SCJC Consultation on Reporting Restrictions

BBC Consultation Response – Addendum

1. The BBC are grateful for the opportunity to make a short additional submission in light of two cases which have come to the attention of the BBC since the closure of the consultation period.

2. As paragraph 3 of the Consultation document makes plain, the intention is to apply the new rules to all reporting restrictions. We agree. The importance of that breadth (in further support of the proposition at question 5 of the consultation document) is underlined by the examples we wish to highlight. They serve as examples of where Courts in Scotland are currently excluding citizens and the media from access to public courts.

3. Two recent cases illustrate the growing concern.

   i) On 20th November 2013, in the case of HMA v MacKay, an order clearing the court was made by Sheriff Corke. The case involved the prosecution of a Police Officer charged with perverting the course of justice. The allegations were of providing the Procurator Fiscal with inaccurate information in order to obtain a search warrant under the Misuse of Drugs Act 1971. It is understood that the Police Officer in question was further accused of repeating the false allegations under oath. The motion to clear the media and public from the Court was made by the Crown. The basis of the motion is understood to be that some of the evidence was said to deal with police intelligence and the way that information was obtained. The Crown adopted the position that such evidence should not be made public. No specific power or legislation appears to have been relied upon by the Fiscal making the motion, no submission was made by the defence and the motion was thereafter simply granted. No prior intimation to the media such that the article 10 considerations of the media and the public might be

addressed was made. No such input from the media was sought by the Court.

The example is a stark deviation from open justice. That the subject matter involved a Police Officer and the administration of justice makes the public interest considerations of the highest order. It is an illustration of the exercise by the Court of a power which, it is respectfully submitted, ought to have required challenge and justification given the erosion of Article 10 rights which it involves. The position of the Crown must have been known well in advance of the motion. There was no urgency requiring that prior notification be dispensed with. The Crown simply chose not to intimate the motion to close the court. The mechanism which exists under section 4(2) such that the media can be alerted to any reporting restriction was not engaged precisely because the motion was not made under reference to that statute. Accordingly, only a procedure which requires **any** reporting restriction to be notified can provide adequate protection.

ii) The immediate question posed by Application of BBC Scotland re: A v Secretary of State for the Home Department [2012] CSIH 43) related to the granting of Section 11 orders. Such orders, however, can only be granted where an antecedent order has been sought which has previously withheld the name or other matter forming the substance of the Section 11 order.

We wish, therefore, to bring to the attention of the Council another situation which is being encountered with increasing frequency; the reliance for the making of such permanent orders on antecedent orders which themselves have been made without any representations being made by the media and the effect of which is to exclude the public and media from criminal trials.

In the case of HMA v Duncan & Hilson, two Police Officers were charged in connection with allegations of selling heroin whilst on duty, and later arresting those to whom the drug had been sold.

The case had been subject to significant media coverage prior to trial, including the charges and the identity of the accused. Again involving Police Officers, the public interest aspect is obvious.

On 19th December 2013, Sheriff Bicket made a Section 11 Order in the following terms

"The crown made a motion in respect of the Contempt of Court Act 1981 S11, for the identity of the witnesses or the locus of the incident which was to be kept private from hereon."

The competence of that order was initially challenged by the BBC informally through the clerk of court. The immediate basis for that challenge was the apparent incompetence of any such section 11 order where the name or other matter which was the subject of the section 11 order had not (as the statute requires) been previously withheld.

The response from the Court was that the order was competent precisely because it had been *'a closed court for the duration of the trial'*. The public had been excluded. Accordingly, the Sheriff took the view the relevant details had been withheld and the section 11 was competent.

The media (unlike the public) were allowed to attend for at least part of the trial, however only under the restriction of a section 4(2) order. The order was made by Sheriff Small on 8th February 2013. It postponed reporting of the trial by the media until its conclusion.

That section 4(2) order was not intimated to the media until 5th March 2013, a full month later.

The reasons for that delay are not known.

We would note in passing that such a delay is a further reason why reliance purely on recall as a remedy for the media is insufficient. Plainly no order can be recalled if it is not intimated.

Once again, none of the applications made – whether the application for the Section 4(2) order, the motion to hear part of the trial in closed court, or the application for a section 11 order - were intimated to the media prior to being sought.

All were made by the Crown, and the fact that such orders were to be sought must plainly have been known to the Crown some time in advance.

On further investigation it is understood that the two witnesses named in the section 11 order were police informants. At least one of those [redacted] was apparently specifically identified in Court as being so, albeit that arrangement had come to a conclusion due to his unreliability.

It further appears that the identity of both witnesses had already been published.

The example illustrates the reality of court reporting and the apparent ease with which Article 10 rights are sidestepped in the absence of representations from media organisations. Not only was there no prior notification in circumstances which were far from urgent or exceptional, but the media have still been unable accurately to

understand the basis for such orders being made and cannot do so unless incurring the expense and delay of seeking recall on a wholly speculative basis.

In short, the very absence of openness and opportunity for the media to be heard is being used as a further hurdle to any attempt to recall or challenge the order. It is respectfully submitted that cannot be an acceptable practice.

Prior notification, with all of the protections of the Contempt of Court Act 1981 available to the Court, is essential in order to provide that balance.

Such erosion of the principle of open justice also has practical consequences. To be competent, the section 4(2) order would plainly require to have been made in relation to matters heard in open court. The publication of those details could only ever (under the terms of Section 4(2))) have been postponed. If so, the section 11 order is incompetent for the very reason that the name and other matter was not, as a matter of fact, withheld. The media, however, cannot know.

Further, the essential protection afforded under statute via section 4(1) of the 1981 Act is lost precisely because (at least some) matters were not raised in open court. Section 4(1) protection does not extend to closed courts. Its terms are clear **(emphasis added)**

"Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings ***held in public****, published contemporaneously and in good faith."*

Quite apart from the impact on open justice, that uncertainty cannot be in the public interest. It is precisely the reverse of the certainty the Contempt of Court Act 1981 was designed to deliver.

Further, in the Duncan & Hilson case, both Police Officers were ultimately acquitted. In the event that a claim was subsequently brought in defamation in

relation to the coverage, any defence would not benefit from the usual statutory protection offered by section 14(1) of the Defamation Act 1996 which is in the following terms **(emphasis added)**

"A fair and accurate report of **proceedings in public** before a court to which this section applies, if published contemporaneously with the proceedings, is absolutely privileged."

It is submitted, therefore, that the potential impact on contemporaneous court reporting and the communication to the public of what is happening in public courts is diminished by the absence of a procedure which allows representations to be made at the earliest stage representing the Article 10 rights of both the public and the media.

15th January 2014