

ORGANISATION: Crown Office and Procurator Fiscal Service

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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

COPFS agrees that new rules formalising the process for the consideration and intimation of anonymisation orders are required particularly in light of the MacKay judgment which highlighted the existing ad hoc procedures which rely heavily on informal contact between the media and court officials and the requirement to provide an opportunity for affected parties, most commonly the media, to make representations in advance of an order being made. Such rules will streamline the process and provide clarity to parties.

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

Whilst, as stated above, it is agreed that new rules formalising the process for the consideration and intimation of anonymisation orders are required for the Court of Session and indeed for all instances where the court is considering making such an order including criminal proceedings, COPFS believes the unique nature of criminal proceedings, the application of Article 6 of the ECHR, the need for justice to be done and to be seen to be done, and the potential impact on victims and witnesses if proceedings were to be delayed as a result of the new process, requires separate consideration to be given to the introduction of such rules and processes within the criminal courts.

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

See question 2 above

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

See question 2 above

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

COPFS believes that as this is a question of drafting style it would not be appropriate for COPFS to comment other than to say that the broad approach taken by not listing the specific orders covered will provide some comfort that existing orders will not be missed and that future provisions will not require amendment to the rules.

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

Whilst 48 hours is logical in terms of the likely lifespan of a news story, COPFS believes the delay incurred whilst the media decide whether or not to make such representations could adversely impact on the criminal proceedings and in particular the victims and witnesses involved in the proceedings.

COPFS is also concerned regarding what happens during that 48 hour period. There does not appear to be provision for an order to be made ad interim covering that 48 hour period and therefore publication of the proceedings during that timeframe could presumably occur without restriction. This could cause significant difficulties with criminal cases, for instance a trial could be deserted as a result of a witness disclosing the criminal history of an accused in the course of their evidence. If reporting of that was to take place during the 48 hour period prior to an order being made then this could prejudice any fresh prosecution of the case.

COPFS would welcome a provision for an interim order to be made in the interests of justice covering the 48 hour period.

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

Comments

See comments at q.6 above

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

COPFS notes that there appears to be an error within paragraph 2 of rule 102.4 where it specifies that the Court may dispense with rule 104.2 and 104.3 rather than 102.2. and 102.3. Aside from that, COPFS considers this to be a sensible provision which is necessary to cover situations whereby advance intimation to the media would defeat the purpose of the protection being sought. The comments of the court in *BBC, Applicants 2013 SLT 749* are worthy of note in this regard:

[40] The question then is at what stage that opportunity should be given. Ideally, the media should be heard before the court decides whether or not to grant the s.11 order. But circumstances may necessitate that that decision should be made before notification of the s.11 application to the media. The urgency of the case may be such that to continue the hearing on the petition so that the media could be notified of it would frustrate the purpose of the petition. Urgency might also constitute a “compelling reason” under s.12(2)(b) of the 1998 Act. I am not persuaded that the media must in every case have the opportunity to be heard before any order can be granted. In my view, an early opportunity to apply for recall of the order would in many cases adequately secure the rights and interests of the media.

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

Yes

No

Comments

COPFS believes that in order to control the dissemination of potentially sensitive information, consideration should be given as to who “qualifies” for inclusion on the list held by the Lord President i.e. list of persons to whom intimation of an order will be given. COPFS questions whether demonstration of qualification / accreditation as a journalist is to be a pre-requisite?

It is further noted by COPFS that the whilst Rule 102.2 provides that the clerk of court shall immediately arrange for a copy of the draft order to be disseminated, there is no clarity provided in terms of who has responsibility for drafting the order i.e. would it be the responsibility of the parties or the court? COPFS believes that if the burden of drafting the order fell to the interested party then this could become cumbersome and resource intensive with the unintended consequence of further disrupting and delaying court proceedings.