

## MINUTES OF MEETING OF THE CRIMINAL COURTS RULES COUNCIL

PARLIAMENT HOUSE, MONDAY 1 NOVEMBER 2010

**Present:** Lord Justice General (Hamilton)  
Lord Justice Clerk (Gill)  
Jamie Gilchrist QC  
James Keegan QC  
Iain Fleming, Solicitor  
Gillian Prentice, Deputy Principal Clerk of Justiciary  
David Shand, Sheriffdom Business Manager  
James Chalmers, University of Edinburgh  
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

**Apologies:** Lord Matthews  
Lord Bracadale  
Sheriff Nigel Morrison QC  
Sheriff Fiona Reith QC  
Sheriff Frank Crowe  
Frances McMenamin QC  
John Logue, Crown Office  
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 12 July were approved. The only matter which was not otherwise dealt with was the issue of *ex parte* hearings under the Regulation of Investigatory Powers Act 2000. The Lord Justice General informed

the Council that he had now received the views of the administrative judges and Lord Matthews. A rule was in preparation for consideration by the Council at its next meeting.

### **Item 3: update on Acts of Adjournal**

3. Since the last meeting one Act of Adjournal had been made; namely Act of Adjournal (Criminal Procedure Rules Amendment No 2) (Presentation of Conviction Appeals in Writing) 2010 (SSI 2010/309). The Act of Adjournal came into force on 1 November. It had been the subject of extensive discussion at the last meeting and had been adjusted to reflect the extended time period for lodging the case and argument which the Council had then decided on. The Council had no comments on the instrument on this occasion.

### **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. It was noted that a number of provisions of the Act were scheduled for commencement on 13 December. It was envisaged that one set of provisions might be commenced in February (though no final decision had yet been made). It was planned to commence a further substantial tranche of the Act in March.

5. Mr McGillivray added that there was a possibility of urgent commencement of section 83 of the Act (which dealt with references to the High Court by the SCCRC). Advice had gone to Ministers about commencing this provision this week, as it was felt to link with recent action taken following the decision of the UK Supreme Court in the case of *Cadder v HM Advocate*. This would have implications for the proposed changes to the Rules which were being discussed at item 5.

6. Mr McGillivray went on to outline the action taken following *Cadder*. The Scottish Government had introduced an emergency Bill into the Scottish Parliament. The Bill – the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill – gave effect to the decision of the Supreme Court by conferring a right of an accused person to legal advice before and during detention under section 14 of the 1995 Act. It also extended the period of detention from six to twelve hours and made provision for it to be extended further in individual cases. The Bill also contained provision concerning criminal appeals in an effort to reflect the principle of finality and certainty in criminal proceedings. It tightened up the procedure for applications for extensions of time to intimate an appeal against conviction. It imposed a time limit for lodging bills of suspension and bills of advocation in certain circumstances. It imposed a requirement on the SCCRC to have regard to the need for finality and certainty in the determination of criminal proceedings in determining whether or not it was in the interests of justice for a reference of a case to the High Court to be made. And, finally, it conferred on the High Court a power to reject a reference if it considered that it was not in the interests of justice that any appeal arising from the reference should proceed.

7. The Bill received Royal Assent on 29 October and the consequent Act came into force the following day. Mr McGillivray highlighted the need for consideration to be given to whether the new provisions raised any need for changes of the rules.

8. Reverting to the Criminal Justice and Licensing (Scotland) Act 2010, members asked about several matters which were scheduled for commencement in March 2011 “or later”. Mr McGillivray said that much depended on progress – for example, the Scottish Government was keen to commence Part 6 (disclosure) in March but that was contingent on early identification of the

authority which was to take responsibility for administration of the system of special counsel required. The Lord Justice Clerk enquired about the commencement of the provision for a Sentencing Council. No firm date for such commencement was yet envisaged.

9. Mr Shand expressed enthusiasm for the commencement of section 61, which would facilitate the transfer of cases in JP courts. He was of the view that this would improve the efficient disposal of business. It was noted that forms may require to be prescribed in order to make the section work. It was felt that this was achievable.

10. The Lord Justice General noted that the 2010 Act made another series of substantial amendments of the 1995 Act and asked whether the Scottish Government had any plans to commence a process of consolidation. Mr McGillivray agreed to reflect on this matter and to report at the next meeting.

#### **Item 5: draft miscellaneous Act of Adjournal**

11. The Council considered a draft miscellaneous Act of Adjournal with a proposed commencement date of 13 December 2010. This contained five discrete strands of work, namely—

- rule changes following the decision of the European Court of Human Rights in *Allen v United Kingdom*.
- rule changes on interruption of solemn proceedings.
- rule changes in relation to the Protection of Vulnerable Groups (Scotland) Act 2007
- rule changes in relation to the provisions of the Criminal Justice and Licensing (Scotland) Act 2010 scheduled for commencement on 13 December 2010.

- rule changes in relation to section 64 of the Legal Aid and Legal Profession (Scotland) Act 2007 scheduled for commencement on 13 December 2010.

12. The second and third of these matters were agreed at the meeting on 12 July and no more required to be said about them. So far the first of them was concerned, the Deputy Principal Clerk of Justiciary drew attention to the decision of the European Court of Human Rights in *Allen v United Kingdom* in which it had been held that Article 5(4) of the Convention required that an accused be entitled to attend a Crown appeal against a grant of bail. Subsequently, the Criminal Procedure Rules 2010 were amended so as to include such an entitlement (see rule 19.17(4)). It was accordingly proposed that a corresponding amendment of our rules should be made. Because of the fact that all bail appeals were heard in Edinburgh under a strict 72 hour timetable, it was further proposed that where an accused person wished to attend the bail appeal he or she should be required to intimate that at least 24 hours before the hearing.

13. Following discussion, these changes were agreed by the Council. Members were assured by the Deputy Principal Clerk that as a matter of practice, the accused's representative was contacted by the sheriff clerk immediately on the intimation of a Crown bail appeal in order to establish whether attendance by the accused was sought. An unrepresented accused was, of course, taken to the bail appeal hearing automatically. It was not clear what arrangements would be made for the transport etc. of a prisoner released in Edinburgh.

14. The Council then discussed and agreed the rule changes required in consequence of the Criminal Justice and Licensing (Scotland) Act 2010. These changes included:

- making provision in connection with applications by the Scottish Criminal Cases Review Commission under new section 194IA of the 1995 Act (inserted

by section 105 of the 2010 Act) for assistance in obtaining information from abroad.

- making provision in connection with section 83 of the Act, which changed the position on references from the Commission so that in the ordinary case an appeal had to be based on the Commission's statement of reasons.
- removing provisions of the rules dealing with short periods of detention which were spent in consequence of the repeal, by section 16 of the 2010 Act, of sections 169 and 206(2) to (6) of the 1995 Act.
- amending Chapter 49 (financial reporting orders) so that an application for variation or revocation of such an order required to be intimated to the prosecutor.

It was noted that the Scottish Government had yet to finalise its policy on transitional and savings provisions in connection with the commencement of the relevant provisions. This was to be discussed between them and the LPPO and the instrument adjusted accordingly before it was made.

15. Finally, the Council agreed to an amendment of Chapter 33 (legal aid) in consequence of the commencement of section 64 of the Legal Aid and Legal Profession (Scotland) Act 2007. That section transferred from the High Court to the Scottish Legal Aid Board the power to grant legal aid in relation to solemn proceedings.

#### **Item 6: draft miscellaneous Act of Adjournal**

16. The Council considered a draft miscellaneous Act of Adjournal containing draft rule changes in consequence of the introduction, by the Criminal Justice and Licensing (Scotland) Act 2010 of community payback orders in place of the current array of community disposals including probation orders and community service orders. These changes were agreed. It was noted that the

Scottish Government was yet to firm up on the commencement date for the provisions of the 2010 Act introducing community payback orders.

**Item 7: any other competent business**

17. There was no other business to be discussed. The next meeting is on Monday 14 February at 10.30 am.