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# CONSULTATION QUESTIONNAIRE

## BBC Scotland response to SCJC Consultation on Reporting Restrictions

**Please note the altered order of numbering.**

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

We begin our response by answering this question because there are important issues of principle which affect the structure and content of the draft rules.

1. Common law rights of freedom of expression and rights conferred by article 10 are in no way inferior or subsidiary to the rights which give rise to applications for reporting restrictions of all kinds. Rights of freedom of expression are not absolute in that they will admit of derogation but only for the reasons and to the extent which the law will permit. From a procedural point of view there is no reason in principle why a person asserting those rights should be at a material disadvantage by comparison with any other party with an interest in the proceedings.

2. Section 12 of the Human Rights Act 1998 ("HRA") is engaged even if the press or media are not involved in proceedings in which an application for reporting restrictions is made and even if they choose not to intervene on being given notice of an application or an order.

   Section 12(4) applies where

   *"the proceedings relate to material…….which appears to the court, to be journalistic, literary or artistic materials…."* See also the effect of section 6 of HRA

which makes it unlawful for a court in Scotland to act in a way which is incompatible with convention rights.

3. In England the courts have **Practice Guidance (Interim Non-disclosure Orders) [2012] 1 WLR 1003 ("The Practice Guidance"** – http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/practice-guidance-civil-non-disclosure-orders-july2011.pdf) written by Lord Neuberger of Abbotsbury MR (as he then was) which apply to a whole range of reporting restrictions including orders of the type covered by the Scottish draft Rules. This states at paragraph 16:-

*"…orders which contain derogations from the principle of open justice cannot be granted by consent of the parties. Such orders affect the article 10 rights of the public at large. Parties cannot waive or give up the rights of the public."*

**4.** When the parties to the action support reporting restrictions the court should be particularly careful to ensure that article 10 rights are respected – **see In Re Guardian News and Media Ltd [2010] 2 AC 593 – Lord Rodger at para. 2.**

5. It is fundamentally wrong to proceed on the basis that reporting restriction orders can be made without close judicial scrutiny (applying the principles referred below) if the press/media choose not to intervene in a particular case. We would respectfully take issue with the final sentence of paragraph 26 of the Consultation document

*"If no representations are made then the court is free to make the order"*

unless it is read subject to the strict requirement that the court must still be satisfied on a close examination of the facts that an order is justified.

6. The Practice Guidance contains a valuable summary of the legal rules which govern derogations from the "fundamental principle" of open justice – see paragraphs 9 -15.

Although most of the cases cited are English the points taken from them are entirely consistent with Scottish authorities including **BBC Petrs.(No 3) 2002 JC the Lord**

**President at para. 12 and Galbraith v HMA 2001 SLT Lord Rodger again at para.9 and BBC Petitioners 2012 SLT 476.**

The main rules as summarised in the Practice Guidance are:-

- *Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice [para.10]*

- *The grant of derogations is not a question of discretion. It is a matter of obligation [para.11]*

- *There is no general exception to open justice where privacy or confidentiality is in issue [para.12]*

- *The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence [para. 13]*

- *When considering the imposition of any derogation from open justice the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in the public reporting of court proceedings [para. 14]*

7. To these we would add the following general points from the authorities:-

- Freedom of expression is an essential foundation of a democratic society – **see BBC Petitioners (No 3) 2002 JC 27 – The Lord President at paragraph 13.**

- Orders which anonymise proceedings (and which curtail reporting in other ways) undermine the ability of the media/press to function effectively by

engaging legitimate public interest – **see In Re Guardian News Media Ltd, Lord Rodger at paras. 63 to 65.**

**8.** Drawing from these statements of principle we respectfully make the following constructive criticisms of the draft rules.

i) Rule 102.2 Notification:-

- The rule should make it clear that the court has a duty to conduct a close scrutiny of the application (including the factual material offered in support) and to apply the relevant principles in all cases including those in which the application is not intimated to the press/media and in cases where no representative of the press/media intervenes.

- The court should issue practice notes similar to the Practice Guidance.

- The requirements of rule 102.2(3) should be beefed up. The note should specify the ground on which the order is sought, explain why the restriction is necessary and set out the source and content of the factual material founded on. The rule should make it clear that the applicant must draft this.

ii) Rule 102.3 Hearings:-

- The rules should make it clear that a hearing is always required and that the merits of the application must be considered even if the press/media are not notified in advance or do not intervene.

- It should be explicit that any party who makes representations has the right to attend and participate in the hearing.

- See our answer to question 6 below on the 48 hour time limit.

- The rules should require a judge who makes any order to give written reasons for granting an order. These will be required in order to inform a decision to seek a review of the order. They will be very important in cases where orders are made without prior notification.

iii) Rule 102.4 Non Notification:-

- Section 12(2) of HRA requires the court to be *"satisfied…….that there are compelling reasons why the respondent should not be notified…."* The rule repeats this mandatory requirement.

- The example given in para. 27 of the Consultation is, with respect, unhelpful. We would refer to paragraphs 14, 15, 21 and 22 of the Practice Guidance on this. Courts should be discouraged from making orders without notification simply because a party contends that notification might defeat the purpose of the order.

- Another ground which might be put forward as a reason to withhold notification is urgency. The court should be disinclined to see this as a compelling reason. The party seeking the order should be required to make the application timeously so as to accommodate the notification requirement as a matter of routine.

- A right to seek recall or variation is no substitute for prior notice of the application.

- The court should be required to identify the compelling reason for ordering non-notification because the requirement that the court be satisfied of its existence must be a justiciable issue.

iv) Rule 102.6 Variation or Revocation:-

- It is very important that the original application and the judge's reasons for making the order (and for dispensing with notification where this has occurred) are made available to persons who might wish to seek variation or revocation. Otherwise they will be at a serious disadvantage in making their application.

- The finality provision is objectionable on a number of grounds.

  First, it makes article 10 rights inferior to the rights which were invoked by the party who obtains the order. They have the right to appeal in the normal way if an order is refused or they can make a fresh application.

  Secondly, there is no reason in principle to impose such a draconian restriction on the conventional right to challenge substantive rulings through the appeal courts.

  Thirdly, it is objectionable in principle that the only opportunity to challenge the merits of a decision should be before the Judge or Sheriff who made the order. Justice (including the principle that justice must be seen to be done) requires that decisions at first instance are open to review by other judges. This is the only way of ensuring that judges at first instance are accountable for bad decisions.

  Fourthly, the rule as presently drafted creates an inequality of arms because a party seeking an order for reporting restrictions would be entitled to appeal against a refusal to grant it in whole or in part.

  Fifthly, the provision fails to accommodate changes of circumstances which not infrequently arise in cases like this where, for example, information enters the public domain after an order is granted.

Sixthly, as the rule is drafted, one unsuccessful challenge by one aggrieved person, however ineptly presented, would deprive every press/media interest and every member of the public of the right to challenge the order for ever.

Finally, the provision on finality appears to run contrary to the accepted provision of an appeal in England (see Section 159 of the Criminal Procedure Act 1988). Such a disparity between the position in Scotland and England cannot be justified simply on the basis (in a criminal context) of the existence of the nobile officium. That approach was specifically rejected in Mackay & BBC Scotland v UK (Application no 10734/05).

**Against that backdrop, we address the remaining questions**

**1. Do you agree or disagree that new rules should be made in respect of reporting restrictions?**

We agree.

In addition, and in order to supplement these rules, it would be extremely useful (for the Court, for the public and for those appearing or otherwise making submissions) if guidance were issued, in the form of a Practice Note, setting out the principles summarised in our answer to question 9, in particular to inform the consideration by Sheriffs and Judges of applications for reporting restrictions.

**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?**

We agree. The substantive law being applied is the same regardless of whether the matter arises in the Sheriff Court or the Court of Session. We see no obvious reason why the rules should be different.

We also note, however, that the current rules for seeking variation or recall of orders made under section 4(2) of the Contempt of Court Act 1981 in criminal cases (Chapter 56 of the Act of Adjournal) are defective for the same reasons as are the new draft civil rules, even although section 12 of the HRA does not apply to orders made in criminal proceedings.

**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?**

We prefer a standalone set of rules applicable across the Court of Session and Sheriff Court.

**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.**

We consider the most appropriate approach to be one derived from legal principle. Those principles are referred to in Answer 9.

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

We agree.

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

We have no difficulty with the 48 hour period in principle.

However, the proposed rule 102.3 is flawed for the reasons outlined in Answer 9.

We also note that the requirement placed upon the applicant for any order (in rule 102.2 (3)) is weaker and more vague than the provisions for representations to be made by those subsequently opposing any order granted.

Specifically, '*setting out the circumstances out of which the making of an order is being considered'* may well be simply the factual background of the type of case involved, the fact that an application has been made to protect the identity of a party involved, and little or no justification for that application.

The explanatory notes (para 25) suggest that *'The information received by the media at this point should be sufficient to allow them to make representations'* under reference to Rule 102.3.

Unfortunately, no such provision is explicit within the order. No guidance is given to the court as to what that information should include.

Our experience in practice opposing such orders is that those seeking the orders routinely offer as little information as possible. As presently drafted, our concern is that the order would simply reinforce that possibility and offer no fair notice to the media as to the rationale and legal basis upon which any argument is subsequently to proceed.

The effect of this proposal would be to risk reversing the accepted principle that those seeking the order must justify it. The rationale, both factual and legal, for the application must be made plain.

We further note, as a matter of practice, the potential advantage both to parties and to the court in requiring clarity and candour at the earliest possible stage. The reality of opposing such orders around the country is that in possession of the full facts and justification the media often does not find it necessary to challenge the orders sought. Equally, on other occasions a simple letter to the clerk outlining the objections can often resolve matters without the expense and delay of a full court hearing. Even in the event that a hearing is ultimately necessary, it is inevitably a more efficient use of court time if parties have been able to focus submissions on the mutually understood factual position.

More generally, we would encourage any Practice Note accompanying these rules to make plain that where at all possible, any likely application for a reporting restriction should be identified at an early stage, ideally pre-trial or before the substantive hearing at which the matters in relation to which the order is sought are to be heard. Not only does that assist the administration of justice in terms of keeping any disruption to trials, proofs and other substantive hearings to an absolute minimum, but additionally it fosters a culture of early consideration of such matters which is consistent with the move towards judicial management of proceedings and early disclosure.

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

We are content with 48 hours in principle, but only in circumstances where there has been sufficient opportunity for all those who have registered an interest to have been contacted.

We would propose an additional safeguard which would allow the Court, on cause shown, to extend that period.

The alternative is for the party opposing to rely upon section 102.6, but seeking recall after an order has been granted will inevitably be harder, add to delay and be more expensive. It would also somewhat defeat the purpose of these changes, which is to ensure no order is granted prior to satisfaction of the requirements of Section 12 of the HRA.

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

We disagree.

We refer to Answer 9.

We note that the drafting is in error – we assume 102.4 (2) is meant to refer to rules 102.2 and 102.3.

We would note that a much higher test to justify non-disclosure is applied in England (see below) to ensure that the mere risk of an order being so defeated is an insufficient basis to justify non-notification.

We draw the Council's attention to paragraphs 21 & 22 of the Guidance Note which emphasise

i) the need for evidence, which is absent from the proposed draft order, and also

ii) the higher 'truly exceptional circumstances' test

When set in that context, the example given in paragraph 27 is far from exceptional. It is a normal and regular application proceeding on a standard argument made in such cases.

It is accordingly an example which apparently would succeed in ensuring non-disclosure in Scotland but which would almost certainly require disclosure in England. That outcome, proceeding on the same legislative basis and the same requirements under ECHR is difficult to explain.

Failure to adopt that higher standard will lead to parties seeking to have an order granted with the minimum publicity and scrutiny moving the court to dispense with notification in inappropriate cases. As currently drafted, there is in our view the real risk that the order allows such an applicant to achieve through rule 102.4 (on a lower test) what would otherwise be defeated on a fair analysis of the merits at a hearing under rule 102.3 which would proceed on the basis of written and oral submissions and a proper analysis of the respective rights of the parties.

The final justification (in paragraph 28) is that Scotland does not, in any event, have the same number of privacy cases. We would respectfully submit that such a consideration is of limited relevance in a context of establishing the correct rules.

Further, and in any event, whilst the number of privacy cases and 'superinjunction' applications is indeed limited, rule 102.4 is specifically intended to apply to all orders restricting reporting. That deliberately covers a very wide range of cases. It is also anticipated in the consultation document that these rules will ultimately apply to criminal matters.

Getting the right regime in place with the right test is therefore of the utmost importance. The ramifications go far beyond 'pure' privacy actions.