

MINUTES OF MEETING OF THE CRIMINAL COURTS RULES COUNCIL

PARLIAMENT HOUSE, MONDAY 28 FEBRUARY 2011

Present: Lord Justice General (Hamilton)
Lord Justice Clerk (Gill)
Sheriff Frank Crowe
Jamie Gilchrist QC
James Keegan QC
Iain Fleming, Solicitor
Joe Moyes, Justiciary Office (for Gillian Prentice)
David Shand, Sheriffdom Business Manager
James Chalmers, University of Edinburgh
Michelle Macleod, Crown Office (for John Logue)
Morag McLaughlin, Procurator Fiscal Service
David Kemp, Sheriffdom Legal Adviser
Don McGillivray, Scottish Government

In attendance: Lord Carloway

Secretariat: Michael Anderson, Legal Secretary to the Lord President
Christopher Nicholson, Deputy Legal Secretary to the Lord President

Apologies: Lord Matthews
Lord Bracadale
Sheriff Nigel Morrison QC
Sheriff Fiona Reith QC
Frances McMenamin QC
Graeme Marwick, Principal Clerk of Session and Justiciary
Professor Fiona Raitt, University of Dundee

Item 1: welcome, apologies and introductions

1. The Lord Justice General welcomed members and noted apologies.

Item 2: minutes and matters arising

2. The minutes of the meeting of 1 November 2010 were approved. In terms of matters arising the Lord Justice General asked Mr McGillivray if he had an

opportunity to consider the matter raised in paragraph 10 of the minutes. Mr McGillivray advised that the Scottish Government were of the view that a process of consolidating the 1995 Act was, at least, two years away. The Lord Justice General then referred members to paragraph 13 of the minutes. Mr McGillivray advised that prisoners were transported back to the prison from which they had come, for release, if they had been present and successful at their bail appeal.

Item 3: update on Acts of Adjournal

3. Since the last meeting four Acts of Adjournal had been made. Paper 3 informed members about three of these, namely: Act of Adjournal (Criminal Procedure Rules Amendment No. 3) (Scottish Criminal Cases Review Commission) 2010 (SSI 2010/386); Act of Adjournal (Criminal Procedure Rules Amendment No. 4) (Miscellaneous) 2010 (SSI 2010/418); and Act of Adjournal (Criminal Procedure Rules Amendment) (Community Payback Orders) 2011 (SSI 2011/21). Members were advised that Act of Adjournal (Criminal Procedure Rules Amendment No. 2) (Protection of Vulnerable Groups (Scotland) Act 2007) 2011 had been made on 24 February 2011; it substituted for Chapter 47 (Protection of Children (Scotland) Act 2003) new Chapter 47A (Protection of Vulnerable Groups (Scotland) Act 2007) and had been approved at the meeting of the Council on 12 July 2010. The Council had no comments on the instruments.

Item 4: Scottish Government Update

4. Mr McGillivray updated the Council on the position regarding commencement of the Criminal Justice and Licensing (Scotland) Act 2010. A large number of provisions were scheduled for commencement on 28 March, 15 April, and 6 June 2011. Mr McGillivray provided members with a circular providing further detail. The Lord Justice Clerk enquired about the Scottish Sentencing Council. Mr McGillivray advised that no date had been scheduled.

Item 5: draft miscellaneous Act of Adjournal

5. The Council considered a draft miscellaneous Act of Adjournal (paper 5) which was planned to be made at the end of March. This contained four discrete strands of work, namely—

- rule changes in relation to the provisions of the Criminal Justice and Licensing (Scotland) Act 2010 scheduled for commencement on 28 March and 6 June 2011.
- rule changes following the decision of the European Court of Human Rights in *Mackay and BBC Scotland –v- U.K.*
- rule changes in relation to the Regulation of Investigatory Powers Act 2000.
- rule changes in relation to the Control of Dogs (Scotland) Act 2010.

6. Mr McGillivray introduced and gave a summary of the rule changes required in consequence of the Criminal Justice and Licensing (Scotland) Act 2010. These changes included:

- making provision in connection with disclosure in consequence of the commencement of Part 6 of the 2010 Act on 6 June 2011.
- making provision in connection with the prosecution of organisations in consequence of the commencement of sections 65 to 68 of the 2010 Act on 28 March 2011.
- making provision in connection with the transfer of justice of the peace court cases in consequence of the commencement of section 61 of the 2010 Act on 28 March 2011.

7. In relation to disclosure Mr McGillivray advised that there may be some outstanding issues in relation to appeals, the content of a form and the need for rules arising from section 135 of the 2010 Act; these would be raised with officials in the LPPO. Mr McGillivray advised that the Scottish Government were otherwise content with the draft. The Council approved these rules subject to some minor changes

proposed by Mr Chalmers and the Lord Justice Clerk. Mr McGillivray also referred members to the appointment of special counsel under section 150. Discussions were ongoing between stakeholders as to how a list of special counsel could be created and maintained. Sheriff Crowe was of the view that the list should contain a wide range of persons and experience, not just those persons who were Advocates Depute or Standing Juniors.

8. Mr Gilchrist asked Mr McGillivray whether the Legal Aid Regulations were being amended as a result of the requirement to lodge defence statements under the new disclosure regime. Mr McGillivray was not sure and would have to check. Mr Gilchrist was of the view that this was very important and members agreed.

9. The Council turned to consider the draft rules in connection with reporting restrictions imposed under section 4(2) of the Contempt of Court Act 1981. Members were advised that, in the case of *Mackay and BBC Scotland -v- UK*, the European Court of Human Rights held that there had been a violation of Article 13 of the Convention, read in conjunction with Article 10; the Court had criticised the “informal nature” of the practice which governs challenges to section 4(2) orders. The proposed rule change would address this issue. Mr Chalmers enquired as to whether multiple applications and the notification of hearings had been considered. Members were of the view this was not an issue given the low number of challenges that currently take place and were content for the rules to be made. The Lord Justice General went on to advise members that, in the course of the draft rules being prepared, media law practitioners had expressed a view that the difficulties encountered in the *Mackay* case were not limited to the imposition of section 4(2) orders and that this may require to be looked at, perhaps by way of a working group, at a later date.

10. The Council then considered the draft rules in connection with the Regulation of Investigatory Powers Act 2000 (RIPA). The Lord Justice General reminded members of its background; the need for procedural arrangements in relation to

section 18 of RIPA had been raised sometime ago and had been the subject of a working group chaired by Lord Matthews. The proposed rule change would introduce a procedure whereby the prosecutor could request a hearing before the judge for the purposes of section 18. The Lord Justice General advised members that the views of the administrative judges for criminal business and those of Lord Matthews had been taken into account. The Council were content for the rule to be made.

11. Although it had not been a Scottish Government Bill, Mr McGillivray spoke to the need for rules in consequence of the Control of Dogs (Scotland) Act 2010 which had come into force on 26 February 2011. Members noted that the rules related to prescribing of forms for applications and appeals and were content for these to be made.

Item 6: Sexual Offences (Scotland) Act 2009 – compound charges

12. The Council considered a paper prepared by Crown Office and spoken to by Michelle Macleod. The paper proposed that the High Court should use its power to amend the Schedule to the Act of 1995 to introduce style charges in relation to those offences created by the Sexual Offences (Scotland) Act 2009. The Lord Justice General queried the need and the appropriateness of this, expressing reservations about the extent to which the court could or should become involved in the framing of charges given the possibility of subsequent adjudication. He asked that Mr Chalmers chair a working group to consider the matter further. Mr Chalmers would be assisted by Mr Gilchrist, Mr Keegan, Ms Macleod and Ms McLaughlin. Sheriff Crowe noted that the issue raised the question of whether the style charges (which had been in existence in one form or another since 1887) served much of a purpose anymore.

Item 7: Citation of witnesses in summary proceedings

13. Sheriff Crowe presented and spoke to a paper which proposed a rule change as a result of difficulties being experienced in citing witnesses in summary proceedings. It had, unfortunately, become known that the simplest way to avoid attending as a witness was to send back the reply form and then fail to attend. The reply forms, which were centrally processed and then destroyed by COPFS, would not be with the Fiscal in court who would not, therefore, be able to seek a warrant. One possible solution would be to amend rule 16.6. The Lord Justice General noted however that it was perhaps not the rule which was defective but rather the process of destroying the return slips and that this needed to be resolved. Ms McLaughlin undertook to look into the matter further.

Item 8: Provisional arrests under the Extradition Act 2003

14. The Council considered a paper addressing the need for rules arising from provisional arrests under the Extradition Act 2003. The Lord Justice General explained the background. The amendments to the 2003 Act had been made in preparation of the introduction in the UK of system called SIS II. This would see provisional arrests becoming more commonplace. Sheriff Crowe agreed and explained how Edinburgh Sheriff Court was planning to deal with the expected upturn in extradition work. Mr Shand recalled that SIS II had been shelved or, at the very least, delayed by the Coalition Government until 2014/2015. Members noted the development though the question remained as to what would be appropriate in terms of a rule in relation to notice envisaged by section 6(3D) of the 2003 Act. The Lord Justice General suggested that a form of written notice be provided prior to the hearing. Members agreed.

Item 9: any other competent business

15. There was no other business to be discussed. The next meeting is on Monday 6 June at 10.30 am.