (paragraphs 53 to 57).

3. Our proposed new provision (outlined in paragraph 56) would put the High Court of Justiciary on an equal footing with its counterparts elsewhere in the UK by enabling the Supreme Court to grant permission to appeal only if the High Court of Justiciary has granted a certificate that the case raises a point of general public importance. Other issues about permission are suggested for further discussion (paragraphs 67 to 69).

4. It should be made clear that, in criminal appeals from the High Court of Justiciary on “compatibility” questions, the Supreme Court’s jurisdiction is to be exercised in such a way that it defines and expresses the law applicable and then sends the case back to the High Court of Justiciary to apply that law (paragraphs 60 to 64). In this way the traditional role of the High Court of Justiciary, reflecting the long history of separate development of the Scottish criminal system, would be preserved. The precise method of achieving this clarification should be fully discussed with those who have to deal with such cases in practice.

5. We advise that careful consideration be given to a general rule that normally the Supreme Court should give a ruling on a “compatibility” question only after the case has been completed. However, it might be wise to permit the High Court of Justiciary to ask the Supreme Court for a ruling at an earlier stage (paragraphs 65 and 66). We have not, as yet, fully discussed the provisions that allow References to the Supreme Court by the Advocate General or the Lord Advocate.

6. We are prepared to consult interested parties on the way forward following publication of this Report and the subsequent Parliamentary debate.
ITEM 2. CLAUSE 17 OF SCOTLAND BILL, WHICH HAD HOUSE OF LORDS SECOND READING ON 6 SEPTEMBER

The Lord Advocate: Convention rights and Community law

(1) The 1998 Act is amended as follows.

(2) In section 57(3) (Community law and Convention rights: excepted acts of the Lord Advocate), omit the words after paragraph (b).

(3) After section 98 insert—

“98A The Lord Advocate and Convention rights etc: criminal appeals

(1) This section applies to an act or failure to act of the Lord Advocate—
( a) in prosecuting any offence, or
( b) in the capacity of head of the system of criminal prosecution in Scotland.

(2) In this section “compatibility” means the compatibility of such an act or failure to act with any of the Convention rights or with Community law.

(3) For the purpose of determining any question relating to compatibility, an appeal shall lie to the Supreme Court against a determination by a court of two or more judges of the High Court of Justiciary.

(4) An appeal under this section lies from such a court only with the permission of that court or, failing such permission, with permission of the Supreme Court.

(5) Where the High Court’s determination was on an appeal under section 106 of the Criminal Procedure (Scotland) Act 1995 (appeal from solemn proceedings), subsections (3) to (3D) of that section apply in accordance with subsections (7) and (8) below.

(6) Where the High Court’s determination was on an appeal under subsection (2) of section 175 of that Act (appeal from summary proceedings), subsections (5) to (5D) of that section apply in accordance with subsection (7) and (8) below.

(7) The subsections of the 1995 Act referred to in subsections (5) and (6) above (appeal to be on grounds of miscarriage of justice) apply to the Supreme Court in relation to an appeal under this section as they apply to the High Court in relation to any appeal.

(8) But an alleged miscarriage of justice may not be brought under review of the Supreme Court by virtue of subsection (7) except for the purpose of determining a question relating to compatibility.

(9) In relation to an appeal under this section, 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.”

(4) In paragraph 1 of Schedule 6 (devolution issues), after sub-paragraph (f) insert—

“But a question whether an act or failure to act is, or would be, incompatible with any of the Convention rights or with
Community law is not a devolution issue if it is an act or failure of the Lord Advocate in prosecuting any offence or in the capacity of head of the systems of criminal prosecution and investigation of deaths in Scotland.”

(5) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

(6) In sections 112(6), 121(5)(a), 121A(5), 122(4) and (5) and 177(8), for “paragraph 13(a) of Schedule 6 to the Scotland Act 1998” substitute “section 98A of the Scotland Act 1998 or paragraph 13(a) of Schedule 6 to that Act”.

(7) In section 124(2)—
(a) for “and paragraph 13(a) of Schedule 6 to the Scotland Act 1998” substitute “section 98A of the Scotland Act 1998 and paragraph 13(a) of Schedule 6 to that Act”;
(b) after “appeal under” insert “section 98A of that Act or”.

(8) In section 288A—
(a) in subsection (1) omit “in pursuance of paragraph 6 of Schedule 6 to the Scotland Act 1998 (devolution issues)”;
(b) for subsection (2) substitute—
“(2) Where the Advocate General for Scotland was a party in pursuance of paragraph 6 of Schedule 6 to the Scotland Act 1998 (devolution issues), the Advocate General may refer to the High Court for their opinion any devolution issue which has arisen in the proceedings.
(2A) Whether or not subsection (2) applies, the Advocate General for Scotland may refer to the High Court for their opinion any question which has arisen in the proceedings as to whether an act or failure to act of the Lord Advocate in prosecuting in the proceedings or in the capacity of head of the system of criminal prosecution in Scotland was incompatible with any of the Convention rights or with Community law.
(2B) If a reference is made under subsection (2) or (2A) the Clerk of Justiciary shall send to the person acquitted or convicted and to any solicitor who acted for that person at the trial a copy of the reference and intimation of the date fixed by the Court for a hearing.”;
(c) in subsection (6) after “(2)” insert “or (2A)”.

(9) In section 288B(1)—
(a) for “paragraph 13(a) of Schedule 6 to the Scotland Act 1998” substitute “section 98A of the Scotland Act 1998 or paragraph 13(a) of Schedule 6 to that Act”; 
(b) omit “of a devolution issue”.
ITEM 3. BACKGROUND TO THE JURISDICTION OF THE JCPC

The two bills that became the Scotland Act 1998 and the Human Rights Act 1998 were introduced into Parliament about the same time: the Scotland Bill was introduced in the Commons; the Human Rights Bill was introduced in the House of Lords. Each piece of legislation was preceded by a White Paper. That for the Scotland Bill (“Scotland’s Parliament”, July 1997) stated that Convention incorporation issues would be addressed in the White Paper for the Human Rights Bill. The White Paper for the Human Rights Bill, “Rights brought home”, October 1997) stated that the Scottish Parliament was to have no power to contravene Convention rights; that the Scottish Executive would have no power to make ‘incompatible’ subordinate legislation or to take incompatible action; the Welsh Assembly and Executive would be “similarly” constrained. There is nothing in these White Papers to indicate that those responsible for drafting the legislation were taking into account that fact that the Lord Advocate, when exercising retained functions, was in a wholly different position from members of the Welsh Executive or other members of the Scottish Executive. Furthermore, it appears probable that it was originally intended that, when enacted, both Acts would have come into force at the same time: had that been done, then the Lord Advocate, as a “public authority” would have been subject to the Human Rights Act in the same way as a public prosecutor in other parts of the United Kingdom: all prosecutors in the different jurisdictions would have been “similarly constrained”. The possible remedies in respect of an ‘incompatible’ act would have been those prescribed in the Human Rights Act. The High Court of Justiciary was also, of course, to be a “public authority” within the meaning of the Human Rights Act, but, having regard to the terms of section 40 of the Constitutional Reform Act 2005 (in effect, simply re-enacting the existing and historical position), there was no appeal to the Supreme Court from the High Court of Justiciary.

A different solution was devised, that of putting a special provision into the Scotland Act 1998. The impression that is given is that the consequences of treating the Lord Advocate in section 57 of the Scotland Act 1998 as if, in the exercise of his retained functions, he could be treated in the same way as were other members of the Scottish Executive (or the Welsh Executive), were not properly thought through. No one foresaw that the new procedures under section 57 and Schedule 6 would produce the volume and character of

32 Para. 4.20
33 Para 2.21 says, “The Government has decided that the Scottish Parliament will have no power to legislate in a way which is incompatible with the Convention; and similarly that the Scottish Executive will have no power to make subordinate legislation or to take executive action which is incompatible with the Convention. It will accordingly be possible to challenge such legislation and actions in the Scottish courts on the ground that the Scottish Parliament or Executive has incorrectly applied its powers. If the challenge is successful then the legislation or action would be held to be unlawful”.
34 Para. 2.22
35 Section 9 of the Human Rights Act 1998
36 See sections 7, 8 and 9
litigation that in fact resulted. No one foresaw that the Supreme Court would acquire as wide and intrusive a jurisdiction as it did in relation to Scottish criminal cases. It would have been bizarre if, in a statute whose whole purpose was to devolve power from Westminster to Scotland, Parliament had deliberately reduced the power of Scotland’s highest criminal court to determine Scottish criminal cases. The reasons for taking such a step would surely have been made clear by ministers in Parliament.

Because the decisions of the High Court of Justiciary were not subject to appeal to the House of Lords or to the JCPC, it seems to have been thought that the only way that allegedly incompatible actions, including rulings by the High Court of Justiciary, could be brought before the Supreme Court was to treat almost every related event, from the moment when a crime was discovered until the case reached its conclusion, as being an “act” of the Lord Advocate, albeit many such acts were clearly acts by the court, including acts that the Lord Advocate was wholly unable to control. This, in our view, not only distorted the case law governing the exercise of its jurisdiction by the JCPC and the Supreme Court. It also led to a most unfortunate difference between Scotland and the rest of the United Kingdom. The “acts” of the Lord Advocate, if deemed to contravene a Convention right, were made, ultra vires, null and void whereas similar acts by other prosecutors were merely held to be “unlawful” in terms of the Human Rights Act.

It appears to us that the choice of the Judicial Committee of the Privy Council can be traced back to the proceedings in Parliament, and in particular in the House of Lords, when the Scotland Bill of 1977/8 was debated there. The background to that Bill, however, was very different from that of the Bill that became the Scotland Act 1998.

The earlier bill was constructed on a wholly different basis, both constitutional and otherwise. In the first place, in 1977/8 the office of Lord Advocate was not to be devolved: the Lord Advocate was to remain a minister of the Government at Westminster. Secondly, the Human Rights Act had not been passed and no mechanism was needed to deal with alleged violations of rights contained in the European Convention on Human Rights, for those rights were not incorporated into our law: cf Kaur v Lord Advocate 1980 SC 319; Moore v Secretary of State for Scotland 1985 SLT 38. Thus, in the context of devolution, the only important and relevant international obligations deriving from any international treaty which had in any substantial degree been incorporated directly into our UK domestic law were those contained in the legislation that flowed from our membership of the European Economic Community (now the European Union). That matter was dealt with differently in the 1977/8 Bill and need not concern us here. Accordingly, all that was needed, and what the 1997/8 bill provided for, was a means whereby there could be effective challenges to legislation, including subordinate legislation, or acts of the Executive of the devolved administration, if the government at Westminster, or others, including litigants, considered that such legislation or acts were incompatible with the restrictions placed the Scotland Act 1978 itself upon the vires of the Scottish Assembly.

That matter was debated at great length in the House of Lords and those taking part in the debate included most of the most distinguished judges in the country. Members of the Appellate Committee of the House of Lords were then all members of the House of Lords and were entitled to take part in the legislative proceedings in the chamber: they did so regularly. Not only that: they were also members of the Judicial Committee of the Privy Council and, in that capacity, sat regularly in No. 12 Downing Street as members of the Board of the Privy council to advise the Crown on constitutional matters affecting the vires of legislation or of administrative acts by subordinate legislatures and executives throughout the Commonwealth. (Lord Wilberforce referred to the members as “the same five old gentlemen Members of the House of Lords Appellate Committee sitting in a different place”38). Such legislatures and executives were subordinate to the Crown, whether their vires derived from UK statutes or other quasi-legislation, such as Orders in Council. Thus the government and everyone who contributed to the Parliamentary debates on the Scotland Bill in 1977/8 accepted that the Judicial Committee of the Privy Council, which included judges from other Commonwealth countries, had a

unique experience of dealing with questions of vires in a constitutional context.

The relationship between the United Kingdom government and the new Scottish Assembly that was being created was seen as very similar to that between the UK government, or the Crown, on the one hand, and many of the remaining Commonwealth dependencies on the other. It followed that the JCPC was the ideal body to deal with the vires issues that might arise under the form of devolution contained in the 1977/8 Bill. The choice of the JCPC had the additional advantage, which the debates recognised, that the new arrangements would respect what Lord Scarman described as “the rogue elephant in our constitutional picture, which Scotsmen, I think, treat as a pet elephant: namely that there is no right of appeal in criminal matters from the Court of Justiciary to the House of Lords”. That was the approach that instructed the debates about how to deal with devolution vires issues and the choice of the JCPC.

Incidentally, it was to be the Secretary of State (usually, for Scotland), who was to have the responsibility for considering vires issues perceived to arise pre-enactment (before Scottish bills became law) and take them if necessary to the JCPC. We wish to make it clear that we take the same view mutatis mutandis of the propriety and appropriateness of the essence of this type of system for dealing with vires issues that might arise today between Scotland and the UK government. In the context of the devolution settlement, they are truly “devolution issues” and should continue to be treated as such. They are properly to be understood as constitutional issues, as distinct from human rights issues. The Supreme Court, when dealing with such vires issues is acting as a constitutional court. Nothing that we say about human rights issues and compatibility with Convention rights arising in criminal proceedings in Scotland is intended to challenge that view.

For the removal of doubt, we wish to make it clear that we also recognise – as did those who took part in the 1978 debates in the House of Lords – that vires issues might arise, in relation to legislation on devolved criminal matters, in legal proceedings, civil or criminal, in Scotland. In our view, any such vires issues, being truly devolution issues, are, in our view, suitable for devolution minute procedure. But the corollary of that is that alleged violations of Convention rights in the course of bringing or conduction criminal proceedings, whether such violations are attributed to the Lord Advocate, the police, the prison service or any other public authority, are not constitutional issues that properly arise as, or fall to be treated as, devolution issues. These considerations have a bearing on our view that a fresh approach is needed for present purposes to consider the different position of the near independent members of the Commonwealth – such as Canada and Australia – under the Statute of Westminster.

Parliamentary Debates LORDS, vol.389, col.1229; the same point was made by Lord Fraser of Tullybelton in a speech that comprehensively covers all the relevant matters. vol. 389, col.1428 et seq.

The Supreme Court now exercises the remains of that “Commonwealth” jurisdiction.

Although such constitutional issues might have human rights elements

see paras 27-30
to the drafting of the new Section 98A in the current Scotland Bill. It seems not unlikely, though no explanation was forthcoming at the time when the relevant provisions were inserted into the 1998 Scotland Bill, that those responsible for the drafting of that bill simply adopted elements of the 1978 solution without taking full account of the wholly different circumstances which obtained in 1978. We perhaps cannot emphasise enough that this Report is concerned only with the reform of the system for dealing with statutory human rights issues arising in the course of criminal proceedings in Scotland and not with normal *vires* issues relating to legislation or administrative acts.

We should also repeat for the avoidance of doubt that we have addressed the impact of incorporating Convention rights into our law. We have no proposals in relation to compatibility with EU law.
ITEM 5. THE QUESTIONS – from our First Report

Question 1. Should the law be amended along the lines of our suggested amendment (4A) (see our report) to the new section 98A (added to the [Scotland] bill on 22 June), so as to make it an essential pre-condition of an appeal to the Supreme Court in Scottish criminal cases that the High Court of Justiciary has granted a certificate that the case raises a point of law of general public importance?

Question 2. If YES, to question 1, why? If NO to question 1. Why not?

Question 3. On the assumption that such a pre-condition were introduced into the legislation, should the High Court bench that decided the appeal in respect of which leave to appeal is sought be alone responsible for deciding the application(s) for leave and for the necessary certificate, or should there be a statutory requirement for that court to consult other High Court judges (How many?) on the question whether or not the case raises such a point of law?

Question 4. Should leave/permission be automatically granted if the decision of the judges constituting the court that has decided the appeal is not unanimous?

Question 5. Should the current Scotland Bill be amended to alter and redefine the jurisdiction of the Supreme Court in such cases in any of the following ways:
   (a) by restricting appeals to the Supreme Court to cases which have been completed, i.e. the trial and appeal processes have been finished;
   (b) (as an exception to (a)) by allowing the High Court of Justiciary at any earlier stage in the criminal process to invite the Supreme Court to answer a specific (preliminary) question as to whether or not a defined process or set of circumstances would constitute a violation of a ‘Convention’ right;
   (c) by enabling the Supreme Court to give a binding ruling only on the point of law raised, with the case then remitted to the High Court of Justiciary for further procedure;
   (d) by empowering the Supreme Court to re-formulate the specific question before ruling on the matter?

Question 6. Would there be value in providing, whether by legislation or by convention, that the Supreme Court will sit in Scotland in Scottish cases and/or have a majority of Scots on the bench in such cases?

Question 7. Is there anything that you would wish to add?
ITEM 6. RESPONDENTS TO OUR CONSULTATION

Sheriff Kenneth McIver
Lord Cullen of Whitekirk
Sir David Edwards and members of the Advocate General’s Expert Group
Ian Leitch CBE
Cabinet Secretary for Justice
JUSTICE
Iain Jamieson
Professor Alan Page
Law Society of Scotland
Glasgow Bar Association
Scottish Human Rights Commission
James Chalmers and Professor Gerry Maher QC
Equality and Human Rights Commission
The Supreme Court

The Review Group also met with:

The Rt Hon Lord Wallace of Tankerness QC, Advocate General for Scotland;
The Right Hon Lord Hope of Craighead KT;
The Right Hon Lord Hamilton, Lord President and Lord Justice General; and
The Right Hon Lord Gill, Lord Justice Clerk