

## MINUTES OF MEETING OF THE CRIMINAL COURTS RULES COUNCIL

PARLIAMENT HOUSE, MONDAY 29 JUNE 2009

**Present:** Lord Justice General (Chair)  
Lord Justice Clerk  
Lord Matthews  
Sheriff Nigel Morrison, Q.C.  
James Chalmers, Edinburgh University  
Ian Fleming, Solicitor  
Jamie Gilchrist, Q.C.  
James Keegan, Solicitor  
John Logue, Crown Office  
Frances McMenamin, Q.C.  
Roma Menlowe, Scottish Government  
Gillian Prentice, DPCJ  
Professor Fiona Raitt, University of Dundee  
David Shand, Scottish Court Service

**In attendance:** Michael Anderson, Legal Secretary to the Lord President  
Carolyn Breeds, Deputy Legal Secretary to the Lord President

**Apologies:** Sheriff Frank Crowe  
David Kemp, Sheriffdom Legal Adviser  
Graeme Marwick, PCJ  
Morag McLaughlin, Procurator Fiscal Service  
Sheriff Fiona Reith, Q.C.

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

1. The Lord Justice General welcomed members and noted apologies tendered on behalf of absent members.

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

2. The minutes of the meeting of 23 February 2009 were approved. In relation to item 4 of those minutes (contempt of court), the Lord Justice General noted that the Act of Adjournal introducing rules for contempt of court would come into force on 5 August 2009. In relation to item 5 (written submissions in appeals against conviction), the Lord Justice Clerk confirmed that the new legal aid regulations had not yet been drafted and the rules could not come into force until they were in place. His understanding was that the Scottish Legal Aid Board was content with the detail of the new rules. Mr. Logue advised that, regarding the issue of timing of the Crown giving an indication of its position, Crown Office would be in a position to provide its views on this within two to three weeks. The Deputy Principal Clerk of Justiciary reiterated Justiciary Office concerns regarding the timing of lodging of submissions.

**Item 3: Update on Acts of Adjournal made since last meeting**

3. Ms. Breeds advised that there had been four Acts of Adjournal made since the meeting on 23 February concerning: contempt of court; confiscation proceedings under the Proceeds of Crime Act 2002; transfer of proceedings; and amendment of the Criminal Procedure (Scotland) Act 1995 in relation to appeals by stated case. The Council had seen these instruments in draft at the last meeting and had made various comments which had been taken into account. In particular, it was decided that the confiscation rules would apply only to the High Court. If it subsequently appeared that similar procedure would be useful in the sheriff courts, the matter could be revisited.

**Item 4: Lists of Jurors**

4.1. Ms. Menlowe presented the paper prepared by the Scottish Government on the question of the minimum number of jurors to be cited for a trial diet (“the list of jurors”) and the minimum number of jurors before the court could properly proceed to ballot the jury (“available pool”). At present, the Criminal Procedure Rules specified a minimum of 30 for the list of jurors. In practice, 60 persons were ordinarily cited. There was no statutory minimum number for the available pool. In *Brown v. HMA* the Appeal Court had ruled that empanelling 15 jurors from a pool of 22 lacked the appearance of fairness and, accordingly, there had been a miscarriage of justice. In addition, the Appeal Court recommended a re-examination of the system by which jurors are excused and jury panels are put together.

4.2. Ms. Menlowe advised that the Scottish Government had been discussing the matter with the Scottish Court Service and COPFS. The Scottish Government proposed that the available pool be set at a minimum of 25. It was not thought that this was the only way to approach the problems which had arisen in *Brown* but it was one option. The precise number was a matter for the Rules Council to consider. Whilst primary legislation could specify the number (with provision being inserted into the Criminal Justice and Licensing (Scotland) Bill) it may be that it would be more appropriate – and more flexible – if the number were to be specified in the Criminal Procedure Rules.

4.3. The Lord Justice General asked in what circumstances the judge should have discretion to proceed even if the available pool fell below 25, as suggested in the Scottish Government’s paper. Ms. Menlowe advised that circumstances might include where there were excusals on the day in relation to a trial that everyone wished to see advance. In such circumstances, if all parties were content, it would be a pity if there were no flexibility in the rules. Ms. Menlowe confirmed that, although *Brown* made some mention of gender balance issues, it was not mentioned in the paper as the point had not been pursued elsewhere and consequently the Scottish Government did not see a compelling reason to pursue it.

4.4. Ms. Menlowe suggested that there were 3 questions for the Council to consider: (1) was 25 a reasonable figure for the minimum available pool; (2) should

provision be made in rules of court rather than primary legislation; and (3) should the minimum number for the list of jurors be increased from 30?

4.5. The Lord Justice Clerk was of the view that a minimum of 25 for the available pool was not enough and it should be set at 30. The paper did not provide any evidence as to why 25 would be enough, whereas 22 would not. He was of the view that it was extremely important for there to be robust control of excusals. He did not agree with the suggestion that the judge should have discretion to allow the ballot to proceed with 22 jurors and considered that there should be no flexibility to go below 30. He questioned whether, even if the accused was anxious to go ahead, a representative would be able to advise his or her client that the trial could be fair. He considered that the minimum number on the list of jurors should be increased. Other members expressed support for the Lord Justice Clerk's views and one member suggested that 30 might itself be too low. In addition, it was thought that the guidance should be amended to require that larger numbers of jurors should be cited in trials with multiple accused.

4.6. After discussion it was agreed that (a) it would be better if provision regarding the minimum available pool were to be made in the rules rather than in primary legislation; and (b) the minimum available pool should be set at 30 and the minimum list of jurors increased to 40.

- **Action: Act of Adjournal to be made providing that the minimum number of cited jurors from which a jury could be balloted should be 30 and amending rule 13.1 to provide for the list of jurors to be increased to 40.**

**Item 5: Update from RIPA 2000 working group**

5. Lord Matthews introduced his paper updating the Council on progress of the RIPA 2000 Working Group. In light of the novel nature of these hearings in Scotland, the group had sought information from Her Majesty's Court Service and Crown Prosecution Service to see how section 18 has been approached in England. Information had recently been received and the group intended to meet again to consider it and take matters forward.

- **The RIPA 2000 Working Group to report to next meeting of the Council.**

**Item 6: AOCB**

6.1. Ms. Menlowe presented a paper providing an update from the Scottish Government on the Criminal Justice and Licensing (Scotland) Bill.

6.2. Ms. Menlowe also mentioned that there was now fairly intensive planning across civil and criminal justice agencies in relation to swine flu. Consideration was currently being given in relation to any relaxations of criminal procedure provisions that might be necessary and what would be the best mechanisms to achieve this quickly. It may be that, with the Lord Justice General's agreement, a special meeting

of the Rules Council might need to be convened to consider provision that might be made by rules of court. The numbers of those affected by swine flu was continuing to rise and there was some urgency to putting into place measures to deal with a potentially serious outbreak. Ms. Menlowe confirmed that the Scottish Government would share with the Private Office in advance what provisions it had in mind.

6.3. The next meeting of the Council is on Monday 9 November at 10.30am in Parliament House.