Review of sections 34 to 37 of the Scotland Act 2012

Compatibility issues

Consultation

January 2018

Contents

Chapter 1. Introduction

1.1 Sections 34 to 37 of the Scotland Act 2012 ("the 2012 Act") made a number of amendments to the Criminal Procedure (Scotland) Act 1995 and the Scotland Act 1998 ("the 1998 Act"). Significant changes included the introduction of "compatibility issues" in criminal proceedings and modifications to the right of appeal to the United Kingdom Supreme Court ("UKSC").

1.2 A review of the amendments made by those provisions is required by section 38 of the 2012 Act. This section requires the Secretary of State for Scotland to arrange for a review to take place as soon as practicable, three years after the date on which the provisions came into force[1]. That was on 23 April 2013.

Review Group

1.3 The Secretary of State has invited the Lord Justice General to chair the review and to establish a Review Group[2]. The first meeting of the Review Group took place on 23 June 2017. At this meeting the Review Group agreed to publish a consultation paper in order to invite views from those with an interest in criminal justice on the practice and procedure relating to compatibility issues and appeals to the UKSC. At a second meeting on 29 September 2017 a draft paper was discussed and revised.

Remit of the Review

1.4 As provided by section 38(3) of the 2012 Act, the review is to consider:

- whether changes should be made to sections 34 to 37;
- whether any further provision should be made in relation to any matter dealt with by those sections; and
- in particular, whether an appeal to the UKSC on a compatibility issue should lie only if the High Court of Justiciary certifies that the issue raises a point of law of general public importance.

1.5 This paper has been prepared under the auspices of the Review Group to facilitate discussion on the extent to which any amendments should be recommended.

[1] Scotland Act 2012 ("the 2012 Act"), section 38(2).

[2] The Review Group is: Lord Carloway (Lord Justice General); Lady Dorrian (Lord Justice Clerk); Lord Reed (UKSC); David Harvie (Crown Agent); Roddy Dunlop Q.C. (Advocate); and John Scott Q.C (Solicitor Advocate).

Chapter 2. Background

Devolution issues

2.1 The 1998 Act created a Scottish Parliament and Scottish Executive with limited powers. Prior to its amendment, the 1998 Act provided that any legislative provision or act of the Scottish Parliament or Scottish Ministers was outside their respective legislative and devolved competences *"so far as it is incompatible with the Convention rights or EU law"*[3]. The expression 'Scottish Ministers' referred collectively to the members of what was previously known as the 'Scottish Executive', who were:

- the First Minister;
- such Ministers as the First Minister might appoint; and
- the Lord Advocate and the Solicitor General for Scotland[4].

2.2 Prior to its amendment by the 2012 Act, section 57(2) of the 1998 Act provided:

> "*A member of the Scottish Executive has no power to make any subordinate legislation, or do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law*".

Section 57(3) provided a limited exception to that general rule, by reference to section 6 of the Human Rights Act 1998. The effect was to exclude acts of the Lord Advocate: (a) in prosecuting any offence; or (b) in his or her capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland which was compelled by, gave effect to, or enforced 'primary legislation' (i.e. Acts of the UK Parliament). Subject to that exception (designed to preserve the sovereignty of the UK Parliament), the Lord Advocate, as a member of the Scottish Executive, could not do any act that was incompatible with Convention rights or EU law. Any such act was beyond the powers of the Lord Advocate and therefore, in legal terms, *ultra vires*.

2.3 The following questions, amongst others, are declared to be 'devolution issues':

- whether an Act (or any part of an Act) of the Scottish Parliament is within its legislative competence;
- whether the exercise (or purported exercise) of a function by a member of the Scottish Government is (or would be) within devolved competence, or incompatible with a Convention right or EU law; and

[3] Scotland Act 1998 ("the 1998 Act"), sections 29(2)(d) and 57.

[4] *Ibid,* section 126(1) and (9).

- whether a failure to act by a member of the Scottish Government is incompatible with a Convention right or EU law[5].

Jurisdiction of the UKSC

2.4 The 1998 Act confers on the courts a jurisdiction to determine devolution issues, with a final appeal to the UKSC (and, prior to the establishment of that court, to the Judicial Committee of the Privy Council). It also provides that, before enactment by the Scottish Parliament, the Advocate General, the Lord Advocate or the Attorney General may refer directly to the UKSC the question of whether a Bill (or part of a Bill) would be within the legislative competence of the Scottish Parliament[6]. The Act thus confers on the UKSC a constitutional jurisdiction designed to ensure:

- that Acts of the Scottish Parliament are within the 'legislative competence' of the Parliament[7]; and
- that the Scottish Ministers exercise their functions within the scope of their 'devolved competence'[8].

2.5 The High Court of Justiciary is traditionally the final court of appeal in criminal matters in Scotland. The background to this is set out in Professor Neil Walker's Report to the Scottish Government on the *Final Appellate Jurisdiction in the Scottish Legal System*[9]. Prior to devolution, the absence of a right of appeal to the House of Lords was made clear in section 124(2) of the Criminal Procedure (Scotland) Act 1995 which stated that decisions of the High Court *"shall be final and conclusive and not subject to review by any court whatsoever"*. That was the position until the commencement of the 1998 Act, notwithstanding the United Kingdom having joined what is now the EU in 1973 and ratified the European Convention on Human Rights ("ECHR") in 1951.

The procedure for determining devolution issues

2.6 Proceedings for determination of a devolution issue can be instituted by the Law Officers in Scotland, England & Wales and Northern Ireland. Otherwise, the 1998 Act proceeds on the basis that a devolution issue may 'arise' in the course of civil or criminal proceedings in any of those jurisdictions.

[5] *Ibid,* section 98 and schedule 6, paragraph 1.

[6] *Ibid,* section 33.

[7] *Ibid,* section 29.

[8] *Ibid,* sections 53 and 54.

[9] Professor Neil Walker, *Final Appellate Jurisdiction in the Scottish Legal System*, January 2010.

2.7 The same procedure, *mutatis mutandis*, applies where a devolution issue arises in civil or criminal proceedings. In the criminal context, the 1998 Act distinguishes between: (a) a court consisting of two or more judges of the High Court (i.e. the High Court sitting as an appeal court); and (b) any lower court, including the High Court, sitting at first instance. A court below the level of the appeal court may refer a devolution issue to the appeal court,[10] or the issue may reach there (or arise there) in the ordinary course of an appeal. The appeal court may either refer the issue directly to the UKSC[11], or determine the issue itself. The 1998 Act provides that:

> *"An appeal against a determination of a devolution issue by—*
>
> *(a) a court of two or more judges of the High Court of Justiciary (whether in ordinary course of proceedings or on a reference under paragraph 9)…*
>
> *shall lie to the Supreme Court, but only with permission of the court concerned or, failing such permission, with special permission of the Supreme Court"*[12].

The 1998 Act requires intimation of any devolution issue to be given to the Advocate General and the Lord Advocate unless already a party to the proceedings[13].

2.8 The procedure by which a party to criminal proceedings (other than the prosecutor) may raise a devolution issue is set out in Chapter 40 of the Criminal Procedure Rules[14]. In proceedings on indictment, written notice of the intention to raise a devolution issue (known as a 'devolution minute') must be lodged with the clerk of court and served on the other parties not later than 14 days before the preliminary hearing or first diet.[15] A comparable rule applies in summary proceedings[16]. The devolution minute must specify *"the facts and circumstances and contentions of law on the basis of which it is alleged that a… devolution issue arises in the proceedings… in sufficient detail to enable the court to determine whether such an issue arises"*[17].

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[10] The 1998 Act, schedule 6, paragraph 9.

[11] *Ibid*, schedule 6, paragraph 11.

[12] *Ibid*, schedule 6, paragraph 13.

[13] *Ibid,* schedule 6, paragraph 5.

[14] Act of Adjournal (Criminal Procedure Rules) 1996, schedule 2.

[15] *Ibid,* rule 40.2(3).

[16] *Ibid,* rule 40.3(3). Comparable rules are also made for 'other criminal proceedings', e.g. bills of suspension and petitions to the *nobile officium*, see rule 40.4.

[17] *Ibid*, rule 40.5.

'Acts of the Lord Advocate'

2.9 Prior to the amendments made by the 2012 Act, by far the most productive source of devolution issues was section 57(2) of the 1998 Act as it related to 'acts of the Lord Advocate'. As noted above (paragraph 2.2), the effect of this section as originally enacted was that acts of the Lord Advocate that were incompatible with Convention rights or EU law were *ultra vires*, except in so far as they were exempt under section 57(3). Case law interpreted the concept of 'acts of the Lord Advocate' as including all aspects of the conduct of public prosecutions at first instance and on appeal. The concept thus embraced many aspects of criminal proceedings.

2.10 A summary of the breadth of matters challenged under devolution issue procedure is provided in Part 1 of the Annex to this paper.

The Report of the Expert Group

2.11 In 2008, the judges of the High Court put a submission to the Calman Commission[18], raising concerns about the operation of section 57(2) of the 1998 Act and devolution issue procedure. In their submission, the judges stated that:

> *"the facility provided by section 57(2) of the Scotland Act, to challenge by way of devolution minute virtually any act of a prosecutor has led to a plethora of disputed issues, with consequential delays to the holding of trials and to the hearing and completion of appeals against conviction. The jurisdiction of the Judicial Committee… has arguably created, or at least substantially contributed to, delay in the handling of criminal business[19]."*

2.12 The Calman Commission, ultimately, took the view that these issues went beyond its remit. The Advocate General therefore formed an Expert Group, chaired by Sir David Edward, to consider and report on the application of devolution issue procedure to acts of the Lord Advocate in his role as a prosecutor.

2.13 The Expert Group accepted that the existing arrangements created a very serious problem for the Scottish court system and the work of the Lord Advocate and Advocate General.[20] In that regard, they referred to statistics, indicating that over 10,000 devolution minutes had been lodged since devolution, and to the Report of Lord Bonomy entitled *Improving Practice – 2002 Review of the Practices and Procedure of*

[18] As noted in the consultation paper prepared by the Office of the Advocate General entitled *Devolution issues and acts of the Lord Advocate – section 57(2)*, September 2010, paragraphs 1 to 3.

[19] Representation from the Judiciary in the High Court to the Calman Commission, 2008, paragraph 13.

[20] Expert Group Report, paragraph 4.3.

the High Court of Justiciary[21]. Chapter 17 of that Report discussed *"devolution issues as a source of delay"* and urged that *"schedule 6 of the Scotland Act should be amended to make it clear that acts or failures to act by the Lord Advocate as prosecutor, and anyone acting on his authority or behalf as prosecutor, are excluded from the definition of devolution issue"*[22].

2.14 The Expert Group noted that *"it is because (and only because) the Lord Advocate is 'a member of the Scottish Executive' that her acts are subject to review as a devolution issue"*[23]. The extent to which the concept of 'acts of the Lord Advocate' had been interpreted so as to embrace many aspects of criminal proceedings was due to the unique position of the Lord Advocate as head of the system of criminal prosecution in Scotland. There was no parallel in other parts of the United Kingdom[24].

2.15 On the other hand, the Human Rights Act 1998 ("the Human Rights Act") provided judicial remedies for contraventions of Convention rights by public authorities[25]. The Lord Advocate was a 'public authority' within the meaning of the Human Rights Act. In so far as acts of the Lord Advocate were incompatible with Convention rights, they were 'unlawful' by reason of section 6(1) of that Act. While it was possible to raise such human rights issues in an appeal to the UKSC in respect of criminal proceedings in England, Wales and Northern Ireland, there was no right of appeal to the UKSC in respect of such issues from decisions of the High Court in Scotland, any such right of appeal being excluded by the Constitutional Reform Act 2005[26].

2.16 The result was that an act of the Lord Advocate that was incompatible with Convention rights was both *ultra vires* by reason of section 57(2) of the 1998 Act, and therefore subject to review by the UKSC as raising a 'devolution issue', and 'unlawful' by reason of section 6 of the Human Rights Act but not subject to review by the UKSC under that Act. It followed that, if acts of the Lord Advocate as head of the system of criminal prosecution were simply to be excluded from the scope of section 57(2) of the 1998 Act, they would remain 'unlawful' under the Human Rights Act, but would not be subject to review by the UKSC[27].

2.17 The Expert Group considered that there was a fundamental constitutional objection to the existing statutory framework. It was constitutionally inept to treat acts of the

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[21] *Improving Practice – 2002 Review of the Practices and Procedure of the High Court of Justiciary*, December 2002

[22] *Ibid*, paragraphs 17.10 to 17.14.

[23] Expert Group Report, paragraph 2.3

[24] *Ibid*.

[25] Human Rights Act 1998, sections 6 to 9.

[26] Expert Group Report, paragraph 2.4.

[27] *Ibid*, paragraph 2.6 and 2.7.

Lord Advocate in respect of her functions as head of the system of prosecution as raising a 'devolution issue'. Those functions had not been conferred by the 1998 Act, or as part of the devolution settlement. That problem could be addressed in the first instance by amending section 57(3) of the 1998 Act, so as to exclude acts of the Lord Advocate in prosecuting any offence, or in her capacity as head of the systems of criminal prosecution and investigation of deaths, from the scope of section 57(2). The Expert Group recommended that the jurisdiction of the UKSC could be maintained by substituting a self-standing provision that would make explicit, and put beyond doubt, the nature and limits of the jurisdiction of the UKSC in relation to criminal proceedings, and (if necessary) the investigation of deaths, in Scotland. This was to make it clear that the purpose of the jurisdiction was (and was only) to ensure compliance with the international obligations of the United Kingdom with particular reference to Convention rights and EU law. In so far as it related to the protection of Convention rights, the statutory formulation ought to concentrate attention on the compatibility with Convention rights of the criminal proceedings as a whole, as required by the case law of the European Court of Human Rights[28].

2.18 The Expert Group considered that much of the dissatisfaction with the current procedures was attributable to the fact that in Scotland (unlike England, Wales or Northern Ireland) issues of compatibility with Convention rights and EU law were not dealt with by the normal procedures of the criminal courts, but by procedures designed to deal with issues of legislative or administrative *vires*. The existing procedure for raising devolution issues was particularly ill-suited to determining issues of compatibility with Convention rights. It focused on the 'acts of the Lord Advocate' rather than the fairness of the criminal proceedings as a whole[29].

2.19 The Expert Group considered that there was no need for any special procedure, or for routine intimation to the Lord Advocate or the Advocate General. The Lord Advocate would in any event be involved in appeal proceedings and the High Court could, where appropriate, order intimation to the Advocate General. The existing devolution procedure would remain for other devolution issues[30].

The response to the recommendations of the Expert Group

2.20 The UK Government accepted the recommendations of the Expert Group and introduced an amendment to the Scotland Bill designed to give effect to those

[28] *Ibid*, paragraphs 4.20 to 4.28.

[29] *Ibid*, paragraphs 4.32 to 4.33.

[30] *Ibid*, paragraphs 4.43 to 4.36.

recommendations[31]. The relevant clause, when introduced, proposed a right of appeal to the UKSC for the purpose of determining any question of whether the Lord Advocate, in prosecuting an offence, had acted compatibly with Convention rights or Community law. The clause also proposed an amendment to section 57 and schedule 6 of the 1998 Act to remove acts of the Lord Advocate in that role from the scope of devolution issue procedure, as had been recommended by the Expert Group.

2.21 In June 2011, the First Minister for Scotland invited Lord McCluskey to chair an Independent Review Group to consider the law and practice governing the jurisdictions of the High Court and the UKSC. The Group published its First Report on 27 June 2011[32] and its Final Report on 14 September 2011[33]. The Final Report considered the clause introduced by the UK Government and highlighted a number of perceived weaknesses. In particular, the Final Report was critical of the continued focus on 'acts of the Lord Advocate' which, it was said, erroneously narrowed the focus of the real issue in dispute (i.e. whether a Convention right or EU law had been, or was being, violated)[34]. The Group considered that the effect of the proposed new system would be that devolution minutes would simply be replaced by "incompatibility minutes" and, as a result, the procedure would not be improved as might have been hoped[35].

2.22 The Final Report mooted a certification requirement, whereby an appeal to the UKSC should only be possible where the High Court had certified that an issue raised a point of law of general public importance. That requirement was discussed at paragraphs 35 to 48 of the Report and was designed, in part, to reflect the position of the High Court as the final court of criminal appeal in Scotland.

2.23 The clause, as introduced, was debated in the House of Lords in February 2012. At the outset of the debate, the Advocate General proposed the deletion of the clause so that a new provision could be brought forward[36]. The intention was that the new clause would take account of some of the recommendations by the Independent Review Group and give greater effect to the recommendations of the Expert Group.

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[31] Office of the Advocate General, Scotland Bill: Consultation on Draft Clauses, March 2011.

[32] Independent Review Group, First Report, June 2011.

[33] Independent Review Group, Final Report, September 2011.

[34] *Ibid*, paragraph 27.

[35] *Ibid*, paragraph 30.

[36] UK Parliament, Official Report – House of Lords, 02 February 2012, paragraph 1761.

2.24 The new clause was introduced on 13 March 2012. It widened the right of appeal to the UKSC to include questions as to the compatibility with Convention rights or EU law of acts of any public authority, as defined by section 6 of the Human Rights Act.

2.25 As the Bill progressed through the UK Parliament, a number of relevant amendments were proposed. One such proposal was the inclusion of a certification requirement. That amendment was rejected. Another proposal was to widen the scope of 'compatibility issues' so as to include questions about the compatibility of legislation with Convention rights or EU law. This amendment was initially not supported by the UK Government, which considered that the compatibility of legislation was an issue of *vires* and thus constituted a 'devolution issue' in its truest form[37]. However, the UK Government was subsequently persuaded to widen the definition of a compatibility issue in this way and an amendment to that effect was accepted by the House of Lords at the Report stage. The purpose of this amendment was to provide for a single route of appeal for all matters relating to EU and ECHR compatibility, irrespective of whether they related to the acts of a public authority or legislation[38].

2.26 The 2012 Act received Royal Assent on 01 May 2012. Most notably, the new compatibility issue procedure provided for by the Act went beyond the recommendations of the Expert Group in that it included issues concerning the compatibility of Acts of the Scottish Parliament with Convention rights and EU law.

[37] *Ibid*, paragraph 1762.

[38] UK Parliament, Official Report – House of Lords, 28 March 2012, paragraph 1529

Chapter 3. Sections 34 to 37 of the Scotland Act 2012

Compatibility issues

3.1 The 2012 Act introduced the concept of a "compatibility issue".

3.2 A compatibility issue is defined as a question, arising in criminal proceedings, as to—

- whether a 'public authority' has acted unlawfully under section 6(1) of the Human Rights Act 1998 or in a way which is incompatible with EU law[39]; or
- whether an Act of the Scottish Parliament, or a provision within such an Act, is incompatible with the European Convention on Human Rights or EU law.[40]

3.3 As was the case for devolution issues, compatibility issue procedure has been invoked to challenge a wide range of aspects of criminal proceedings. Part 2 of the Annex to this paper provides some examples of the types of issue raised.

3.4 The term "devolution issue" within the Scotland Act 1998 was redefined so that a matter which is a compatibility issue cannot also be a devolution issue.[41]

3.5 The procedure for raising a compatibility issue is set out in Chapter 40 of the Criminal Procedure Rules 1996. As with a devolution issue, if an accused intends to raise a compatibility issue in proceedings at first instance, the accused must give notice of the intention to do so in Form 40.2 (solemn) or Form 40.3 (summary).[42] The notice must be intimated to the Lord Advocate and any co-accused.[43]

3.6 In the case of a devolution issue, the party raising the issue must serve a copy of the document in which the issue is raised on the Advocate General.[44]

Appeal to the UKSC

3.7 The Criminal Procedure (Scotland) Act 1995 was amended to make provision for a right of appeal on a compatibility issue from the High Court, when constituted as a

[39] Public authority includes a court; Human Rights Act 1998, section 6(3)(a).

[40] Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), section 288ZA(2) (added by the 2012 Act, section 34(3)).

[41] The 1998 Act, schedule 6, paragraph 1(f) (amended by the 2012 Act, section 36(4)).

[42] Criminal Procedure Rules 1996, Forms 40.2 and 40.3.

[43] *Ibid*, rules 40.2(3) and 40.3(3).

[44] *Ibid*, rules 40.7(1) and 40.9(2).

court of criminal appeal, to the UKSC[45]. The effect of this amendment is that the UKSC retains its constitutional jurisdiction in criminal matters.

3.8 Such an appeal can only be made with the permission of the High Court or, failing that, with the permission of the UKSC[46]. There is no certification requirement.

3.9 An application to the High Court for permission to appeal to the UKSC must be made within 28 days of the determination of the appeal[47]. If that permission is refused, an application to the UKSC for permission to appeal must be made within 28 days of the date on which the High Court refused permission[48]. These time limits may be extended if the court that is considering the application thinks it would be equitable to do so[49].

3.10 The right of appeal to the UKSC in criminal proceedings applies only for the purpose of determining the compatibility issue; although the issue in question may be reformulated by the UKSC if that is considered necessary in the interests of justice[50]. Once the compatibility issue has been determined, the UKSC must remit the proceedings back to the High Court[51].

Involvement of the Lord Advocate and Advocate General

3.11 The Advocate General is entitled to take part in criminal proceedings as a party, insofar as those proceedings relate to a compatibility issue[52]. Intimation of a compatibility issue to the Advocate General is not routinely required. The High Court can order such intimation where appropriate.

3.12 The Advocate General is given a power to refer a compatibility issue from a lower court to the High Court for an opinion. The same power is conferred upon the Lord Advocate[53].

3.13 A compatibility issue before a lower court, that is to say a court other than the High Court sitting as a court of criminal appeal, may be referred to the High Court at the

[45] The 1995 Act, section 288AA(1) (added by the 2012 Act, section 36(6)).

[46] *Ibid*, section 288AA(7) and (8).

[47] *Ibid*, section 288AA(7)(a).

[48] *Ibid*, section 288AA(8)(a).

[49] *Ibid*, section 288AA(7)(b) and (8)(b).

[50] *Ibid*, section 288AA(2).

[51] *Ibid*, section 288AA(3).

[52] *Ibid*, section 288ZA(1) (added by the 2012 Act, section 34(3)).

[53] *Ibid*, section 288ZB(2) (added by the 2012 Act, section 35).

discretion of the lower court[54]. This discretion is not absolute. The Lord Advocate or the Advocate General may "require" that such a referral be made[55].

Acts of the Lord Advocate

3.14 The 1998 Act was amended to remove the acts or failures of the Lord Advocate in prosecuting any offence, or as head of the system of criminal prosecutions, from the ambit of section 57(3). The consequence is that such acts or failures, while still unlawful and subject to challenge under the compatibility issue regime, are not *ultra vires* by virtue of being incompatible with the ECHR or EU law[56]. This brought the position of the Lord Advocate in line with other prosecuting authorities in the UK.

Sections 34 to 37 – Summary

3.15 Sections 34 to 37 of the Scotland Act 2012 make provision for the following matters:

- the definition of a compatibility issue and a devolution issue;
- the role of the Lord Advocate and the Advocate General in respect of compatibility issues arising in criminal proceedings, particularly their powers to require a referral to higher courts and the UKSC;
- the susceptibility to *vires* challenges of acts of the Lord Advocate, so far as his prosecutorial responsibilities are concerned;
- the appellate relationship of the Scottish criminal courts and the UKSC;
- the functions of the UKSC in respect of Scottish criminal proceedings; and
- the general procedure relating to compatibility issues arising in criminal proceedings, such as time limits for applying for permission to appeal.

3.16 It will be open to the Review Group, as part of the final report to be sent to the Secretary of State for Scotland to recommend amendments insofar as they relate to sections 34 to 37 and the other matters set out in paragraph 1.4 of this paper.

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[54] *Ibid*, section 288ZB(1).

[55] *Ibid*, section 288ZB(5).

[56] The distinction, if any, between unlawful acts and *vires* was considered by the House of Lords in the *Attorney General's Reference (No 2 of 2001)* [2004] 2 A.C. 72 in which Lord Hope of Craighead observed that: *"the meaning to be given to the word "unlawful" has a bearing too on what is to be done about past acts. If the view of the majority is right and the word in this context means something that cannot lawfully be done, the conclusion to which one would be driven to would be that such acts would have to be treated as acts which the public authority had no power to do"* (paragraph 78).

Chapter 4. Questions for consideration

4.1 This Chapter sets out some overarching questions for consideration in connection with compatibility issues. It is intended to facilitate discussion, but is not exhaustive.

4.2 The Review Group has considered various possible amendments to the current compatibility issue regime. This Chapter presents those potential amendments. The Review Group does not commend any particular option at this stage.

4.3 This paper does not invite views on whether the UKSC should continue to have a role in criminal appeals. Under the constitutional settlement, the principle that the UKSC should have a supervisory role in ensuring that the UK's treaty obligations are enforced in a uniform manner throughout the UK is one which appears to be accepted.

Should certification by the High Court be necessary?

4.4 This review is required to consider specifically whether an appeal to the UKSC on a compatibility issue should only be possible where the High Court has certified that the issue raises a point of law of general public importance.[57] A certification requirement was discussed in the Final Report of the Review Group chaired by Lord McCluskey[58]. That report recommended that the UKSC should have no power to grant permission to appeal unless a certificate were granted by the High Court[59].

4.5 The Final Report acknowledged concerns, which had been expressed by some of its respondents, that the introduction of a certification process might frustrate the aim of consistent consideration of international obligations by the UKSC[60]. This is not the only argument against a certification requirement. For example, if the High Court were to refuse to certify a potentially justified point of law of general public importance, because the point was not specified clearly enough by the party raising the issue, then a potential violation of a Convention right would be without remedy.

4.6 Although not contained in statute, the 'point of law of general public importance' test is almost always applied by the High Court when determining whether to grant permission to appeal on a compatibility issue to the UKSC[61]. The prescribed form for permission to appeal prompts the applicant to specify whether any of the grounds of appeal raise a point of law of general public importance.

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[57] The 2012 Act, section 38(3)(c).

[58] Final Report of the Independent Review Group, paragraphs 35 to 48.

[59] *Ibid*, paragraph 43.

[60] *Ibid*, paragraph 45.

[61] *Macklin v HM Advocate* [2013] HCJAC 141, paragraph 1.

4.7 Lord McCluskey, when giving evidence before the Scottish Parliament's Scotland Bill Committee in November 2011, expressed concerns about leaving open the floodgates to the UKSC[62]. Such concerns would, with the benefit of hindsight, appear to be have been unfounded. The Review Group has, with assistance of the Crown Office and Procurator Fiscals Service, collated data: (a) on the number of compatibility issues intimated on the Crown Office; and (b) on applications for permission to appeal to the UKSC. The following data is accurate as of 08 December 2017:

All Scottish criminal courts	
Number of compatibility issues imitated to the Crown Office:	1402
High Court of Justiciary	
Applications for permission to appeal:	27
Permission to appeal refused:	26
Permission to appeal granted:	1
UKSC	
Applications for permission to appeal:	8
Permission to appeal refused:	8
Permission to appeal granted:	0

4.8 There are two pending applications. Of the applications made to the High Court, 96.3% were refused. Of the applications made directly to the UKSC, all were refused.

4.9 There has only been one case post-April 2013 in which the High Court refused permission only for the UKSC to grant permission subsequently; *Macklin v HM Advocate*[63]. This case does not feature in the above table as the proceedings had started before the relevant provisions of the 2012 Act were commenced. As such, this case concerned a "convertible devolution issue" under the transitional regime[64]. In *Macklin*, in the application to the High Court, there was no reference to the case containing a point of law of general public importance. The High Court held that this

[62] Scottish Parliament, Official Report – Scotland Bill Committee, 01 November 2011, page 418.

[63] [2016] SC (UKSC) 47

[64] *Ibid*, paragraph 10.

omission was "not without significance"[65]. However, in the application to the UKSC, such a reference was added. The appeal was ultimately unsuccessful.

4.10 The Review Group recognises that the UKSC has exhibited an appropriate degree of restraint in the exercise of its appellate jurisdiction. In *Macklin*, the UKSC made clear its willingness to respect the High Court's application of the principles which it has laid down[66].

Should challenges to legislation be a compatibility issue or a devolution issue?

4.11 The Review Group recognises that a criminal jurisdiction must deal with a situation in which a person is charged under a provision of an Act of the Scottish Parliament, or subordinate legislation, which is said to infringe EU law or Convention rights. However, a question arises as to whether such a challenge ought to be categorised as a "compatibility issue" and thus dealt with procedurally in the same way as challenges to any other aspect of the proceedings. It is worth noting, as was recognised by the Expert Group, that the volume of challenges to legislation, compared to challenges to other aspects of proceedings, is minuscule[67]. This is still the case.

4.12 The Expert Group considered that it was constitutionally inept to treat certain acts of the Lord Advocate as subject to devolution issues (because such acts did not relate to the 1998 Act or the devolution settlement). However, the converse may be true for compatibility issues. It may be inept to treat challenges to Acts of the Scottish Parliament on Convention or EU grounds as distinct from the devolution regime. Such challenges relate to the legislative competence of legislation enacted by the Scottish Parliament and so may be properly described as "devolution issues".

4.13 As noted in Chapter 2, the definition of a compatibility issue was extended, to include legislation challenges, by amendment during the passage of the 2012 Act. The reason was to provide a single avenue through which a party can raise an issue on Convention or EU grounds. This was thought to be necessary to avoid potential confusion as to which procedure ought to be invoked. Such clarity is desirable, but could perhaps be better achieved by amending the relevant legislation to provide a single avenue by which a party can challenge legislation, as a devolution issue. All other compatibility issues could be dealt with during the normal course of proceedings, without requiring a bespoke procedure.

[65] *Macklin v HM Advocate* [2013] HCJAC 141, paragraph 6.

[66] *Macklin v HM Advocate* [2016] SC (UKSC) 47, paragraph 11.

[67] Expert Group Report, paragraph 2.1.

4.14 A compatibility issue which relates to the *vires* of an Act of the Scottish Parliament may be more likely than other challenges to give rise to a point of law of general public importance. It is noteworthy that the only case post-April 2013 in which the High Court has granted permission to appeal to the UKSC concerned the compatibility of legislation; *AB v HM Advocate*[68]. In that case, the challenge related to the compatibility of section 39(2)(a)(i) of the Sexual Offences (Scotland) Act 2009 with an individual's article 8 rights (private and family life). The provision in question prevented a person, charged with a sexual offence against a child, from relying on the defence that he reasonably believed that child was aged 16 or older. The High Court, in granting permission, held that the question of whether the provision was engaged by article 8 was a point of law of general public importance. In the UKSC, the Lord Advocate conceded that the impugned provisions engaged article 8. The question which arose as a result of that concession was whether the legislation was compatible with the Convention. The UKSC held that it was not.

Is a special procedure necessary or desirable for all compatibility issues?

4.15 The Expert Group considered that the procedure for raising a devolution issue was ill-suited for determining non-*vires* issues. For these issues, the procedure was thought to be productive of delay. As a consequence, the Group recommended that issues of the compatibility of more routine aspects of criminal proceedings ought not to be subject to a special procedure and should instead be treated in the same way as any other issue of law. To some, it is regrettable that the amendments to Chapter 40 of the Criminal Procedure Rules in consequence of the 2012 Act deal with compatibility and devolution issues in an almost identical manner (the key procedural difference being the requirement for routine intimation to the Advocate General when raising a devolution issue).

4.16 The reason why compatibility issues are subject to a procedure designed for *vires* challenges could, in part, be attributable to the categorisation of questions as to the compatibility an Act of the Scottish Parliament as a compatibility issue. If, as discussed at paragraphs 4.11 to 4.14 of this paper, these issues were to be re-defined as a devolution issue, it could facilitate a departure from a specialised form of procedure for questions as to the compatibility of acts of public authorities.

4.17 Some aspects of specialised procedure may be desirable. The intimation of a compatibility minute, designed to give fair notice of the issue to the other parties and the court, is one aspect of this. In practice, minutes are often found to be devoid of sufficient detail, in describing the nature of the incompatibility and specifying the remedy sought, as to be of material assistance to the court in identifying the nature of

[68] [2017] UKSC 25.

the issue. The reason for this could, in part, be cultural as written pleadings have been a less frequent element in criminal proceedings. Where compatibility issue procedure is invoked, a significant portion of the court's time is taken up by queries as to the precise nature of the issue. The lack of specification could perhaps be remedied by the criminal courts using existing powers to order adjustment, a response to, or, ultimately, the dismissal of, a compatibility issue minute. However, as proceedings would need to be adjourned for some of the steps ordered by the court to be carried out, there will be scope for delay. As such, a balance is needed between giving fair notice of the compatibility issue being raised and facilitating the expeditious determination of the issue.

Should appeals from sift decisions and refusals of leave from the Sheriff Appeal Court be permitted?

4.18 The current provisions[69] permit an appeal to the UKSC against a determination in criminal proceedings by a court of two or more judges of the High Court. Leave to appeal may be sought not just from decisions of the High Court, sitting as a court of criminal appeal, but from "sift" decisions taken by judges on whether leave should be granted to appeal to the High Court from first instance decisions and from decisions to refuse leave to appeal from the Sheriff Appeal Court[70].

4.19 Some members of the Review Group consider that it is almost inconceivable that the judges constituting the 'second sift' court, who have decided that there are no arguable grounds of appeal, could contemplate granting permission to appeal to the UKSC. Such a decision would be inconsistent with the decision to sift out the case. Similar considerations would apply to High Court judges who have decided in a summary case that no important point of principle or practice or any other compelling reason exists to permit an appeal from the Sheriff Appeal Court. However, the UKSC has power to grant leave directly to itself in such situations. This is what happened in *Cadder v HM Advocate*[71]. The disputed issue in *Cadder* had previously been determined by a full bench in *HM Advocate v McLean*[72]. An application, in *Cadder*, for leave to appeal to the High Court was refused on the basis that the issue had been determined by *McLean*. A request for a hearing on an application for leave to appeal to the UKSC was refused on the basis that the court had not determined a devolution issue but had held, as a matter of procedure, that no arguable case had been advanced. The UKSC disagreed and took the view that a determination of a devolution issue was implicit in the decision to refuse leave to

[69] The 1995 Act, section 288AA.

[70] *Ibid*, sections 194ZB and 194ZD-E.

[71] 2011 S.C. (UKSC) 13

[72] 2010 S.L.T. 73.

appeal to the High Court. The effect is that, at present, the UKSC may determine an issue in a case which has not been argued before the High Court sitting as a court of criminal appeal.

4.20 To some, it may appear somewhat strange that leave to appeal against a decision refusing leave to appeal should be an option. It rather defeats the purpose of the sift. A decision to refuse leave is not, it would be argued, one on the merits of the issue but a procedural one on arguability. To others, however, it might be considered strange that the High Court could prevent an issue from reaching the UKSC by refusing leave to appeal to itself.

4.21 One possible reform considered by the Review Group was to allow an accused[73] to lodge an application with the High Court seeking a "leapfrog appeal" to the UKSC[74]. The purpose of such an appeal would be to avoid requiring parties to litigate in a court in which the case could not succeed as a 'stepping stone' to a court where it could succeed. In Scotland, providing for such appeals is not obviously necessary. The High Court may review one of its earlier decisions by convening a larger court. The doctrine of precedent is less inflexible when compared to the position in England and Wales. Further, the High Court has a power to refer a compatibility issue directly to the UKSC.

Are the current appeal time limits sufficient?

4.22 The Review Group has considered whether the current time limits, within which an application for permission to appeal to the UKSC may be made, are appropriate.

4.23 As noted previously, a party seeking permission from the High Court to appeal must apply within 28 days from the date of the High Court's determination of the compatibility issue. A party seeking permission from the UKSC following refusal from the High Court must do so within 28 days of the date on which the High Court refused permission[75]. One matter worth considering is the appropriateness of a party being given a period of eight weeks in total to prepare two applications, when the grounds of appeal ought to have been properly specified in the first application.

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[73] The Lord Advocate has a power to refer a compatibility issue directly to the UKSC.

[74] In England and Wales, an appeal in civil proceedings against a decision of the High Court of Justice may be made directly to the UKSC, thereby by-passing the Court of Appeal (Administration of Justice Act 1969, sections 12-16). Such appeals are permitted only if the trial judge certifies that the statutory conditions are fulfilled (for example, that there is a point of law of general public importance and the trial judge is bound on that point of law by an earlier decision of the Court of Appeal or, as the case may be, the UKSC (section 12(1) and (3)).

[75] The 1995 Act, section 288AA(7) and (8).

4.24 On the other hand, the Review Group recognises that it will be important that any amendments to time limits do not impede access to legal aid. According to recent guidance from the Scottish Legal Aid Board, all reasonable steps undertaken in seeking permission from the High Court to appeal to the UKSC fall under an existing legal aid certificate. However, if the High Court does not grant permission, a fresh application for criminal legal aid must be made. The application must be accompanied by an opinion from counsel on the prospects of success[76]. The Review Group observes that this process has, in practice, resulted in significant delay in certain Scottish appeals being heard by the UKSC.

[76] Scottish Legal Aid Board, Guidance on the processes for consideration of criminal appeals and supreme court applications, March 2015.

Chapter 5. Next Steps

Responding to this consultation

5.1 The Review Group **welcomes views on the practice and procedure relating to compatibility issues in criminal proceedings in Scotland**. In particular, views are sought on the overarching questions for consideration set out in Chapter 4.

5.2 For ease of reference, those questions are as follows:

- Should certification by the High Court be necessary?
- Should challenges to legislation be a compatibility issue or a devolution issue?
- Is a specialised procedure necessary or desirable for all compatibility issues?
- Should appeals from decisions to refuse leave at sift and refusals of leave to appeal from the Sheriff Appeal Court be permitted?
- Are the current appeal time limits sufficient?

5.3 If you wish to respond to this consultation, please send your response to Norman Munro (email: nmunro@scotcourts.gov.uk) by **09 April 2018**.

5.4 The Review Group would be grateful if responses could set out whether a respondent is making representations as an individual or on behalf of an organisation. Similarly, responses should, where appropriate, set out each respondent's level of experience of compatibility issue practice and procedure, and of the previous devolution issue practice and procedure.

What happens next?

5.5 After the closing date, all consultation responses will be analysed and considered along with any other available evidence to help the Review Group prepare its report on compatibility issues in criminal proceedings in Scotland.

Annex

Examples of devolution and compatibility issues raised in criminal proceedings

Part 1 – Devolution issues prior to April 2013	
Case	**Summary**
McKenna v HM Advocate, 2000 J.C. 291	A devolution minute was intimated challenging the Crown's intention to lead a written statement from a possible co-accused who had since died. It was contended that admitting this hearsay evidence would be oppressive and would infringe the accused's right to a fair trial. The High Court held there had been no such violation as appropriate safeguards were in place, such as the judge directing the jury as to the difference between hearsay and other evidence and the requirement of corroboration.
Dyer v Watson, 2002 S.C. (P.C.) 89	The issue before the Judicial Committee of the Privy Council concerned the right to a trial within a reasonable time under article 6 (right to a fair trial). There had been a delay between the charges and the proposed trials of 20 and 28 months. This is one of a number of challenges in connection with the right to have a trial within a reasonable time. For further examples, please also see: *Mills v HM Advocate*, 2003 S.C. (P.C.) 1; *HM Advocate v Morton*, 2003 S.C.C.R. 305; *HM Advocate v R*, 2003 S.L.T. 4; *McLarnon v McLeod*, 2004, S.C.C.R. 397; and *Farrell v HM Advocate*, 2005 S.C.C.R. 411.
Brown v Gallagher, 2002 S.L.T. 1135	This appeal challenged the sanction imposed for failing to comply with the statutory requirement to provide a breath sample. The appellant raised a devolution issue contending that his right not to incriminate himself had been infringed by the compulsion to provide a sample. The High Court dismissed the appeal and recognised that ECHR jurisprudence makes a distinction between specimens and compelled testimony.
McTeer v HM Advocate, 2003 J.C. 66	The devolution issue which arose in this case concerned the impartiality of the jury. The foreman of the jury was, through his son, acquainted with one of the accused and had knowledge of a prior conviction for an analogous offence. The

	High Court, in allowing the appeal and quashing the convictions, held that the foreman ought to have been disqualified, and the verdict lacked the necessary impartiality.
Dudley v HM Advocate, 2003 J.C. 53	The challenge in this case was that obtaining evidence through monitoring the telephone calls of prisoners, without prior warning, was incompatible with article 8 (private and family life). The appellant had argued that the monitoring of the call was not in accordance with the law and, as such, the evidence obtained was inadmissible. The High Court dismissed the appeal. The evidence was admissible as the information had been obtained under specific statutory powers.
Gilchrist v HM Advocate, 2005 1 J.C. 34	A devolution issue arose in relation to the admissibility of evidence obtained from a surveillance operation by police officers. The issue contended that this operation was incompatible with the accused's right to private and family life. The High Court held that there had been no infringement as the surveillance was in a public place, which would have been observable by any person who happened to be in the vicinity.
Holland v HM Advocate, 2005 1 S.C. (P.C.) 3	The devolution issue in this case was that the prosecution had infringed the appellant's article 6 rights by relying on dock identification and by failing to disclose certain information. The Judicial Committee of the Privy Council held that information about outstanding charges would likely be of material assistance and ought to have been disclosed to the defence. On the issue of dock identification, it was held that the procedure was not so unfair as to be incompatible in every case.
HM Advocate v G, 2010 S.L.T. 239	The devolution issue in this case concerned an objection to the admissibility of oral evidence which the Crown proposed to adduce from a witness which, it was said, would constitute a violation of the accused's right to a fair trial. The High Court held that the consideration of the objection ought to be deferred until the trial and not be dealt with at a preliminary hearing.
Wilson v Harvie, [2010] HCJAC 23	Wilson challenged the sentence for an offence in terms of article 7 ECHR (retrospectivity). It was argued that the judge ought to have imposed a lesser sentence. The sentence was passed some time after the commission of the offence and, during the intervening period, there had been an increase in the maximum

	applicable penalty. The High Court rejected the challenge and held that the sheriff was entitled to impose the sentence passed.
McLean v HM Advocate, [2011] HCJAC 67	McLean had pled guilty following the refusal of a devolution minute in which he contended that the leading of evidence of his police interview, which had been taken without legal advice, was contrary to his article 6 rights. In light of the UKSC decision in *Cadder v HM Advocate*, McLean unsuccessfully appealed against the refusal of the devolution minute.
Walker v HM Advocate, [2011] HCJAC 51	Walker submitted that the trial judge had misdirected the jury by failing to offer more guidance in relation to the complex expert evidence put to the court. It was also submitted that the jury's failure to provide reasons for their decision was contrary to the right to a fair trial. The High Court allowed the appeal and quashed the conviction. It was held that leaving the technical evidence at large for the jury involved a material misdirection resulting in a miscarriage of justice.
O'Neill v HM Advocate, [2013] UKSC 36	One of the issues in this case concerned the accused's right to a trial before a fair and impartial tribunal. The appellants had been convicted of sexual offences, after which the trial judge had made adverse comments regarding their character. The appellants were then subsequently charged and convicted of murder at a trial presided over by the same judge. The UKSC held that there was no basis for suggesting that the trial judge was not impartial and so there was no breach of Convention rights. The judge, when making the remarks directly relevant to sentencing, did so in the performance of his judicial function.

Part 2 – Compatibility issues	
Case	**Description**
Griffith v HM Advocate, [2013] HCJAC 138	In an application for leave to appeal to the UKSC, the appellant argued that allowing evidence to be led about previous convictions infringed upon the right to a fair trial. The High Court, in refusing the application, held that ECHR jurisprudence does not consider that the disclosure of prior convictions renders the proceedings unfair.

Spiers v HM Advocate, [2013] HCJAC 151	This was an appeal against a notification requirement imposed on the appellant under the Sexual Offences Act 2003. The High Court refused the appeal and held that no compatibility issue arose. The appellant had not argued that the order was inappropriate or excessive. Further, the legislation was a UK statute and so any challenge should have been raised under Human Rights Act 1998 procedures.
Rondos v HM Advocate, [2014] HCJAC 119	An application for leave to appeal to the UKSC in which the appellant argued that his right to a fair trial had been breached by: (i) the sheriff's failure to desert the trial due to prejudicial publicity; (ii) the failure to uphold objections to the admissibility of certain evidence; and (iii) the failure to provide a reasoned judgment. The High Court refused leave to appeal. It held that no compatibility issue, or convertible devolution issue, arose. In any event, the Appeal Court had left no doubt why the appeal failed and so had given a reason judgment which met the requirements of the ECHR.
HM Advocate v Porch, [2015] HCJAC 111	In this case, the accused challenged the imposition of a bail condition which restricted his ability to contact his girlfriend as being incompatible with his right to a private and family life. The Crown had requested the imposition of such a condition as part of a blanket policy in domestic abuse cases. The High Court held that there had been no incompatibility. The ultimate decision on bail and any bail conditions was for the court, carrying out a careful balancing of all relevant factors. Any Crown policy would not be determinative.
MacLennan v HM Advocate, [2015] HCJAC 128	A compatibility issue arose in this case in relation to reliance on statements made by a child witness during a joint investigative interview. The appellant appealed against the conviction, submitting that there had been an unjustified delay in commencing the commission process which made the process unfair as the child's recollection will have been severely affected by the passage of time. The High Court refused the appeal. The High Court held that the appellant had an opportunity to cross-examine the child at the interview and his right to a fair trial had been protected by other aspects of the criminal system, including the electronic recording of the

	interview and the judge's jury directions.
HM Advocate v Coulter, [2016] HCJAC 96	A number of compatibility issues were raised in this case in which the Crown made an application under the Double Jeopardy (Scotland) Act 2011 to have the acquittals of three co-accused set aside to bring forward a new prosecution. The issues contended delay, adverse publicity and a denial of a "right to freedom/liberty" (ECHR article 5). The High Court granted the Crown's application. In doing so, the court considered that there was no breach of article 5 as the individual raising the compatibility issue was at liberty and the mere making of an application to bring forward a fresh conviction could not be said to infringe upon that right.
Cafferkey v HM Advocate, [2016] HCJAC 114	Two individuals appealed against the sheriff's dismissal of their compatibility minutes challenging the admissibility of certain evidence. The appeals alleged that there had been a breach of article 6 and 8 on the basis that the police had carried out an irregular search, which could not be excused. The High Court refused the appeal and held that the item searched had abandoned by the accused in a public place, and thus there was no interference with Convention rights.
Potts v Gibson, [2017] HCJAC 8	The compatibility issue was whether the Crown had acted in violation of the accused's article 6 rights in prosecuting him on a summary complaint after the High Court had allowed an appeal against the sheriff's decision to extend the 12 month time bar in solemn proceedings on the same charge. The High Court refused the appeal and held that there had been no breach of the reasonable time requirement.
Henderson v HM Advocate, [2017] HCJAC 43	This was an appeal against a conviction for a breach of the peace. The appellant argued that the non-disclosure of CCTV evidence, which had been destroyed by the police as having no evidential value, resulted in an unfair trial. The High Court refused the appeal. It was held that, where the police had not shared evidence with the Crown, there was no obligation to disclose the evidence to an accused.