ANNEX B CONSULTATION QUESTIONNAIRE

1. **Do you agree or disagree that new rules should be made in respect of reporting restrictions?** ***(Please tick as appropriate)***

Agree /☐ Disagree ☐ No Preference ☐

Comments It is necessary to have a set of rules :- (a) as guidance for Judges and Sheriffs and (b) because a significant number of Scottish Judges and Sheriffs deal with media cases with an anti free speech mindset. Such judges will happily agree to make any Order which will make proceedings over which they preside take place, in effect, in secret.

2. **Do you agree or disagree that the amendments in the draft rules be replicated in the existing rules for the sheriff court and for the criminal courts?**

Agree /☐ Disagree ☐ No Preference ☐

Comments It would seem sensible to consolidate the Rules for criminal and civil courts and for the higher and lower courts. There is already provision in place to deal with the making of Orders under the Contempt of Court Act 1981 S 4(2) by criminal courts – Act of Adjournal (Criminal Procedure Rules) 1996 SI 1996/513. As this Consultation appears to seek to draw all matters relating to Orders granted by Scottish Courts against the media "under one roof", it would seem a sensible approach that Chapter 56 of the Act of Adjournal 1996 be expanded to cover all such Orders being considered by the criminal courts – from whatever statute or part of common law they may emanate.

3. **Which would you consider preferable: a standalone set of rules applicable across the Court of Session and sheriff court, or separate rules for each?**

☐ It would be preferable to have a standalone set of rule applicable across the Court of Session and sheriff court

/☐ It would be preferable for the Court of Session and the sheriff court to each have separate rules.

☐ No Preference

Comments In light of the separate set of Rules already being in existence for the Court of Session and the Sheriff Court, it is surely sensible to incorporate the new Rules into the appropriate section of each set. They can be in the same terms. Should there not be reference to the High Court and the Sheriff Court sitting as a criminal court here also?

4. **Do you consider that any particular or special provision would require to be made in respect of these matters in different types of court proceedings? Please give details.**

☐ Agree /☐ Disagree ☐ No Preference

Comments

It is perfectly possible to draft Rules to cover all sorts of cases (involving potential Orders restricting media reporting of proceedings), no matter on what statute or section of common law the application for the Order is based.
In my experience in litigating these cases, the consideration on the side of the media is simply free speech (Art 10 of ECHR) while the competing considerations are (1) a fair trial (Art 6 of ECHR) or (2)privacy (Art 8 of ECHR). The underlying simplicity of the competing legal considerations points towards a simple set of Rules.

5. **Do you agree or disagree with the approach adopted in rule 102.1, i.e. that the rules apply to "orders which restrict the reporting of proceedings"? If you disagree, please give reasons for your answer.**

/☐ Agree ☐ Disagree ☐ No Preference

Comments I agree and don't see how else the Rule could be framed.

6. **Do you consider the 48 hour period for making representations to the court under rule 102.3 to be appropriate? Please give reasons.**

☐ Yes /☐ No ☐ No Preference

Comments

There is no reason why the hearing cannot take place prior to the re-commencement of proceedings the following morning. That has been the High Court practice since the Galbraith decision and it has worked well. The proposal for the media's lawyers to lodge a Note in process is potentially problematical. In my numerous appearances in cases under S 4(2) of the Contempt of Court Act 1981 in the High Court and Sheriff Court, it is often the case that the media's lawyers cannot find out the basis on which the Order has been applied for by a party/parties to the proceedings. In fact , fairly regularly in the Sheriff Court, clerks would refuse to tell me what had happened in Court when the Order was applied for. So in that situation the media's lawyers haven't the requisite knowledge on which to base the preparation of a Note. As an alternative approach, the Clerk could be obliged to minute the submissions in support of the Order (the judge would approve the Clerk's draft) and the resultant minute could be transmitted to all "registered" media organisations. This would enable the proposed Note in process to be framed.

Rule 102.3 as framed allows the Judge/Sheriff to deliberately frustrate the whole purpose of this draft Act of Sederunt by fixing the time of the hearing (at which the media are be allowed to make representations) either late in the proceedings, or even after the proceedings are ended. My experience suggests that some Judges/Sheriffs would misuse this provision.

I'm afraid that some judges seem to see their courts as their private fiefdom, to which the public should be admitted only when it suits the judge.

7. If you answered "no" to question 6, what alternative period do you consider would be appropriate?

Comments
The period should be " as soon as reasonable practical or at the latest at the start of proceedings the next day"

I note that proposed Rule 102 does not seem to address the question of what happens in the interim – i.e. the period after which the Order has been applied for in the proceedings. Can there be an interim Order put in place? - assuming the Judge/Sheriff is satisfied that prima facie the sought order is appropriate. This is what is happens under S4(2) of the Contempt of Court Act 1981 in criminal matters.
I would suggest that this matter has to be addressed. The present draft Rule 102 fails to deal with this important point.

8. Do you agree or disagree with the terms of rule 102.4 in respect of non-notification? Please give reasons for your answer.

☐ Agree /☐ Disagree ☐ No Preference

Comments

The fact that this question is asked is I'm afraid typical of the underlying attitude of the some judges in Scottish Courts – viz. that the media are to be singled out as litigants to whom the opportunity to be heard is not to be afforded. This provision, if misused by judges, could make nonsense of this entire scheme.

Surely in law the ECHR, as applied by the Strasbourg Court, makes it clear that court orders cannot be granted against people without them having the opportunity to be heard on the matter? That seems to me a simple and obvious rule which admits of no exceptions. Accordingly, draft Rule 102.4 is inappropriate.

9. Do you have any other comments on the proposals contained in this paper?

/☐ Yes ☐ No

Comments

The draft of 102 ends by saying that the decision of the Court is to be final. That is in breach of the undertaking given to the ECHR by the UK in the case of Channel Four TV v. UK DR of ECHR Vol 56/156.
After that case, provision was put in place in English law for an appeal hearing to be allowed in media order cases: S159 of Criminal Justice Act 1988.
Scots law remains in breach of that undertaking. The opportunity to make Scots law ECHR compliant should be taken.

Overall, can I say (with considerable regret), that my extensive experience in S4(2) cases leads me to the view that the proposed new Rules have to be structured so as to give Scottish judges the minimum of opportunity to try to circumvent the proposed provisions – which are designed to allow the media to make representations concerning Orders to be made against them - and so to comply with the Mackay & BBC Scotland ECHR judgement.

Can I end by pointing out that in the Mackay case – the basis for this proposed Rule change and consultation- the submission to the Strasbourg Court from Edinburgh stated that the Court had not been aware that BBC Scotland wished to address the Court on the making of a S4(2) Order. That statement was simply untrue. The Court was perfectly well aware of my wishing to address them. They had received from my office emails or faxes (I can't now recall which) advising of my intention to make submissions. The Clerk and I had spoken on the telephone about this happening.
The Court, however, deliberately prevented that happening.
This incident demonstrates why tight Rules, which will afford no more than basic common justice to the media by allowing them the right to be heard, are vitally necessary in the Scottish court system.