

## MINUTES OF MEETING OF THE CRIMINAL COURTS RULES COUNCIL

PARLIAMENT HOUSE, MONDAY 6 JUNE 2011

- Present:** Lord Justice General (Hamilton)  
Sheriff Nigel Morrison QC  
Sheriff Fiona Reith QC  
Sheriff Frank Crowe  
Frances McMenamin QC  
Jamie Gilchrist QC  
Iain Fleming, Solicitor  
Gillian Prentice, Deputy Principal Clerk of Justiciary  
David Shand, Sheriffdom Business Manager  
James Chalmers, University of Edinburgh  
John Logue, Crown Office  
Don McGillivray, Scottish Government
- In attendance:** Lord Carloway  
Rebecca Smith, Scottish Government
- Secretariat:** Michael Anderson, Legal Secretary to the Lord President  
Christopher Nicholson, Deputy Legal Secretary to the Lord President
- Apologies:** Lord Justice Clerk (Gill)  
Lord Matthews  
Lord Bracadale  
James Keegan QC  
Graeme Marwick, Principal Clerk of Session and Justiciary  
Professor Fiona Raitt, University of Dundee  
Morag McLaughlin, Procurator Fiscal Service  
David Kemp, Sheriffdom Legal Adviser

### **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 28 February 2011 were approved, subject to the substitution of “Mr Keegan” for “Mr Fleming” in paragraph 12.

3. In terms of matters arising the Lord Justice General asked Mr McGillivray if he had an opportunity to consider the matter raised in paragraph 8 of the minutes. Mr McGillivray advised that the Scottish Government were of the view that the Legal Aid Regulations were adequate to allow remuneration of solicitors in relation to the preparation of defence statements and did not require to be amended. Mr Gilchrist questioned the position in relation to the remuneration of counsel and Mr McGillivray undertook to confirm the position.

4. The Lord Justice General then referred members to paragraph 13 of the minutes regarding the citation of witnesses in summary proceedings. Sheriff Crowe had presented a paper at the last meeting of the Council. Crown Office had looked into the matter and had provided the Council with a paper which explained their practice and procedure. Crown Office were of the view that the report generated by their witness citation processing system, an example of which appeared in annex 2 of paper, was sufficient for the Procurator Fiscal to seek a warrant to arrest a witness who had not attended court. It was accepted that an electronic copy of the citation return slip could be made available, albeit with some potential for delay. Members discussed the current arrangements and the proposal for a rule to deem that the report in annex 2 was sufficient. Sheriff Crowe and Mr Logue favoured this course. Sheriff Reith was of the view that the report in annex 2 was not sufficient and that it would not, therefore, be appropriate to make a rule change to say that it was. Sheriff Reith reminded members of the seriousness of the granting of a warrant for arrest and stated that she, personally, would require proof, not an administrative assertion, before doing so. The Lord Justice General agreed with Sheriff Reith’s views and suggested that the matter, in particular the ease of availability of an electronic copy of the return slip in locations where the sheriff court and the fiscal’s office were not co-located, be kept under review. The Council agreed.

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

5. Since the last meeting two Acts of Adjournal had been made, namely: Act of Adjournal (Criminal Procedure Rules Amendment No. 3) (Miscellaneous) 2011 (SSI 2011/194) and Act of Adjournal (Criminal Procedure Rules Amendment No. 4) (Disclosure) 2011 (SSI 2011/242). It was noted that work was ongoing to populate the list of special counsel required by that instrument. The Council had no comments on the instruments.

### **Item 4: Scottish Government Update**

6. Mr McGillivray updated the Council in relation to the ongoing work of the Scottish Government. The new Scottish Government has a majority in the Scottish Parliament and is in the process of preparing its legislative programme for publication in the autumn. Meantime, Mr McGillivray advised the Council that the Government's commitment to the Scottish Sentencing Council remained and as did its interest in the role of the UK Supreme Court; tackling sectarianism; and a Victim's Rights Bill. Mr McGillivray also made mention of a manifesto commitment to legislate in relation to directions to juries in rape cases where there was a lack of resistance by the complainer.

### **Item 5: Double Jeopardy (Scotland) Act 2011**

7. Mr McGillivray informed the Council about the provisions of the 2011 Act; rules would be required to facilitate its implementation. The Council agreed that this was necessary and the Private Office would liaise with the Scottish Government over the drafting of the rules. It was planned to bring the Act into force in the autumn.

### **Item 6: Draft Miscellaneous Act of Adjournal No 5 of 2011**

8. Mr McGillivray proposed two changes to two forms contained in the Criminal Procedure Rules. The first change related to Sexual Offences Prevention Orders (SOPOs). The Criminal Justice and Licensing Scotland Act 2010 amended the Sexual Offences Act 2003 to provide that SOPOs can, in addition to prohibiting an offender from behaving in a particular way, require an offender to behave in a particular way; as a result Form 48.2 required to be amended. The Council agreed this change though Mr Chalmers thought that the mention of insanity needed to be revisited as a result of the 2010 Act and Sheriff Morrison was of the view that the form should reference the section under which the order was made. The Private Office would take these observations into account.

9. The second change related to Non-harassment orders made under section 234A of the Criminal Procedure (Scotland) Act 1995. The 2010 Act had amended section 234A to provide that Non-harassment orders could be imposed where an offender had been convicted of an offence involving misconduct towards a person rather than an offence of harassment within the meaning of Harassment Act 1997; as a result Form 20.10A required to be amended. The Council agreed this change.

**Item 7: Draft Act of Adjournal (Criminal Procedure (Scotland) Act 1995 Amendment) (Refixing diets) 2011**

10. The Council considered a draft Act of Adjournal prepared by the Private Office. At previous meetings of the Council the DPCJ and Mr Shand had submitted proposals that High Court make an Act of Adjournal to amend the Act of 1995 to provide the court with a power to accelerate or postpone a diet; this would be achieved by amending section 75 (solemn) and section 137 (summary). The Council had agreed the proposal.

11. The proposal was then passed to the Private Office to draft an Act of Adjournal making the changes. The Private Office noted, however, that the Court already had a power to re-fix diets in respect of non-sitting days in terms of section

75B (solemn) and section 137A (summary). It was, therefore, more appropriate to amend these sections to give the court the desired power.

12. The Council agreed with this course of action though several members noted that, although it was unlikely that the power would ever be misused by the court, it would be preferable to provide the parties with the right to be heard if need be. It was also felt desirable to adjust slightly the wording of the test proposed for the making of the order. The Private Office would make the necessary changes before submitting the draft Act of Adjournal to Scottish Parliamentary Counsel for approval.

#### **Item 8: Sexual Offences (Scotland) Act 2009 – Working Group on specimen charges update**

13. Mr Chalmers presented the findings of the working group to the Council by way of a written paper. The working group had met on 6 May and had concluded that it would not be appropriate for the High Court to make an Act of Adjournal amending the schedules contained in the Act of 1995 in respect of forms of indictment and complaint (style or specimen charges) in consequence of the 2009 Act. If changes were to be made this was a matter for the Scottish Government, working in conjunction with Crown Office, by means of secondary legislation under section 58 of the 2009 Act or, more commonly, by means of primary legislation.

14. The working group also discussed the nature of style charges more generally. The working group noted the purpose they had been created to serve and questioned whether this was still relevant today.

#### **Item 9: any other competent business**

15. Sheriff Crowe informed the Council that he and his fellow extradition sheriffs at Edinburgh had recently visited their counterparts in England and Wales at the

City of Westminster Magistrates Court. Sheriff Crowe was of the view that some of their procedures could prove useful north of the border; including the lodging of notes of argument at an earlier stage. With the assistance of the Private Office he had made contact with the clerk of the court in Westminster with a view to presenting a paper to the Council at its next meeting. The Council noted this development.

16. Ms McMenammin informed that Council that she had been approached by colleagues at the Faculty of Advocates asking her to raise with the Council the need to look at the rules relating to the signing of documents by the Counsel who drafted them. However, Ms McMenammin was of the view that it would be more appropriate to investigate the practice of members of Faculty further before deciding whether to submit a paper to the Council.

17. The Lord Justice General noted that composition of the Council was soon to change; he thanked those members who were leaving the Council for their contribution to its work.

18. The next meeting is on Monday 17 October at 10.30 am.