

MINUTES OF MEETING OF THE CRIMINAL COURTS RULES COUNCIL

PARLIAMENT HOUSE, MONDAY 17 OCTOBER 2011

Present: Lord Justice General (Hamilton)
Lord Carloway
Lord Bracadale
Sheriff John Baird
Sheriff Frank Crowe
Sheriff William Gilchrist
Frances McMenamin QC
Robert Burnett, Solicitor
Gillian Prentice, Deputy Principal Clerk of Justiciary (*in place of the Principal Clerk*)
David Shand, Sheriff Clerk
Keith Stirling JP
James Chalmers, University of Edinburgh
Jennifer Harrower, Procurator Fiscal
Michelle Macleod, Crown Office
Jim Andrews, Victim Support Scotland
Iain Hockenhull, Scottish Government (*in place of Mr McGillivray*)

Secretariat: Kathryn MacGregor, Legal Secretary to the Lord President
Christopher Nicholson, Deputy Legal Secretary to the Lord President

Apologies: Lord Justice Clerk (Gill)
Jamie Gilchrist QC
Iain Fleming, Solicitor

Item 1: welcome, apologies and introductions

1. The Lord Justice General welcomed members, in particular those new members of the Council, introduced his new Legal Secretary, Kathryn MacGregor and noted apologies.

Item 2: minutes and matters arising

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2. The minutes of the meeting of 28 February 2011 were approved, subject to the substitution of “where” for “were” in paragraph 9.

3. In terms of matters arising, Mr Hockenhull circulated a paper informing the Council that the Scottish Government were of the view that the Legal Aid Regulations were capable of being interpreted in such a way as to allow the remuneration of counsel in relation to the preparation of defence statements. This was, however, a holding position and further discussion would be required to ascertain the level and nature of work involved in the preparation of defence statements with a view to prescribing a reasonable fee. Mr Hockenhull advised members that the Scottish Government team responsible for sponsorship of the Scottish Legal Aid Board (SLAB) were due to meet with members of Faculty to discuss the matter further. Ms McMenemy welcomed the update and in particular the proposed meeting. Mr Burnett noted that the preparation of defence statements was being viewed by SLAB as more than just written work and that this may have implications in relation to the remuneration of solicitors.

Item 3: update on Acts of Adjournal

4. Since the last meeting two Acts of Adjournal had been made, namely: Act of Adjournal (Criminal Procedure Rules Amendment No. 5) (Miscellaneous) 2011 (SSI 2011/290) and Act of Adjournal (Criminal Procedure Rules Amendment No. 6) (Sexual Offences Prevention Order) 2011 (SSI 2011/355). The Council had no comments on the instruments.

Item 4: Scottish Government Update

5. Mr Hockenhull updated the Council in relation to the ongoing work of the Scottish Government.

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6. Although the timing of future Bills was subject to Cabinet approval and would be announced by Ministers in due course, Scottish Government officials were planning in anticipation of a general Criminal Justice Bill in 2012/13 and it was likely that the main recommendations of the Independent Review of Sheriff and Jury Procedure would be taken forward then. However, this was subject to the identification of recommendations that could usefully be taken forward by way of amendment to Criminal Procedure Rules instead. The Scottish Government would, therefore, welcome any comments or advice the Council may have in this regard.

7. The Scottish Government had recently made a commencement order (SSI 2011/354) bringing into force, on 1 November, those provisions of the Criminal Justice and Licensing Act 2010 in relation to sexual offences prevention orders (section 100); risk of sexual harm orders (section 103); spent alternatives to prosecution: rehabilitation of Offenders Act 1974 (section 109); and medical services in prisons (section 110). The result of this was that 80-90% of the 2010 Act would soon be in force. The Scottish Sentencing Council was, however, still to come.

8. The Scottish Government planned to introduce, before Christmas, legislation in relation to the operation of the Scottish Criminal Cases Review Commission, in particular the disclosure of information held by the Commission. That legislation would also seek to address the issues raised in the case of *Petch & Foye –v- HMA (2011) HCJAC 20*. The Lord Justice General noted and welcomed the latter. Sheriff Crowe asked about the Government's manifesto commitment to legislate in relation to directions to juries in rape cases where there was a lack of resistance by the complainer, Mr Hockenhill advised that that was still to be looked at in detail.

Item 5: Double Jeopardy (Scotland) Act 2011

9. The Council considered a draft of an Act of Adjournal prepared by the Private Office containing the rule changes required in consequence of the Double Jeopardy (Scotland) Act 2011. The draft Act of Adjournal would see existing Chapter

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7A (disclosure) amended and introduce new Chapter 59 (Double Jeopardy (Scotland) Act 2011). Contained within new Chapter 59 were rules relating to – applications made by the Lord Advocate; applications by the prosecutor in other subsequent prosecutions; hearing and determination of applications and appeal to the High Court. Sheriff Gilchrist noted that the High Court’s determination of a Double Jeopardy application under the 2011 Act was final and it was explained that the rules in relation to an appeal to the High Court related only to the grant or refusal of a motion under section 11(6) of the 2011 Act. The Lord Justice General suggested that draft Rule 59.4(1) be amended to make this clearer. Members discussed the wording of some of the other rules but were otherwise content with the draft.

Item 6: Contempt of Court

10. The Council considered a paper prepared by the Private Office proposing that Rule 29B.7 of the Criminal Procedure Rules be amended as a result of Act of Sederunt which was to be made in respect contempt of court in civil proceedings. Sheriff Gilchrist was of the view that the existing criminal rules were sufficient. Members agreed with this view. Sheriff Crowe asked whether provision should be made in Rule 29B.7(4) (adjournment of hearing) to allow the court to grant bail to the relevant person; this would also be relevant for Rule 29B.4(3). Members were broadly in agreement with this proposal though the DPCJ highlighted that this may give rise to a number of practical problems. It was agreed that those concerns would require to be looked at further before any change to the existing rules were made.

Item 7: Draft Act of Adjournal (Criminal Procedure (Scotland) Act 1995) (Amendment)

11. The Council considered a revised draft of an Act of Adjournal amending the Act of 1995 to provide the court with a power to re-fix diets in respect of days which are no longer suitable to the court. The Council were content with the terms of the draft. The Lord Justice General explained that the policy had been suggested and the

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draft prepared in the absence of any primary legislation on the horizon which could make the change. The question for the Council was, therefore, whether to wait for the Scottish Government's Criminal Justice Bill in 2012/13 or to make the Act of Adjournal now. Lord Bracadale was of the view the view that the change was a useful one which should be made sooner rather than later. The Council agreed.

Item 8: Extradition cases

12. The Council considered a paper submitted by Sheriff Crowe proposing that Chapter 34 (extradition) of the Criminal Procedure Rules be amended in order to formalise the procedure which currently takes place in Edinburgh Sheriff Court prior to the (full) extradition hearing. Sheriff Crowe had prepared a draft rule to assist the Council. The Rule would allow the court to fix a preliminary hearing in order to ascertain the state of preparation of the parties and, if the person was maintaining their opposition to extradition, the grounds upon which that opposition was based. Sheriff Baird was concerned about proceeding in a manner (i.e. to fix a procedural hearing) which was not provided for in the Extradition Act 2003. Members agreed, however, that to give the court the power to fix a procedural hearing was within the High Court's rule making power under section 305 of the Act of 1995. Sheriff Baird had a number of other comments on the draft rule prepared by Sheriff Crowe and these would be taken into account by the Private Office when the matter was passed to them for detailed drafting.

Item 9: Appeals in respect of extension of time in summary and solemn trials

13. The Council considered a paper submitted by Sheriff Crowe proposing that the Criminal Procedure Rules be amended to provide, in both solemn and summary proceedings, that it be specified that the judge's or sheriff's report is sent to the Clerk of Justiciary when an appeal is taken against the granting of an extension of time under section 65 or 147 of the Act of 1995. Sheriff Crowe had prepared a draft to assist the Council. The DPCJ informed members that, in practice, the report was

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requested when the papers were received and the hearing fixed. The Lord Justice General noted that the current draft may result in delay as the Clerk of Justiciary would have to wait until the report was received with the other (main) papers to fix a hearing; leaving aside that observation, which could be picked up on when the matter was passed to the Private Office for drafting, the suggestion was a useful one. The Council agreed.

Item 10: any other competent business

14. JP Stirling noted that former Sheriff Principal John McInnes QC had recently died; the Council noted his passing with regret.

15. The next meeting is on Monday 13 February 2012 at 10.30 am.