

# The Supreme Court of the United Kingdom

## Practice Direction 10

### Devolution Jurisdiction

#### General note

10.1.1 The Supreme Court has jurisdiction to hear and determine questions relating to the powers and functions of the legislative and executive authorities established in Scotland and Northern Ireland by the Scotland Act 1998 and the Northern Ireland Act 1998 respectively, and questions as to the competence and functions of those established by the Government of Wales Act 2006, whether or not the issue arises in proceedings in England and Wales, Scotland or Northern Ireland. These questions are referred to in the relevant legislation as “devolution issues”, except that as a result of provisions introduced by Part 4 of the Scotland Act 2012 a question of the kind described in section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995 is referred to as a “compatibility issue” and the powers of the Supreme Court are exercisable only for the purpose of determining that issue: section 288ZB(6) of the Criminal Procedure (Scotland) Act 1995.<sup>1</sup>

10.1.2 The Supreme Court can also be asked to scrutinise Bills of the Scottish Parliament (under sections 32A or<sup>2</sup> 33 of the Scotland Act), Bills of the Northern Ireland Assembly (under section 11 of the Northern Ireland Act) and Bills of the National Assembly for Wales<sup>3</sup> (under section 112 of the Government of Wales Act 2006)<sup>4</sup>.

10.1.3 Questions of the kind referred to in paragraphs 10.1.1 and 10.1.2.<sup>5</sup> can reach the Supreme Court in four ways.

- a. by way of a reference of a question by a relevant officer.
- b. by way of an appeal from the determination of a devolution issue by<sup>6</sup> certain superior courts of England and Wales, Scotland and Northern Ireland and from the determination of a compatibility issue by a court of two or more judges of the High Court of Justiciary in Scotland.<sup>7</sup>
- c. by way of a reference of a devolution issue or a compatibility issue<sup>8</sup> by certain appellate courts.
- d. by way of a direct reference by a relevant officer<sup>9</sup> of a devolution issue whether or not the devolution<sup>10</sup> issue is the subject of litigation.

10.1.4 Rule 3(2) defines “relevant officer” as meaning

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<sup>1</sup> Amended April 2013  
<sup>2</sup> Amended Oct 2016  
<sup>3</sup> Amended April 2013  
<sup>4</sup> Amended April 2013  
<sup>5</sup> Amended April 2013  
<sup>6</sup> Amended April 2013  
<sup>7</sup> Amended April 2013  
<sup>8</sup> Amended April 2013  
<sup>9</sup> Amended April 2013  
<sup>10</sup> Amended April 2013

- a. in relation to proceedings in England and Wales, the Attorney General and, in relation to proceedings that particularly affect Wales, the Counsel General to the Welsh Assembly Government,
- b. in relation to proceedings in Scotland, the Advocate General for Scotland and the Lord Advocate, and
- c. in relation to proceedings in Northern Ireland, the Advocate General for Northern Ireland and <sup>11</sup> the Attorney General for Northern Ireland.

10.1.5 Rule 41 of the Supreme Court Rules provides in general for appeals or references under the Court's devolution jurisdiction (as defined by section 40 of, and Schedule 9 to, the Constitutional Reform Act 2005) to be dealt with in accordance with the Rules, but the Court will give special directions as and when necessary and in particular as to –

- a. any **question** referred to the Supreme Court<sup>12</sup> for decision under sections 32A or<sup>13</sup> 33 of the Scotland Act 1998, section 11 of the Northern Ireland Act 1998 or section 99 or 112 of the Government of Wales Act 2006;
- b. any reference of a **devolution issue** or a **compatibility issue**<sup>14</sup>;
- c. any **direct reference** under paragraph 33 or 34 of Schedule 6 to the Scotland Act 1998, paragraph 33 or 34 of Schedule 10 to the Northern Ireland Act 1998 or paragraph 29 or 30 of Schedule 9 to the Government of Wales Act 2006.

As to **(a)** above, sections 32A and<sup>15</sup> 33 of the Scotland Act 1998 provides for the scrutiny of Bills of the Scottish Parliament by the Supreme Court. Section 11 of the Northern Ireland Act 1998 provides for the scrutiny of Bills of the Northern Ireland Assembly<sup>16</sup> Section 112 of the Government of Wales Act 2006 provides for the scrutiny of Bills of the National Assembly for Wales<sup>17</sup>.

As to **(b)** above,

(i) a **devolution issue** is defined by Schedule 6 to the Scotland Act 1998, Schedule 10 to the Northern Ireland Act 1998 or Schedule 9 to the Government of Wales Act 2006: see paragraph 10.1.1 above. Under paragraphs 10, 11, 22 and 30 of Schedule 6 to the Scotland Act 1998, paragraphs 9, 19, 28 and 29 of Schedule 10 to the Northern Ireland Act 1998 or paragraphs 10, 18, 19 and 27 of Schedule 9 to the Government of Wales Act 2006, certain appellate courts may refer a devolution issue arising in proceedings before them to the Supreme Court;

(ii) a **compatibility issue** is defined by section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995, inserted by section 34(3) of the Scotland Act 2012. Under section 288ZB (1) and (2) of the Criminal Procedure (Scotland) Act 1995 a court consisting of two or more judges of the High Court of Justiciary in Scotland may refer, or be required

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<sup>11</sup> Was omitted April 2013

<sup>12</sup> Amended April 2013

<sup>13</sup> Amended Oct 2016

<sup>14</sup> Amended April 2013

<sup>15</sup> Amended Oct 2016

<sup>16</sup> Was omitted April 2013

<sup>17</sup> Was omitted April 2013

to refer, a compatibility issue which has arisen in proceedings before it to the Supreme Court.<sup>18</sup>

As to (c) above, (i) a relevant officer may make a direct reference of a devolution issue to the Supreme Court under paragraph 33 or 34 of Schedule 6 to the Scotland Act 1998, paragraph 33 or 34 of Schedule 10 to the Northern Ireland Act 1998 or paragraph 29 or 30 of Schedule 9 to the Government of Wales Act 2006 whether or not the issue is the subject of litigation.

10.1.6 The forms set out in Annex 1 to Practice Direction 7 may be used for appeals and applications brought under the Court's devolution jurisdiction. In cases where a reference is made to the Court, the use of Form 1 is likely to be inappropriate and, in those circumstances, a document should be filed which contains the information set out in Annex 1 to this Practice Direction: see the Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General for England and Wales<sup>19</sup>.

10.1.7 In cases where the Court is asked to consider the provisions of Bills passed by devolved legislatures, it will usually be desirable for special directions to be given, particularly if there is some urgency. It is helpful if at an early stage the relevant officer making the reference notifies any relevant officer and any other person or body who has a potential interest in the proceedings, of the making of the reference and of any request for directions. All parties to the proceedings are expected to co-operate with one another in order that the Court can ensure that the proceedings are conducted efficiently and expeditiously.<sup>20</sup>

## References of a question by a relevant officer

10.2.1 A reference of a question by a relevant officer is made by –

- a. filing the reference, and
- b. serving a copy on any other relevant officer who is not already a party and who has a potential interest in the proceedings, within any time limits specified by the relevant statute.

10.2.2 The reference should state –

- a. the question to be determined with respect to the proposed Order in Council or Bill to which the reference relates;
- b. whether it applies to the whole Order in Council, Bill or to a provision of it, and the reference shall have annexed to it a copy of the Order in Council or Bill to which it relates.

10.2.3 Any relevant officer (other than the one making the reference) who wishes to participate in the proceedings shall within 7 days of service of the reference on him give notice to the Registrar by filing an acknowledgment in Form 3 and serve that notice on<sup>21</sup>

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<sup>18</sup> Amended April 2013

<sup>19</sup> Reported as *Attorney General v National Assembly for Wales* [2012] 3 WLR 1294

<sup>20</sup> Amended March 2016

<sup>21</sup> Amended April 2013

the other parties. Any relevant officer who gives notice automatically becomes a respondent to the proceedings.

10.2.4 The relevant officer making the reference shall, within 14 days of filing the reference, file a case with respect to the question referred. The referring relevant officer's case should include a copy of any statement made in relation to the Order in Council or Bill in accordance with the relevant statute and any relevant extracts from the Official Report of proceedings in the Parliament or Assembly.

10.2.5 Any other relevant officer who is participating in the proceedings shall file a case with respect to the question referred within 14 days of the notice given under paragraph 10.2.3.

10.2.6 The relevant officer making the reference shall, within 7 days of filing the reference,<sup>22</sup> also notify the relevant Assembly or Parliament which passed the Bill or approved the draft of the Order in Council, as the case may be, of the making of the reference and, in the case of a Bill passed by the Northern Ireland Assembly, the relevant officer shall also notify the Office of the First Minister and Deputy First Minister<sup>23</sup>.

10.2.7 If the Supreme Court decides that an Act or a provision of an Act is not within the competence of the relevant Assembly or Parliament that a member of the relevant executive authority did not have power to make, confirm or approve a provision of subordinate legislation or that any other purported exercise of a function by a member of the Scottish Executive was outside devolved competence, it may make an order removing or limiting any retrospective effect of that decision or suspending its effect for a period to allow the defect to be corrected. Where that decision relates to a compatibility issue, however, the power to make such an order is exercisable by the High Court of Justiciary instead of the Supreme Court: Scotland Act 1998, section 102, as amended by Scotland Act 2012, section 36(3).<sup>24</sup>

## **Appeals to the Supreme Court**

### **a. Permission to appeal**

10.3.1 Part 2 of the Supreme Court Rules applies to applications for permission to appeal. Permission to appeal to the Supreme Court may be sought only if permission to appeal has been applied for and refused by the court below. Where permission is sought for the purpose of determining a compatibility issue, the application must be made within 28 days of the date on which the High Court of Justiciary refused permission or within such longer period as the Supreme Court considers equitable having regard to all the circumstances: Section 288AA(8) of the Criminal Procedure (Scotland) Act 1995<sup>25</sup>. The provisions of this section apply, with necessary modifications, to applications for permission to cross-appeal as they apply to applications for permission to appeal. For the procedure in cases where permission to appeal is not required, see paragraph 10.3.3.

10.3.2 An application for permission to appeal shall –

- a. briefly set out the facts and points of law involved in the appeal;

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<sup>22</sup> Amended April 2013

<sup>23</sup> Amended April 2013

<sup>24</sup> Amended April 2013

<sup>25</sup> Amended April 2013

- b. conclude with a summary of the reasons why permission to appeal should be granted; and
- c. not normally be accompanied by supporting documents except
  - i. the order or interlocutor appealed from;
  - ii. the judgment appealed from; and
  - iii. if separate, the order or interlocutor of the court below refusing permission to appeal to the Supreme Court.

## **b. Appeals**

10.3.3 Rules 18 and 19 and the following paragraphs apply to a person who has obtained permission to appeal from the Supreme Court and in cases where permission to appeal is not required, for example, where a person desires to appeal to the Supreme Court under paragraph 12 of Schedule 6 to the Scotland Act 1998<sup>26</sup> against a determination of a devolution issue by the Inner House of the Court of Session on a reference under paragraph 7 or 8 of that Schedule.

10.3.4 A person who desires to appeal to the Supreme Court shall file Form 1 within 42 days of the date on which the order or interlocutor appealed from was made or permission to appeal was granted, as the case may be.

10.3.5 A notice of appeal must be made in Form 1 and signed by the appellants or their counsel or solicitor.

10.3.6 The appellant must also serve a copy of his Form 1 on any relevant officer to whom it has not already been intimated or<sup>27</sup>who is not already a party and who has a potential interest in the proceedings. Any relevant officer who is so served may intervene in the proceedings on the appeal in the Supreme Court if within 14 days of service he notifies the Registrar by filing an acknowledgement in Form 3 and serving that notice on<sup>28</sup> all other parties. Any relevant officer who gives notice automatically becomes a respondent to the proceedings.

## **References by Courts**

10.4.1 A reference by a court is made by the appropriate officer of the court –

- a. filing the reference,
- b. serving a copy of the reference on the parties, and
- c. serving a copy of the reference on any relevant officer who is not already a party and who has a potential interest in the proceedings.

10.4.2 The reference shall set out -

- a. the question referred;
- b. the addresses of the parties;
- c. the name and address of any person who applied for or required the reference to be made;
- d. a concise statement of the background to the matter including -

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<sup>26</sup> Amended April 2013

<sup>27</sup> Amended April 2013

<sup>28</sup> Amended April 2013

the facts of the case, including any relevant findings of fact by the referring court or lower courts; and

the main issues in the case and the contentions of the parties with regard to them;

- e. the relevant law, including the relevant provisions of the relevant statute;
- f. the reasons why an answer to the question is considered necessary for the purpose of disposing of the proceedings.

10.4.3 All judgments and orders already given in the proceedings, including copies of any interlocutors and any notes attaching to such interlocutors, shall be annexed to the reference.

10.4.4 Any party to the proceedings in the court making the reference who intends to participate in the proceedings in the Supreme Court shall within 14 days of service of the copy reference on him notify the Registrar by filing Form 3 and serving that form on<sup>29</sup> the other parties. Any relevant officer who is already a party to the proceedings automatically becomes a respondent to the proceedings.

10.4.5 Any party who does not intend to participate shall give notice in writing to the Registrar and the other parties accordingly.

10.4.6 Where notice has to be given under this section of this Practice Direction, it shall also be given to any relevant officer who is not already a party and who has a potential interest in the proceedings.

10.4.7 Any relevant officer who is not already a party to the proceedings may intervene in the proceedings on the reference by filing Form 3 and serving that form on<sup>30</sup> other relevant officers with a potential interest and the court making the reference.

10.4.8 Unless the Supreme Court directs otherwise, once a final judgment has been given on a reference by a court the proceedings shall stand remitted to the court from which the reference came without further order, subject to the disposal of any outstanding issues as to the costs of the reference.

### **Direct reference by a relevant officer**

10.5.1 In a case where the devolution issue arises in proceedings before a court or tribunal to which the relevant officer is a party, a direct reference by the relevant officer is made by –

- a. filing the reference,
- b. serving a copy of the reference on the parties to those proceedings, and
- c. serving a copy of the reference on all other relevant officers who are not already a party to those proceedings and who have a potential interest.

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<sup>29</sup> Amended April 2013

<sup>30</sup> Amended April 2013

10.5.2 The reference shall set out –

- a. the question referred;
- b. the addresses of the parties;
- c. the name and address of any other person who applied for or required the reference to be made;
- d. a concise statement of the background to the matter including -  
  
the facts of the case, including any relevant findings of fact by the court or tribunal;  
and  
  
the main issues in the case and the contentions of the parties with regard to them;
- e. the relevant law, including the relevant provisions of the relevant statute;
- f. the reasons why an answer to the question is considered necessary for the purpose of disposing of the proceedings.

10.5.3 All judgments and orders already given in the proceedings, including copies of any interlocutors and any notes attaching to such interlocutors, shall be annexed to the reference.

10.5.4 Any party to the proceedings in the court or tribunal who intends to participate in the proceedings in the Supreme Court shall within 14 days of service of the copy reference on him notify the Registrar by filing Form 3 and serving that form on<sup>31</sup> the other parties. Any relevant officer who gives notice automatically becomes a respondent to the proceedings.

10.5.5 In a case where the devolution issue is not the subject of proceedings before a court or tribunal, a direct reference by the relevant officer is made by –

- a. filing the reference, and
- b. serving a copy of the reference on any other relevant officer who has a potential interest.

10.5.6 Any relevant officer served with a copy of the reference may intervene in the proceedings on the reference by filing Form 3 and serving that form on<sup>32</sup> the relevant officer making the reference.

10.5.7 Where notice has to be given to any person under the Scotland Act 1998, the Northern Ireland Act 1998 or the Government of Wales Act 2006, as the case may be, the reference shall state the name and address of that person and when he was notified.

10.5.8 A person who has to be notified under paragraph 35 of Schedule 6 to the Scotland Act 1998, paragraph 35 of Schedule 10 to the Northern Ireland Act 1998 or paragraph 30 of Schedule 9 to the Government of Wales Act 2006, as the case may be, but who does not intend to participate in the proceedings in the Supreme Court shall give notice in writing within 14 days to the Registrar and the other parties to the proceedings.

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<sup>31</sup> Amended April 2013

<sup>32</sup> Amended April 2013



Annex 1 PD 10<sup>33</sup>

## References to the Supreme Court

1. Where a reference is made to the Supreme Court, the provisions of the Supreme Court Rules 2009 and the Practice Directions which supplement the Rules, are to be applied with such variations or modifications as may be required by the particular circumstances of the reference.
2. The reference must contain the matters required to be set out by Practice Direction<sup>34</sup> 10 and be produced on A4 paper, securely bound on the left using both sides of the paper. A reference must be served in accordance with the relevant statute and the provisions of this Practice Direction before it is filed. Notice of the filing of a reference should be given to those persons and bodies required to be notified by the terms of the relevant statute or of this Practice Direction. Ten copies of the reference should be filed.
3. The person at whose request the reference is made (“the applicant”) must
  - (a) provide the Registrar with the name and address of any person or body who was served with the reference (*“the respondent”*) and the dates when service was effected;
  - (b) supply the Registrar with the names, addresses and contact details of the applicant’s legal representatives and (if known) of the respondent’s legal representatives;
  - (c) inform the Registrar of any person or body who has been notified of the making of the reference, providing the names, addresses and contact details of that person or body and their legal representatives.
4. A respondent who wishes to take part in the reference must notify the Registrar and provide the names, addresses and contact details of his legal representatives.
5. The information required by paragraphs 3 and 4 is to be supplied in addition to the information and details which are required to be supplied by the terms of Practice Direction 10.
6. Appendix and cases
  - (a) At least 4 weeks before the hearing (or within such period as may be specified by the Registrar), the applicant must file 12 copies of an appendix of the essential documents which are necessary for consideration of the reference.
  - (b) The Appendix must be submitted to, and agreed with, every Respondent before being filed.
  - (c) The Applicant and every Respondent must file 12 copies of their written cases at least 2 weeks before the hearing.

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<sup>33</sup> Amended April 2013

<sup>34</sup> Amended April 2013