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*Dear Paul,*

### **Eighth Commission Programme for Law Reform**

I refer to the interview which was published at the beginning of June on the Judicial Hub.

I have been meaning to write to you for some time but judgments and holidays have intervened.

I wonder if the Scottish Law Commission would like to consider drafting a bill to consolidate and update the Criminal Procedure (Scotland) Act 1995?

I started in practise as a solicitor in 1975 and found it a great benefit to have the Criminal Procedure (Scotland) Act 1975 as my guide. At the time I looked at the modest Parliamentary Committee minutes which marked its passage through Westminster but the Act did repeal some old Scots Acts including the Criminal Procedure Act 1701 and brought together solemn and summary codes of procedure (which are, of course, in large part similar) but which had been scattered in different statutes such as the Criminal Procedure (Scotland) Act 1887, the Summary Jurisdiction (Scotland) Acts 1908 and 1954 and the Criminal Appeal (Scotland) Act 1926.

It could be seen also that criminal procedure had become a matter of regular statutory amendment with significant Acts in 1949, 1954, 1960, 1963, 1965, 1967, 1968, 1972 and 1973.

Of course our thin book of codified procedure did not last long with the inception of the Criminal Law Act 1977 and more significantly by the Criminal Justice (Scotland) Act 1980 and Bail (Scotland) Act 1980. Criminal Justice legislation continued apace with annual changes and so it was no surprise when I learned that Alan Rodger, then Solicitor General, had convened a small group containing among others Frank Mulholland, then a legal assistant to read through from beginning to end the 1975 Act and various other pieces of legislation that still existed (such as the style charges which were buried in the 1887 and 1954 Acts). Some of the sections of the 1975 Act, drawn from the past were out-dated and obscure and these were tidied up by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 and consolidated into the 1995 Act proper.

Since then of course much legislation has flowed. At one time a Scottish Criminal Justice Bill was a rare event and opportunities in the Parliamentary business programme came round once in every few years; important provisions, required with some urgency might be added to a UK Criminal Justice Bill and there is provision to amend and regulate practice and criminal procedure by Act of Adjournal under section 305(1)(a) of the 1995 Act

Recently in the Criminal Rules Council we considered the scope of section 305 but decided it was of limited use as a vehicle to make changes to procedure. Since 1999 the Scottish Parliament has had considerably more time to enact legislation and has done so in the context of criminal procedure at least once a year. In addition there are three bills currently before the Scottish Parliament which will have an effect on procedure in different but significant ways.

Despite all of this political activity I see little interest in Parliament or among Scottish Government officials in consolidating, tidying, simplifying and rationalising our criminal procedure legislation. Due to the number of times the 1995 Act has been amended the legislation has become very cumbersome as draftsmen try to maintain its logic and structure.

When Community Payback Orders were introduced to replace probation and community service many new sections- 227A to 227 Z0 were squeezed into the 1995 Act and there have been similar intrusions for children and vulnerable witnesses-section 271A to section 271 Z, mental health sections 52A to section 60D, bail and release on undertaking section 22 ZA to section 32A, detention procedures section 14A to section 20B to name but a few.

Almost all parts of the 1995 Act have been amended over the ensuing years yet the legislation is still not fit for purpose on a daily basis. There are quirks, for example the definition of "solemn proceedings" deemed to encompass petition proceedings is to be found, not in section 307 of the 1995 Act as logic might suggest but in the otherwise redundant and obscure Criminal Justice (Scotland) (Act) 1995 (Commencement No 2, Transitional Provisions and Savings) Order 1996 SI 517.

Although the Criminal Proceedings etc. (Reform)(Scotland) Act 2007 sought to unify the sheriff and JP Courts under a single administration (and in practice a common court computer system) it is very difficult and sometimes nigh impossible, notwithstanding sections 136A to 137D of the 1995 Act to gather up the cases of an accused who has matters calling for sentence in the sheriff and JP Court or indeed adjacent sheriff courts. I had hoped the quest to deal with serial offenders and the existence of COP II –the court based computer system with links to other criminal justice agencies would have helped here but it is left to the court to try to gather cases in order that an offender may receive a meaningful sentence at one diet in respect of all outstanding matters.

These are but a few thoughts although it may be helpful to consider a consolidation of the Act of Adjournal which suffers from having extra sections interleaved among its provisions. I appreciate that any consolidation exercise is often used as a spring board for further change but with various significant proposals in Parliament's purview at present concerning detention and sheriff and jury proceedings now would seem a good time to launch a revision and consolidation exercise. In my view the Criminal Procedure Act should be reserved for the main high line provisions, the more arcane details-such as most of sections 227B to 227 Z0 should be consigned to schedules and the Act of Adjournal restricted to facilitation of primary legislation and the publication of forms of procedure to assist practitioners at various stages of the process.

The opportunity could be taken to update the styles in Schedules 2 and 5 to the 1995 Act. In Schedule 5 the breach of the peace charge requires some specification over and above what is shown in example 2-see *Smith v Donnelly* 2001 SLT 1007. Similarly although charmingly quaint the examples of indictment charges could be updated to remove references to "a shawl and boa", "a

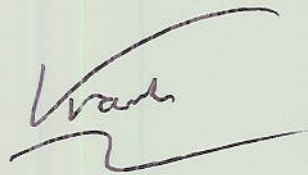


watch and chain," "a candlestick" and the specimen fraud charge perpetrated by the production of false credentials to obtain a "domestic situation". I am sure Lord Rodger left these examples in deliberately of what was required following the demise of the major and minor premise in charges in 1887 but sadly the introduction of disclosure has led to a decline in the quality of drafting charges so as to afford fair notice to the accused and indeed the court. New examples of good practice might lead to improvements down the line in this context.

I would be happy to expand on these proposals if you wished further information. In recent times I have assisted with some small changes to procedure through the Act of Adjournal such as Rule 34.2A which deals with procedural hearings in extradition cases, Chapter 23A Television Link Evidence and Chapter 19 ensuring the timeous submission of reports by the presiding judge in summary cases. However, as indicated, a root and branch consideration of what we have in the 1995 Act and related legislation and how it could be presented in a more coherent, logical and concise way would be of benefit for all involved in the criminal justice system.

I am copying this letter to the Lord Justice Clerk for his information.

*Best Wishes*

A handwritten signature in black ink, appearing to read 'Rodger', with a large, sweeping flourish underneath.