

# MINUTES OF MEETING OF THE CRIMINAL COURTS RULES COUNCIL

PARLIAMENT HOUSE, MONDAY 23 FEBRUARY 2009

**Present:** Lord Justice General (Chair)  
Lord Justice Clerk  
Lord Matthews  
Sheriff Nigel Morrison, Q.C.  
Sheriff Fiona Reith, Q.C.  
James Chalmers, Edinburgh University  
Ian Fleming, Solicitor  
Jamie Gilchrist, Q.C.  
James Keegan, Solicitor  
David Kemp, Sheriffdom Legal Adviser  
John Logue, Crown Office  
Morag McLaughlin, Procurator Fiscal Service  
Gillian Prentice, DPCJ  
David Shand, Scottish Court Service

**In attendance:** Michael Anderson, Legal Secretary to the Lord President  
Carolyn Breeds, Deputy Legal Secretary to the Lord President  
Gerry Bonnar, Scottish Government  
Lady Dorrian (item 3)

**Apologies:** Sheriff Frank Crowe  
Graeme Marwick, PCJ  
Frances McMenamin, Q.C.  
Roma Menlowe, Scottish Government  
Professor Fiona Raitt, University of Dundee

## **Item 1: Introduction, welcome and apologies**

1. The Lord Justice General welcomed members and, in particular, David Kemp, who was attending his first meeting, and Gerry Bonnar, who was attending from the Scottish Government in place of Roma Menlowe. Apologies were tendered on behalf of absent members.

## **Item 2: Minutes and matters arising**

2. The minutes of the meeting of 13 October 2008 were approved, with the addition of the words “outwith courthouses” after “dedicated sites” in paragraph 8.2 of item 8 (AOCB). There were no matters arising.

### **Item 3: Proceeds of Crime Act 2002**

3.1. Lady Dorrian presented the draft rules amending Chapter 37AA of the Criminal Procedure Rules. The rules provide additional new procedure in relation to confiscation proceedings under the Proceeds of Crime Act 2002. Lady Dorrian advised the Council that she had been tasked by the Lord Justice Clerk with considering improvements to the existing procedure that would resolve some of the problems experienced in the processing and management of confiscation proceedings under the 2002 Act. A group of practitioners and officials was convened to assist in this consideration.

3.2. The experience of such proceedings was that a number of “notional proofs” are fixed but notional diets are continued from week to week with nothing being resolved at these diets. This resulted in the bail judge having a number of notional diets to deal with. Two points became clear from the group’s exploration of this issue. Firstly, few of the cases actually went to proof and, secondly, more than 90% of cases settled after receipt of the defence forensic report. It was apparent that more judicial control of these proceedings was necessary. As the critical point was the lodging of the forensic report, it was clear that the case should be brought back into court after that point.

3.3. The draft rules were based on a three-hearing model. Lady Dorrian gave a brief summary of the rules, which include a 6 week period for response, a period of adjustment and then a first hearing to ascertain the state of readiness of the parties and set a date for the lodging of the forensic report. Cases which did not require a forensic report could go straight to proof at that stage, but otherwise, a second hearing would be fixed. At that second hearing, which can be continued for 4 weeks if necessary, the court must order a determination hearing and order the clerk to issue a timetable for further procedure. A pre-determination hearing meeting is to be held and a minute of the meeting lodged, which borrows from the procedure for personal injuries actions in Chapter 43 of the Court of Session rules. A final preparation hearing, much like a By Order hearing, will check parties’ readiness for the determination hearing. The aim is that this procedure will eliminate notional diets and encourage early resolution.

3.4. It was noted by members that the draft rules did not take account adequately of the specialities of the sheriff court. Certain minor amendments were agreed to meet these concerns.

3.5. The Lord Justice General thanked members for their comments which would be taken into account in considering the rules further. It was agreed that the new procedure should be monitored after 12 months to establish whether it has been successful or whether further adjustments should be made.

- **Action: the LPPO to consider points raised.**

#### **Item 4: Contempt of Court**

4.1. The Lord Justice General advised that Lord Osborne - the chairman of the Contempt of Court Group - was unable to attend the meeting as he was on holiday and invited Sheriff Morrison – a member of the group - to say a few words about the draft rules. Sheriff Morrison advised the Council that the Group spent some time considering the procedure that should be adopted. He considered that human rights issues such as the question of remand necessitated a more detailed procedure than might otherwise have been the case. The group concluded that the system introduced would require to be inquisitorial in nature rather than adversarial.

4.2. It was suggested that draft rule 29A.7(2) might be changed so that requests by the relevant person for an adjournment had to be made at the contempt hearing itself rather than being made in writing. It was agreed that the court would want to be addressed in relation to any request for adjournment and that the reference to a request in writing should be removed.

4.3. Concern was expressed in relation to the timing of the contempt hearing. The rules provide that a request for an adjournment would only be considered in “exceptional circumstances” but if there was a dispute as to the facts, and witnesses were required, it would not be possible for the contempt hearing to go ahead without an adjournment. Members also questioned how practical it was to expect the court to prepare the statement of facts in time for it to be received by the relevant person 24 hours before the contempt hearing. Sheriff Morrison advised that the group realised that the timing was tight but was concerned about remanding the relevant person in custody for too long.

4.4. It was also suggested that it would be helpful to include in draft rule 29A.4(3)(b) a requirement to ascertain the relevant person’s current address. It was also noted that the practicalities of the clerk of court citing persons to attend the contempt hearing would have to be sorted out. It was confirmed that the other court to which the alleged contempt was committed was another court of the same level, so that, for example, a contempt directed at a sheriff would be remitted to another sheriff to deal with.

4.5. The Lord Justice General thanked members for their comments, which would be fed back the Contempt of Court Group for consideration.

- **Action: comments to be fed back to the Contempt of Court Group for consideration**

#### **Item 5: Written submissions in appeals against conviction**

5.1. The Lord Justice Clerk noted that a draft Act of Adjournal and note had been circulated in his absence at the last meeting. Since then, he had consulted the Faculty of Advocates, the Law Society, the Society of Solicitor Advocates, Crown Office and the Scottish Legal Aid Board. The rules had been amended and the transitional

provisions tightened up. The draft was in his view now ready to be made as soon as the necessary changes have been made to the legal aid fees. From the consultation that has been carried out, it was clear that interested parties supported the principle of the draft rules and the main features of the procedure. The question of the Crown signalling its position in advance was still to be resolved.

5.2. Members asked about the 21 day period for lodging the case and argument which is set out in rule 15.16A(4). They questioned whether the 21 period was too close to the appeal court hearing to enable judges to be identified to consider whether the Crown should lodge a case and argument under paragraph (5). The Lord Justice Clerk thought that the Crown would signal its position early and the only real case where it would need to lodge detailed submissions would be if the court required it, where it was not happy with the reasoning in the judge's report.

5.3. Mr. Logue advised that, in relation to the issue of when the Crown should be asked to indicate its position, the outstanding issue still to be resolved was the mechanism for providing an early indication. He expected that, in the majority of cases the Crown would rely on the judges' report only; Crown Office should be able to provide suggested wording for the rules within the next few weeks.

5.4. The DPCJ highlighted an administrative problem in that the appeal court programme cannot be efficient if the requirement to lodge comes so close before the hearing. If an extension of time was requested, or if the case and argument was not lodged in the specified period and had to be chased up by Justiciary Office, a longer time period would be required. She advised that Justiciary Office would prefer a period of at least 6 weeks, which was the period currently given for sentence appeals. There were various procedural matters that would also require to be addressed, for example, in relation to receipt of estimate of time for the appeal hearing.

5.5. Clarification of draft rule 15.16(10) was sought. The Lord Justice Clerk explained that this section was not directed specifically at party litigants but to ensure there was focus in the case and argument.

5.6. It was agreed that account would be taken of members' comments. It was also agreed that monitoring of the new rules would be required.

- **Action: The draft rules will be re-considered in light of members' comments.**

## **Item 6: Transfer of proceedings**

6.1. Sheriff Reith advised that the sub-group had met and re-drafted the Act of Adjournal in light of the discussion at the previous meeting of the Council. The Act of Adjournal makes provision for transfers of proceedings in summary cases. It also includes provision, in relation to section 34A of the 1995 Act, for transfer of solemn proceedings. Sheriff Reith advised that the issue of evidencing consent of the sheriff or sheriff principal had been resolved by requiring that consent to be docquetted.

The form of wording was kept deliberately vague, which would allow for electronic methods of transmission to the other court. Mr. Shand advised that Crown Office would be consulted on the best way to do this and an internal direction to sheriff clerks would be issued.

6.2. Sheriff Reith advised that, in addition, the forms had been expanded to include provision for citing and ordaining the accused to appear at the new diet and for adjourning and fixing the new diet. Gerry Bonnar advised that the new Criminal Justice and Licensing (Scotland) Bill will contain provisions for transfers between justice of the peace courts.

- **Action: Act of Adjournal ready to be made**

#### **Item 7: Amendment of Criminal Procedure (Scotland) Act 1995**

7.1. Michael Anderson presented the draft Act of Adjournal making minor amendments to the 1995 Act. He advised the Council that the aim of the amendment was to make the paperwork the same in relation to conviction and sentence appeals, by ceasing the need to transfer principal papers between courts in stated cases, which would reduce errors and administration time. The problem had been identified by the Criminal Appeals Improvement Project. Section 305(2) empowers the court to modify, amend or repeal any enactment insofar as that enactment relates to matters with respect to which an Act of Adjournal may be made under section 305(1). The Scottish Government has been consulted in relation to this proposed amendment and the Office of the Scottish Parliamentary Counsel has also been given an opportunity to comment on the wording of the amendment.

7.2. The Council was happy to proceed with the Act of Adjournal.

- **Action: Act of Adjournal ready to be made**

#### **Item 8: Submission from Crown Office**

8. John Logue introduced the submission from Crown Office. He advised that there were 5 parts to the paper and the proposed changes were mainly tweaks of the Criminal Procedure Rules following the experience of the last year. The Council was content that these points merited further consideration.

- **Action: Crown Office to discuss these points further with the Lord President's Private Office.**

#### **Item 9: Update from Scottish Government (Gerry Bonnar)**

9.1. Gerry Bonnar, who was attending the meeting on behalf of the Scottish Government in place of Roma Menlowe, provided a summary of the forthcoming Criminal Justice and Licensing (Scotland) Bill. He explained that the Bill was

currently in the pre-introduction phase and was not yet public. It was expected that the Bill would be introduced on 5 March and published on 6 March. Mr. Bonnar advised that there was likely to be a general political consensus on some parts of the Bill, which in part implements recommendations of the Scottish Law Commission but contains around 85 different topics, including the establishment of a Sentencing Council, provisions on disclosure and changes to the age of criminal responsibility. Act of Adjournment provision will be required and will be set out in the delegated powers memorandum.

9.2. In relation to the Parliamentary timetable, Mr. Bonnar explained that there would first be general consideration and debate in Parliament known as Stage 1. At Stage 1 the Justice Committee would consider evidence from interested parties. Stage 1 would start from late spring. At Stage 2 in the autumn, amendments would be considered and additional provisions could still be inserted. It was hoped that process would conclude in late autumn and that the Bill might be passed in spring 2010.

9.3. The Lord Justice General noted that the Scottish Government had not taken up the suggestion, put by him in correspondence with the Cabinet Secretary for Justice, that Justiciary office records be examined to test whether there truly was any inconsistency in sentencing.

#### **Item 10: Work in progress**

10.1. Carolyn Breeds provided a summary of some of the other matters that the Lord President's Private Office is considering. The Criminal Procedure Rules have to be amended to make provision for overseas freezing orders for the preservation and transmission of evidence under the Crime (International Cooperation) Act 2003. The relevant provisions of that Act come into force in October 2009. Consideration was also being given to whether it was necessary to provide a form for applications under the Batteries and Accumulators (Placing on the Market) Regulations 2008 about whether it would be desirable to make either specific provision or else more general provision for such applications. It was agreed that provision was not necessary.

10.2. In relation to the Crown Office submission to an earlier meeting on ex-parte hearings under Part 1 of the Regulation of Investigatory Powers Act 2000, Lord Matthews agreed to convene a sub-group to take this forward. Mr. Gilchrist agreed to assist with this sub-group. The DPCS advised that she would nominate a suitable official and Mr. Logue advised he would nominate a representative from Crown Office.

#### **Item 11: AOCB**

12. There was no other business. The next meeting of the Council is at Parliament House on Monday 29 June 2009 at 10.30am.