

**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 Frank Crowe
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
Roma Menlowe, Scottish Government
Morag McLaughlin, Procurator Fiscal Service
Gillian Prentice, DPCJ
David Shand, Scottish Court Service

In attendance: Michael Anderson, Legal Secretary to the Lord Justice General
Carolyn Breeds, Deputy Legal Secretary to the Lord Justice General

Apologies: Professor Fiona Raitt, University of Dundee
Graeme Marwick, PCJ
Frances McMenamin, Q.C.

Item 1: Introduction, welcome and apologies

1. The Lord Justice General welcomed members to the meeting. He noted that there were a number of new appointments and in particular welcomed these members, including Lord Matthews, Sheriff Crowe, James Chalmers, Ian Fleming, Jamie Gilchrist and Morag McLaughlin. Apologies were tendered on behalf of absent members.

Item 2: Minutes and matters arising

2. The minutes of the meeting of 15 October 2007 were approved. There were no matters arising.

Item 3: Update on Act of Adjournal

3. The Council considered the paper which had been circulated to members giving details of the three Acts of Adjournal that had been made since the last meeting. There were no matters arising from the update.

Item 4: Draft Acts of Adjournal

(a) Act of Adjournal (Criminal Procedure Rules Amendment No.4) (Miscellaneous) 2008

4.1. The Council considered this Act of Adjournal and the accompanying paper. Concerns were expressed by several members, regarding the absence of a mechanism for obtaining and recording the consent of the sheriff or the sheriff principal where that was required. It was thought that a sheriff would wish to know that the transferring sheriff had given the required consent. The view was expressed that, if a sheriff or sheriff principal withheld consent the matter would be put out for a hearing although in normal course some form of docket noting consent would be appended to the minute. Thereafter the minute would be faxed or scanned to the receiving court. Crown Office considered that as the initiation of the process had come from the courts, the need for which would be identified by the courts, the mechanics of the transfer would be organised by the courts.

4.2. The Lord Justice General agreed that it would be the courts taking an initiative in relation to transfers but he felt that there was a need for some form of documentary evidence to satisfy the sheriffs. The matter could be resolved by the consenting sheriff or sheriff principal docketting the application. Crown Office would want to consider this suggestion further, as their aim was for as much work to be carried out electronically as possible and the suggestion of docketting or otherwise marking some form of consent may cause difficulties.

4.3. It was suggested that Form 17A.1-D should require more detail as to why the prosecutor wants to raise it in another sheriffdom. Concern was expressed about Form 17A.1-H, suggesting that it would be improper for one court to convict a person and another court to sentence it. In his view this rule would only be appropriate where conviction followed a plea of guilty. It was also suggested that the references to adjourning in some of the forms should be more specific and refer to a specified time and date, to avoid certain cases falling into black holes.

4.4. It was agreed that the Private Office would discuss this further with Crown Office and other interested parties and a revised Act of Adjournal would be put to the Rules Council in draft for consideration at the next meeting.

- *Action: Private Office to convene a wider group to consider draft further*

(b) Draft Act of Adjournal (Criminal Procedure Rule Amendment No.) 2009

4.5. The Council had no comments to make about this instrument.

Item 5: Procedures for lodging and service of Bills of Suspension and Advocation and petitions to the *nobile officium*

5. The Council considered the paper that had been circulated, together with the draft practice note and draft rules. It was explained that this item resulted from a submission by Crown Office considered by the Rules Council at its last meeting. The Lord Justice General asked members whether this would be better dealt with by rule or Practice Note. Members agreed with the view that a practice note was relevant to explaining how a rule operated if such explanation was required but should not be used to create new rules. It was agreed that this matter should be dealt with by way of a rule of court. It was not thought that both a practice note and a rule were required.

- *Action: The Council agreed that this should be dealt with by way of an Act of Adjournal.*

Item 6: Work in progress

6.1. *Item 6(a) (Contempt of Court)*

Sheriff Morrison explained that the Contempt of Court group had hoped to have rules ready for this meeting of the Council, however, due to various circumstances it had not been possible to keep to this timetable. It was explained that the group was charged with looking at personal contempts, in other words, contempts directed personally at the judge. The group was considering some difficult issues, including whether the accused had a right to cross-examine the judge who had made the complaint. It was thought that an investigative procedure might require to be adopted rather than the usual adversarial procedure. However, there was some concern that using a more investigative procedure would not be compliant with the traditions in Scots law and may not be compliant with human rights in general.

The Lord Justice General asked when the group might be able to provide draft rules for the Council's consideration. Sheriff Morrison thought that this could be achieved by the end of the year. However, much would depend on the approach of the new chair.

6.2. *Item 6(b) (Proceeds of Crime Act 2002)*

The Council was advised that Lady Dorrian had been asked by the Lord Justice Clerk to consider improvements to the procedure followed in confiscation proceedings under the Proceeds of Crime Act 2002. Lady Dorrian had convened a group to look into this and prepared a report making various recommendations. Draft Rules were prepared in the Private Office in line with those recommendations, along with a draft practice note. These were forwarded to Lady Dorrian for comment. Mr. Fleming advised that Lady Dorrian had reconvened the group to consider the draft rules and was expected to report to the Private Office shortly. The Lord Justice General agreed that this would be considered further at the next meeting and that Lady Dorrian might be invited to attend the meeting.

6.3. *Item 6(c) (Written submissions on appeals against conviction)*

The Lord Justice General explained that these draft Rules arose out of instructions by the Lord Justice Clerk. The Lord Justice Clerk was unfortunately not available to expand on his proposal. The Lord Justice General explained that there was a wider consideration of criminal appeals ongoing, as discussed in the accompanying paper and that the draft Rules needed to be considered in that context. As mentioned in the paper which was provided to members at the meeting, the Lord Justice Clerk intends to consult with the legal profession. It was hoped that the Lord Justice Clerk would be able to attend the next meeting to discuss the draft rules further with the Council.

6.4. *Item 6(d) (Regulation and Investigatory Powers Act 2000)*

It was explained that this matter had been raised by the Crown Office at a previous meeting of the Rules Council. A meeting had taken place between Crown Office and the Private Office and rules were currently being considered.

Item 7: Submission from Crown Office

7. Mr. Logue explained that the Crown Office submission had not been available in time for the Council to consider it at this meeting and it would be submitted for the next meeting. In the meantime, Crown Office and the Private Office would consider the submission and take forward any matters that could be dealt with other than by the Council.

Item 8: Any other competent business

8.1. The issue of remote evidence being taken by CCTV was raised by Sheriff Crowe. There were concerns that there was no fish-eye lens shot on some of the cameras used. If the sheriff was not happy with the situation and was not able to be satisfied that the witness was not being prompted or otherwise interfered with, he or she may refuse to take evidence that way. The current cameras only show the head of the witness and so it was not possible to see, for example, whether a child witness was uncomfortable, or needed a break, which may be obvious if an overview camera was available.

8.2. Ms. Prentice confirmed that when there was an overview camera, this was only made available to the presiding judge. The Lord Justice General asked whether the overview camera should be available to juries and agents etc., as well. Ms. Prentice advised that there were only six dedicated sites that had an overview camera and it had been agreed that the High Court would only use those six dedicated sites outwith courthouses now, but there quite a few other sites in different locations where there was no overview camera. Those other sites were used by other institutions for example, universities. SCS had asked if overview cameras could be used, but there appears to be some sort of contractual issue which meant that this was not possible at this stage.

8.3. The Lord Justice General asked whether SCS thought as a matter of policy that overview cameras should be available for all courts. Mr. Shand advised that it was indeed SCS's view that there should be an overview for all sites. The Lord Justice General was of the view that there should be some clarity as to the appropriate protocol to be used but that it might not be possible to secure the ideal situation for all the courts. It was agreed that the Private Office should liaise with SCS to identify the terms of the arrangements that should apply and if the actual arrangements applied were less than satisfactory then changes could be pressed for.

8.4. Sheriff Morrison raised an issue regarding the IT system and its ability to comply with the requirements of Practice Note No.1 of 2008 regarding the recording of discounted sentences. Mr. Shand advised that an upgrade was taking place in December but also that a temporary fix had been found which would involve manual input into the computer system.

8.5. The Lord Justice General indicated that he was minded to change the way the Rules Council operated in the future. In light of the fact there are new members and fresh enthusiasm, it would be useful if members could get involved in the work of the Council in a more active way. Members could get involved in the intermediate stages of work on matters that were to come before the Council. The Council tended to rubber-stamp things that were done elsewhere and it would be appropriate for members to get more involved in formulating policy. The frequency of meeting could also be increased. The Lord Justice General's thoughts on this matter were informed by his experience of the work of the Judicial Council for Scotland, which delegates work to sub-committees and which has an Executive Committee charged with evolving the agenda for future meetings. There appeared to be general support for this change in direction. In the light of this, the Lord Justice General suggested that the next meeting should take place in February 2009. Accordingly, the next meeting was fixed for Monday 23 February at 10.30am.

8.6. There was no other business.

- *Action: The next meeting of the Council is at Parliament House on 23 February at 10.30am*