ANNEX A RESPONDENT INFORMATION FORM

Please note this form **must** be returned with your response to ensure that we handle your response appropriately.

Name/Organisation

The Faculty of Advocates

Title *(Please tick as appropriate)*

1.

Mr ☐ Ms ☐ Mrs ☐ Miss ☐ Dr ☐

Other ☐ *Please state*:

Surname

Forename

2. Postal Address

The Faculty of Advocates Parliament House Edinburgh EH1 1RF **Postcode:**

Phone

0131 226 5071

Email

Permissions

I am responding as an:

Group/Organisation ☒ *(complete section (b))*

INDIVIDUALS

(a) If responding as an **individual**:

(i) Do you agree to your response being made available to the public (on the Scottish Civil Justice Council website)? *(Please tick as appropriate)*

Yes ☐ No ☐

(ii) If you are content for your response to be published, please tell us how you wish us to make your response available to the public:

Please tick ONE of the following boxes:

Make my response, name and address all available ☐

Make my response available, but not my name and address ☐

Make my response and name available, but not my address ☐

ORGANISATIONS

(b) If responding as a **group or organisation:**

(i) The name and address of your organisation will be made available to the public on the Scottish Civil Justice Council website. Are you content for your response to be made available?

Yes ☒

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

Comments

The Faculty of Advocates ("the Faculty") agrees. Article 10 of the European Convention on Human Rights is a fundamental right. It is therefore imperative that there are legislative or procedural safeguards in place which are sufficient to protect an individual's Article 10 rights. It is the opinion of the Faculty that the current rules have proved insufficient to safeguard the Article 10 rights of media organisations and the general public.

This is echoed in the recent judicial comments of Lord President Gill and Lord Menzies, who describe the present procedures as "inadequate": *Application of BBC Scotland re: A v Secretary of state for the Home Department* 2013 SLT 749. These comments follow on from the criticism of the European Court of Human Rights in *Mackay & BBC Scotland v United Kingdom* (2011) 53 EHRR 19 of the informal nature of the procedures in Scotland leading to obvious shortcomings in the protection of parties' rights under the Convention.

In these circumstances there is a clear need for revision to the current rules.

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

The Faculty agrees. There is no reason why the changes sought to be made in the Court of Session should not equally apply in the sheriff court and criminal courts and consistency of approach is desirable.

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

It is considered that the preferable option is the one which provides for the least disruption to the current rules and provides the best clarity. Whilst a single set of rules could no doubt be formed, the Faculty's opinion is that the preferable option is separate rules for each forum. This reflects the current position and will allow for clarity when incorporating the differences between the systems. The Faculty believes this response applies equally to criminal proceedings.

For the avoidance of doubt, it is the Faculty's opinion that the substance of any standalone rules should be the same, with only procedural differences being reflected in the rules.

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 not considered that any particular or special provisions would require to be made in respect of these matters in different types of court hearings. It is considered desirable that an amended Chapter 102 ("the new rules") should strike a good balance between the setting of clear procedures and retaining sufficient flexibility in order that the requirements of specific matters, or types of matters, can be accommodated.

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

The Faculty agrees. The Faculty considers that an important function of the new rules would be to act as a safeguard against breaches of s.12 of the Human Rights Act 1998. As recognised by Lord President Gill in *Application of BBC Scotland re: A v Secretary of state for the Home Department* 2013 SLT 749 at para. 39, s.12 of the Human Rights Act 1998 is wide in its terms. The broad approach taken in the draft Rule 102.1 reflects the broadness of s.12 and is therefore appropriate.

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

The Faculty considers that a period of 48 hours is appropriate. This period should be sufficient for an interested party to prepare and lodge representations whilst still being short enough to facilitate the matter being dealt with swiftly. Modern technology allows for quick contact with legal advisors should this be necessary and Rule of Court 1.3(7) minimises any inconvenience caused by the 48 hour period ending on a weekend. However the majority of media organisations are capable of responding to matters of this nature quickly. There are a number of members of Faculty with expertise in media related matters who would be in a position to make submissions in a far shorter time scale. The Faculty is mindful that the newsworthiness of stories can quickly be lost and therefore the hearing should take place as soon as possible. Consideration should be given to ensuring that a hearing takes place within 48 hours.

Whilst it can be envisaged that there may be circumstances which may prevent complete representations being made to the court within 48 hours the Faculty anticipates that the court would retain a discretion to allow any representations made to be supplemented or amended, whether in writing or orally at any hearing assigned. In the event of any attempt to supplement or amend representations then considerations of fair notice and potential consequences in expenses would apply in a similar way as they would do to amendment of pleadings.

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

Comments

N/A

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 (subject to below) ☐ Disagree ☐ No Preference

Comments

In the first instance, it is considered that the terms of rule 102.4 as currently proposed contain a typographical error. It appears that the rule erroneously refers to rules 104.2 and 104.3. These rules relate to the procedure where a declaration under s.6 of the Justice and Security Act 2013 is made. That provision concerns the removal of non-governmental parties from the court due to the nature of sensitive information being disclosed. It is considered that the rule should refer to rules 102.2 and 102.3.

The terms of the proposed rule 102.4 reflect s.12 (2)(b) of the Human Rights Act 1998. The Faculty does not have a concern that this rule introduces to Scotland what are referred to in England as "super-injunctions". The genesis of such a concern is not fully understood. Rule 102.2 and 102.3 as currently framed require a hearing before an order is made. Rule 102.4 appears to do nothing more than permit an order to be made without any interested party having the opportunity to make representations prior to the granting of the

order. This is not the equivalent of a "super-injunction" as there is no requirement for there to be a prohibition upon the disclosure of the existence of an order.

Rule 102.4 as currently framed does not dispense with Rule 102.5, which requires publication of the order on the Scottish Courts website, and therefore it is not considered that Rule 102.4 creates any concerns regarding "super-injunctions".

The effect of Rule 102.4 is to deny any interested party the opportunity to make representations prior to the granting of the order. The consequence of such, under the new rules, is that any party who has objections to the order would require to seek variation or recall under Rule 102.6. Any party doing so would carry the onus of persuading a court that it was appropriate to do so. It is assumed that this would be in contrast to the position (see answer 9 below) of a party who makes representations under Rule 102.2, it being envisaged that at that stage the party seeking the order retains the onus.

The Faculty is of the opinion that careful consideration should be given to where the onus should lie at each stage envisaged by the new rules. In particular, consideration should be given to whether a reversal of onus is an acceptable consequence of there being compelling reasons for non-notification under Rule 102.4. Whilst mindful that Lord President Gill, at para. 40 of *Application of BBC Scotland re: A v Secretary of state for the Home Department* 2013 SLT 749, stated, "*In my view, an early opportunity to apply for recall of the order would in many cases adequately secure the rights and interest of the media*", it is the Faculty's opinion that a reversal of onus is not a desirable consequence of compelling reasons for non-notification. The dicta of Lord President Gill perhaps run the risk of sitting uneasily with the criticisms made by the ECHR in Mackay.

The purpose of Rule 102.4 is to prevent circumstances in which either the delay in making an order, or the revealing to interested parties the existence of a motion seeking an order, would have an adverse or unfair effect upon the party seeking the order. It is considered that the purpose of the rule can be achieved without reversing the onus of proof.

The Faculty considers that there may be an alternative way of balancing the rights of all parties. In the event that a court is of the opinion that there are compelling reasons why an order should be made prior to notification then provision could be made in the new rules for an interim order to be granted. Whilst it may be the case that this would in any event be inherently within

the discretion of the court, it would seem preferable to have this reflected in a rule for the avoidance of doubt. The benefit of an interim order would be that representations could then be sought in a manner similar to Rule 102.2 and Rule 102.3 and a hearing assigned. If the order is an interim one, it allows for the onus to continue to remain with the party seeking the order, as opposed to falling upon any party seeking recall or variation.

This would be similar to the provisions relating to interim diligence under s.15 of the Debtors (Scotland) Act 1987. This Act allows for diligence to be granted on the dependence of an action *ex parte* but provides for a hearing to be assigned at which any interested parties can make representations. It is for the party who has previously been granted diligence on the dependence to satisfy the court that it should remain in place. Therefore the onus remains with the party seeking the order from the court.

It is considered that the granting of an interim order is preferable to the new rules as currently proposed. An interim order allows any opposing party to hear the submissions on behalf of others. This in turn allows for a more appropriate response. The alternative, as is currently envisaged in the new rules, is that the interested party is at an immediate, and in the Faculty's opinion avoidable, disadvantage.

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

☒ Yes ☐ No

Comments

a) Prematurity of consultation

The Faculty is aware that the case of *Application of BBC Scotland re: A v Secretary of state for the Home Department* 2013 SLT 749 has been appealed to the Supreme Court. That case is due to be heard in December 2013. The Faculty has a concern that any changes to the rules made at this stage could be premature. The law as set out in the consultation papers will potentially be reviewed by the Supreme Court and this could have an effect on the issues consulted upon. The Faculty would urge caution in any further steps being taken prior to the decision of the Supreme Court.

b) List of those being consulted

It is noted that Annex C of the consultation documents does not list any representatives of the media. Given that the media have been the catalyst for the majority of the jurisprudence in this area, and are directly affected by the rules, the Faculty considers it appropriate that media organisations should be consulted on the draft court rules.

c) Further comments on the new rules as currently proposed

General lack of clarity and detail

The Faculty is concerned that the new rules as currently proposed do not contain sufficient clarity or detail to fully address the protection of an individual's Article 10 rights.

For example, in Rule 102.2(1) the phrase, "*Paragraph (2) applies where the court is considering making an order*", is open to varying interpretations. In particular, what is meant by considering? Does this go further than a motion for an applicable order being made? Does the party seeking the order require to make submissions to the court on the merits of the order first? Is it the case that only when the court is of the view that on the submissions made there is a real prospect of the order being granted that rule 102.2(2) applies? These matters are important for practical purposes and may have a knock on effect upon the remainder of the proposed rules.

The Faculty is of the opinion that it is appropriate that submissions be heard prior to notification in order to avoid unnecessary notification, for example, where there is no prospect of an order being granted. However, this is only suitable where at any hearing under rule 102.3 the onus of persuading the court remains upon the party seeking the order (discussed in more detail below).

A further example is Rule 102.2(3). It is not clear what is meant by, "*a note setting out the circumstances out of which the making of an order is being considered*". There is no further guidance in the rules about what a note should contain. On a narrow interpretation "*setting out the circumstances*" could be no more than a stating that a motion was made on a certain date seeking a certain order. The Faculty is concerned that if that were to be the

case there would be a lack of fair notice. This would prevent a party properly considering whether representations should be made and if so, what the content of those representations should be. A potential consequence is unnecessary and unspecific representations being made by media organisation in an attempt to protect their position.

In addition, the proposed new rules do not make it clear whose responsibility it is to prepare the note required. The Faculty considers it preferable and most practical that the note would be prepared by the party seeking the order and issued by the clerk of the relevant court, if approved as suitable by the clerk for the purpose of the rule.

The Faculty considers it desirable for there to be guidance, whether within the rules or issued separately, that details what information should be contained in the note to persons on the list. It is noted that the position in England is clearly set out by Lord Neuberger: *Practice Guidance (Interim Non-disclosure Orders)* 2012 1 WLR 1003, and there appears to be no reason why a similar position could not be adopted in Scotland.

Undertakings

The Faculty considers it important that the requirement or otherwise of undertakings be fully considered. A potential consequence of advance notification is media organisations broadcasting matters that they would not otherwise have been aware of, prior to the granting of an order. This would appear to be an unwelcome consequence of an otherwise desirable system. The system in England recommends an irrevocable undertaking to be provided by the media organisations prior to any confidential or private information being communicated: paras 24-27 of Lord Neuberger's guidance. This would appear to be a sensible solution to the potential danger as it preserves the rights of all parties.

Onus

The Faculty believes that in the absence of express guidance there is a danger that the onus upon parties may be unjustifiably reversed. It is considered that it must be, prior to a permanent order being granted, for the party seeking an order to bear the onus of persuading the court. In the circumstances of a hearing under Rule 102.3 it is envisaged that a court will

have heard submissions upon the merits of the order prior to notification and out with the presence of any of the parties who would be subject to notification. Representations would have then been subsequently lodged by any interested party. It would be desirable for the rules to make clear that the onus is on the party seeking the order to persuade the court. Reference is made to paragraph 29 of Lord Neuberger's guidance which makes it clear that the onus is on the applicant in England.

These comments impact on the Faculty's response in Answer 8 regarding onus and interim orders.

Lack of a right of appeal

The Faculty is of the opinion that the new rules as proposed do not provide sufficient mechanisms for challenging any order granted or refused.

As drafted the new rules, in the event that an order restricting reporting is granted, set out the process for an aggrieved party at rule 102.6. An aggrieved party can seek variation or revocation of the order. 102.6(4) states that the hearing should be before the same person(s) who granted the order where possible. The decision under rule 102.6 is final.

It is the opinion of the Faculty that the lack of a right to appeal the grant or refusal of an order is a limitation upon an aggrieved party's rights. The effect is to place a restriction upon an aggrieved party's right to an independent appeal against decisions taken which affect their fundamental human rights.

The Faculty has a concern that without the safeguard of a right of appeal there may arise issues of fairness and potentially Article 6 compliance. It is the opinion of the Faculty that a right of appeal should exist separate to a party's ability to seek variation or revocation of an order, subject to what is said below.

This view emanates from the perceived shortcomings of Rule 102.6. The Faculty recognises that there is a need for finality and certainty in the making of such orders which will impact significantly on privacy rights of individuals and the right to freedom of expression. However the rule as

currently drafted appears flawed in so far as the only method of challenging the grant of an order is to seek to vary or revoke the order before the judge who granted it. There is no specification of the criteria which would apply to trigger such a review, such as a material change in circumstances. As presently drafted the rule seems to provide that if a person is "aggrieved" by the order (or in other words does not like the terms of the order) then he can apply to the same judge or judges for a variation or revocation of such order without any change in circumstances having arisen. Such applications would simply be re runs of the first hearing and would necessarily result in wasted time. They are also unlikely to be successful if all that can be said is that the judge who made the order was wrong to do so.

Further, the terms of Rule 102.6(1) provide that any person aggrieved by the order can apply for variation or revocation. Those persons need not be parties to the proceedings. On the other hand Rule 102.6(3)(b) provides that intimation of this variation or revocation hearing need only be made to the "parties to the proceedings". This might exclude parties who were present at the original hearing such as all those on the list of persons held by the Lord President.

The Faculty is of the view that the rule as presently drafted lacks clarity, may result in pointless and unsuccessful attempts to re run the hearing without any real change in circumstances and may exclude persons with a legitimate interest. In so far as the hearing in terms of the rule is to be considered part of the process as a whole, rather than an administrative step in the process, there arise questions of Article 6 compliance as the process must be looked at as a whole to consider whether there are appropriate safeguards.

The recent jurisprudence shows that this area requires careful consideration of law and principle. It therefore seems unsatisfactory that an order granted by one judge can only be challenged by returning to the same judge for an order seeking variation or recall. A right of appeal is considered preferable (discussed more fully below).

If a right of appeal is incorporated into the revised rules then the Faculty considers that the right to review or revoke the order under Rule 102.6 should necessarily require a material change in circumstances to be demonstrated.

In contrast, where it is considered that the first instance judge has erred in law by granting an order after a hearing under Rule 102.3, a party to the proceedings should have a right of appeal. This would allow challenge either by the party seeking the order or the party opposing it. If an ostensible error can be identified and articulated in a note of appeal, an appellate court could be convened relatively quickly. In this respect the Faculty envisages convention of a larger bench within a day or so in much the same way as is done when the Crown appeal a successful submission of "no case to answer" in criminal proceedings. The Faculty believes it important that there is a mechanism for review by a higher court in an area of law that deals with fundamental human rights. The requirement to identify an error of law would, it is submitted, make appeals of this nature the exception rather than the rule.

The Faculty recognises that appeals in proceedings of this nature are potentially difficult. The subject of the proceedings are often fast-moving and perishable. The Faculty would be concerned if the unavoidable consequence of the lodging of an appeal would be to automatically delay publication in circumstances where an order has been refused. The result could be that the particular story loses its newsworthiness. On the other hand, there is potential for publication in the face of an appeal rendering the appeal worthless, publication essentially deciding the whole matter.

With this in mind the Faculty believes careful consideration should be given to the mechanics of an appeal. For example, it may be that the party appealing should require to seek and justify suspension of the grant or refusal of the order pending an appeal. Consideration should also be given to whether, in circumstances where the granting or refusing of an order would render an appeal academic, whether there should be a higher onus upon the party opposing suspension of the decision pending appeal. This may be similar to the position in respect of interim interdicts which have the effect of deciding the matter as a whole. In that type of matter there is a more stringent requirement upon the party seeking the interim interdict than the usual test of prima facie test and balance of convenience.

In summary, despite the need to proceed carefully in order to avoid potential pitfalls, the Faculty is of the view that, on balance, there is a need for a right of appeal to exist. The Faculty also believes that if a right of appeal is present, there should be a requirement for a change of circumstances prior to an order being varied or revoked.