THE LAW SOCIETY of SCOTLAND
www.lawscot.org.uk

X

Consultation Response

SCJC consultation on reporting restrictions

The Law Society of Scotland's response

October 2013

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Civil Justice committee ('the committee'). The committee is comprised of senior and specialist lawyers who practice in the Civil Courts.

General Comments

In responding to this consultation the Society recognises that a balance needs to be struck between the competing interests of free speech (Art 10 of ECHR) and the competing considerations of the need for there to be a fair trial (Art 6 of ECHR) and the right of an individual to protect their privacy (Art 8 of ECHR).

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

The Society agrees that there should be rules in respect of reporting restrictions.
Rules are needed to provide guidance for Judges and Sheriffs to ensure that a consistent approach is taken in relation to media cases and that free speech is preserved.

Question 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?

The Society agrees that the amendments in the draft rules should be replicated in the existing rules for the Sheriff Court and for the Criminal Courts.

The Society is aware that 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.

This proposal appears to be to consolidate all matters relating to Orders granted by Scottish Courts against the media into a single set of rules. It may be appropriate for Chapter 56 of the Act of Adjournal 1996 to be expanded to cover all such Orders being considered by the criminal courts, from whatever statute or part of common law they may emanate.

Question 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 for the Court of Session and the Sheriff Court to each have separate rules.

Currently there are separate sets of Rules for the Court of Session and the Sheriff Court. The Society agrees that new rules, in the same terms, should be incorporated into each set of existing rules.

Question 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?

The Society does not agree that any particular or special provision would require to be made in different types of court proceedings.

The Society suggests that it would be possible to draft rules to cover all sorts of cases (involving potential Orders restricting media reporting of proceedings) regardless of whether the Order is sought under statute or the common law.

Question 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.

The Society agrees with the approach adopted in rules 102.1 and considers that the rules should apply to "orders which restrict the reporting of proceedings".

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

The Society does not agree that the 48 hour period for making representations to the court under rule 102.3 is appropriate.

The Society considers that there is no reason why the hearing cannot take place prior to the re-commencement of proceedings where such proceedings have been halted to allow the challenge to the Order to be made. Provision should be made in new Rules to enable the speedy cessation of ongoing trials to allow challenges to the making of any restrictive Order in respect of media reporting. Such challenges would be of necessity be both ex parte and in camera.

This appears to be the High Court practice since the Galbraith decision (Galbraith v. H.M. Advocate 2001 S.L.T. 465) and it has worked well.

The proposal for the media's lawyers to lodge a Note in process has inherent difficulties standing the current court practices where these situations arise.

Solicitors who appear in cases under S 4(2) of the Contempt of Court Act 1981 in the High Court and Sheriff Court, on behalf of the media, often have difficulty in ascertaining the basis on which the Order has been sought. The media's lawyers are in practice often unable to obtain the relevant information on which to prepare a Note.

This practical difficulty could be overcome if Rules required that the Clerk minuted the submissions in support of the Order. The minute could then be made available to appropriate media organisations. This would enable a more specific Note in to be constructed.

A possible dysfunction of Rule 102.3 as framed could allow the Judge/Sheriff to frustrate the 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.

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

The Society suggests that the period should be "as soon as reasonable practical but at the latest at the start of proceedings the next day".

The Society is concerned that the proposed Rule 102 does not seem to address the question of what happens in the period after the Order has been applied for in the proceedings. Consideration should perhaps be given to putting an interim Order in place.

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

The Society disagrees with the terms of rule 102.4 in respect of non-notification.

The Society suggests that ECHR principles make it clear that court orders cannot be granted against parties without such parties having the opportunity to be heard on the matter.

The Society is aware that in England there is a Practice Direction (16B) recently issued by The Lord Chief Justice to which it is submitted that the SCJC should have regard.

http://www.justice.gov.uk/courts/procedure-rules/criminal

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

The Society is concerned that Rule 102 states that the decision of the Court is to be final.

This is disconform to the undertaking given by the UK Government to the ECHR in the case of *Channel Four TV v. UK DR of ECHR Vol 56/156.*

In consequence of that decision, provision was made in English law for an appeal hearing to be allowed in media order cases: S159 of Criminal Justice Act 1988.

For further information and alternative formats, please contact:

Fiona J Robb

DD: 0131 226 8883

E: fjrobb@lawscot.org.uk

The Law Society of Scotland
26 Drumsheugh Gardens
Edinburgh
EH3 7YR
www.lawscot.org.uk