

**MINUTES OF MEETING OF THE CRIMINAL COURTS RULES COUNCIL**

**PARLIAMENT HOUSE, MONDAY 13 FEBRUARY 2012**

**Present:** Lord Justice General (Hamilton)  
Lord Bracadale  
Lord Hardie (*for Lord Carloway for item 6*)  
Sheriff John Baird  
Sheriff Frank Crowe  
Sheriff William Gilchrist  
Frances McMenamin QC  
Robert Burnett, Solicitor  
Iain Fleming, Solicitor  
Joe Moyes, Deputy Principal Clerk of Justiciary (*in place of the Principal Clerk*)  
David Shand, Sheriff Clerk  
Keith Stirling JP  
Jennifer Harrower, Procurator Fiscal  
Jim Andrews, Victim Support Scotland  
Don McGillivray, Scottish Government  
Caroline Beattie, Scottish Government (*for item 4*)  
Zoe Mochrie, Scottish Government (*for item 4*)

**Secretariat:** Kathryn MacGregor, Legal Secretary to the Lord President  
Christopher Nicholson, Deputy Legal Secretary to the Lord President

**Apologies:** Lord Justice Clerk (Gill)  
Jamie Gilchrist QC  
Michelle Macleod, Crown Office  
James Chalmers, University of Edinburgh

**Item 1: welcome, apologies and introductions**

1. The Lord Justice General welcomed members and noted apologies. The Lord Justice General introduced Ms Caroline Beattie and Ms Zoe Mochrie from the Scottish Government who were in attendance in relation to the Scottish Government's update, item 4 on the agenda and in due course welcomed Lord Hardie who was here to introduce item 6 on the agenda in place of Lord Carloway.

**Item 4: Scottish Government Update**

2. The Lord Justice General proposed to deal with item 4 on the agenda first in order to allow Ms Beattie and Ms Mochrie to leave thereafter. The Lord Justice General explained that it was the Scottish Government's intention to add the Rules Councils (civil and criminal) to the list of Scottish Public Authorities to whom the Freedom of Information (Scotland) Act 2002 applied. The matter had first come to the attention of the Private Office shortly before Christmas when it was intimated that the changes were due to be made very soon. The Lord Justice General had written to the Cabinet Secretary for Parliamentary Business and Government Strategy requesting further time to consider the matter and this had been acceded to.

3. The Lord Justice General informed members of the discussions that had taken place on an official level in the intervening period. As a result of the Scottish Government's proposal for a Scottish Civil Justice Council, which would replace the civil rules councils, their addition to the FOI regime was on hold. However, the addition of the Criminal Courts Rules Council was still planned and there remained a real concern in the Private Office about the extent to which the exemptions to freedom of information requests provided for in the 2002 Act would apply to the work of the Rules Council; this was in contrast to those bodies which fell squarely within the Scottish Administration. The Council was informed what those exemptions were.

4. In response Ms Beattie referred to a number of other exemptions that may apply if need be. Ms Mochrie apologised for the lack of consultation and informed members that the date at which the Council was to be added was flexible.

5. The Lord Justice General was of the view that more time was required for members to form a mature view on the matter. The Lord Justice General proposed that the Council respond to the Scottish Government after its next meeting in May. This was acceptable to Ms Mochrie. He also said that he would consider responding

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to the Scottish Government's consultation regarding its Freedom of Information (Amendment) Bill meantime. The Lord Justice General thanked Ms Beattie and Ms Mochrie for coming.

6. Mr McGillivray then updated the Council in relation to the other aspects of the Scottish Government's ongoing work that was of interest to the Council.

7. The Criminal Cases (Punishment and Review) (Scotland) Bill had been introduced in the Scottish Parliament and was at Stage 1. The Bill would legislate in relation to the operation of the Scottish Criminal Cases Review Commission, in particular the disclosure of information held by the Commission, and the issues raised in the case of *Petch & Foye –v- HMA (2011) HCJAC 20*.

8. The Scottish Government were considering their response to the Carloway Review and Sheriff Principal Bowen's Review of Sheriff and Jury Procedure; legislation was being planned in relation to the latter.

**Item 2: minutes and matters arising**

9. The minutes of the meeting of 17 October 2011 were approved, subject to the substitution of "in early course" for "2012/13" in paragraphs 6 and 11.

10. In terms of matters arising the Lord Justice General asked the new DPCJ to look into the practicalities of granting bail to a person detained in relation to an alleged contempt of court as mentioned in paragraph 10 of the minutes. The DPCJ agreed to do so.

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

11. Since the last meeting two Acts of Adjournal had been made, namely, Act of Adjournal (Criminal Procedure Rules Amendment No. 7) (Double Jeopardy

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(Scotland) Act 2011) 2011 (SSI 2011/387) and Act of Adjournal (Criminal Procedure (Scotland) Act 1995 (Refixing diets) 2011 (SSI 2011/430). The Council had no comments on the instruments.

**Item 5: Draft Act of Adjournal (Criminal Procedure Rules Amendment) (Miscellaneous) 2011**

12. The Council considered a draft of an Act of Adjournal prepared by the Private Office containing the rule changes proposed by Sheriff Crowe at the last meeting of the Council, namely, the introduction of a procedural hearing in extradition proceedings and the provision of a judge's or sheriff's report when an appeal is taken against the granting of an extension of time under section 65 or 147 of the Act of 1995.

13. Sheriff Crowe discussed the value of being able to have a procedural hearing in extradition proceedings, in particular, the requirement for the person being extradited to state in writing their opposition to the extradition prior to that hearing. Sheriff Crowe had initially queried whether the draft was too elaborate and more suited to High Court proceedings but after hearing the comments of a senior sheriff was satisfied with its terms. Mr Burnett noted that it was important that there was sanction in terms of legal aid to undertake the work required. Sheriff Baird suggested that the subparagraph defining the "relevant person" was not required; it was agreed that this would be looked at.

14. Sheriff Crowe was of the view that the draft provisions in relation to the provision of a judge's or sheriff's report were a neat solution to the problem. The Lord Justice General agreed although he noted that in terms of primary legislation there was not an express requirement to provide such a report but that this could usefully be addressed by the Scottish Government in the future. The Council agreed the Act of Adjournal should be made.

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**Item 6: Draft Act of Adjournal (Criminal Procedure (Scotland) Act 1995) (Amendment) (Transcripts) 2011**

15. The Council considered a draft Act of Adjournal prepared by the Private Office which sought to amend the Act of 1995 in relation to the transcription of evidence. Lord Hardie, in place of Lord Carloway, spoke to the draft and a paper outlining the need for the change.

16. It had become clear that there was an inconsistent approach amongst the judiciary as to when transcription of evidence should be ordered. Originally Lord Carloway, along with Lords Bonyon and Hardie, had proposed to deal with the issue by way of a Practice Note. However, it had been agreed that a rule change was required. The draft Act of Adjournal would substitute “on cause shown” for a test related to the grounds of appeal for which leave to appeal had been granted. Lord Hardie informed members that this was not an attempt to stop the transcription of evidence but rather to ensure that it is only ordered when required; it was costly and inefficient to do otherwise.

17. Ms McMenemy asked whether the Appeals User Group had been consulted and Lord Hardie said that they had. The Lord Justice General suggested that proposed new section 94 (2AA) (c) become part of existing section 94 (2A). It was agreed that this was a neater approach. Lord Hardie confirmed that the conditions at new section 94(2AA) were intended to be conjunctive. Sheriff Baird suggested that an alternative wording be used which would not indicate a failure in the judge’s report. It was agreed that the wording would be looked at before the draft is passed to Scottish Parliamentary Counsel for approval.

**Item 10: any other competent business**

18. None; the next meeting is on Monday 28 May 2012 at 10.30 am.