Current position

The Scotland Act made Convention rights (and other competence restrictions) directly enforceable in the Scottish courts, in two main ways:

- any provision of an Act of the Scottish Parliament that is incompatible with any of the Convention rights (or on other grounds) is outwith the Parliament’s legislative competence and so “is not law” (section 29 of the Scotland Act);

- a Scottish Minister or Law Officer has no power to do anything that is incompatible with a Convention right (or is otherwise incompetent)(sections 53, 54 and 57(2) SA). (These provisions do not apply to certain acts of the Lord Advocate (for instance, in prosecuting offences) under UK Acts provided the Lord Advocate could not have acted differently under, or was required to do so to give effect to, the UK Act involved).

As a result, there are legally binding limits on the powers of the Parliament, Ministers and the Law Officers. Alleged breaches of those limits can be a basis for legal action in the Scottish courts, including claims for damages or seeking nullification of the acts complained of, and Convention rights can be relied on in legal proceedings.

Case for change

In Scots criminal law the strict requirements placed on Ministers and the Lord Advocate under section 57(2) of the Scotland Act has led to a huge volume of devolution minutes - 10,000 have been notified to the Advocate General since the Scotland Act came into force. Many concern the law of evidence and the law of procedure as they relate to individual prosecutions. From the point of view of the criminal justice system in Scotland as a whole, several problems can be identified -

- **Uncertainty as to the law.** There is no way of knowing which decisions might be referred to the Supreme Court, and when. A decision by the Supreme Court that a Scottish authority has not applied Convention rights means that that act of that authority was a nullity. Any action which was ever taken on the basis of that decision, or in conformity with that decision, is rendered null at a stroke. There are provisions allowing courts to restrict the effect of retrospectivity in s. 102 of the Scotland Act, and in Cadder the UK Supreme Court did restrict, to some extent, the applicability of its decision. Despite that, it is estimated that over a hundred solemn cases and more than 1,000 cases in total are potentially affected by that decision alone.

- **Development of a dual corpus of precedents.** The Supreme Court’s jurisdiction in relation to criminal matters is different from the more general jurisdiction of the High Court of Justiciary, being restricted to issues of Convention rights and Community law. This can result in the quashing of a conviction on the basis of much narrower criteria and on tests different from those which would be applied by the High Court. Over time a set of precedents is developing under which the two courts have applied different approaches. The judiciary has drawn attention to a concrete example of that, in the treatment of fresh evidence.

- **Delay, procedural issues and expense** Appeal to the Supreme Court leads to additional delay in obtaining a definitive judgment. There are also more technical concerns regarding the intimation procedures for devolution minutes, and of course expense for all parties concerned.

Scotland has always been a separate jurisdiction, and that position continues to be protected by the Acts of Union. In relation to Convention rights, the European Convention of Human Rights assesses the prevailing law in each jurisdiction (as opposed to requiring identical rules to exist throughout Convention states). Some argue that there is a benefit in the Supreme Court overseeing consistent application of Convention rights in the UK, but it would be more in keeping with the historically separate jurisdiction of the Scottish criminal courts, if review of Scottish compliance with Convention rights were dealt with by the European Court of Human Rights. This would enable a return to a clear corpus of precedent, would remove a layer of procedure and delay for the victim, and would reduce the scope for uncertainty as to the law.
Conclusion and proposed amendment

For all these reasons, the Scottish Government view is that the Supreme Court should not have jurisdiction in matters relating to Scots criminal law. Taking the Supreme Court out of the process would not affect the legal position under the Scotland Act and the Human Rights Act. Human rights claims (and any related damages claims) or other Scotland Act competence issues raised under those Acts would continue to be made, and the obligations of the Lord Advocate, Ministers and the courts to act compatibly would be unchanged.

The differences would be that a layer of procedure would be removed, and cases would be dealt with by Scots judges familiar with the Scottish criminal law system, and ultimately directly by the European Court of Human Rights itself. It would as also restore the High Court of Justiciary as the final court of criminal appeal in Scotland (as it was before devolution).

To assist Committee members in their consideration of this proposal, attached below is possible draft provisions illustrative of what could be included in the Scotland Bill. The draft uses the existing definition of “Scots criminal law” in section 126(5) of the Scotland Act. The restriction on jurisdiction would apply to criminal offences, jurisdiction, evidence, procedure and penalties and the treatment of offenders.

1 No criminal jurisdiction in the Supreme Court

(1) The Scotland Act 1998 (c. 46) is amended as follows.

(2) In Schedule 6 (devolution issues)—
   (a) in paragraph 10, after “may” insert “, subject to paragraph 11A,”,
   (b) paragraph 11 is repealed,
   (c) after paragraph 11 insert—

   “11A No devolution issue may be referred to the Supreme Court so far as the issue relates to Scots criminal law.”,

   (d) in paragraph 12, after “shall” insert “, subject to paragraph 13A,”,
   (e) in paragraph 13—

   (i) sub-paragraph (a) is repealed,
   (ii) after “shall” insert “, subject to paragraph 13A,”,
   (f) after that paragraph insert—

   “13A No appeal against a determination of a devolution issue shall lie to the Supreme Court so far as the issue relates to Scots criminal law.”.