ORGANISATION: Sheriffs' Association

ADDRESS: Secretary to the Sheriffs' Association
Edinburgh Sheriff Court
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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 ☐

It is quite clear from the case law referred to at paragraphs 9 to 19 of the consultation paper that the procedures in our courts for dealing with reporting restrictions require to be revised. That is especially so since it was established by the House of Lords in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 (per Lord Steyn at paragraphs 15, 18, 29) that at least where ECHR rights are concerned, all courts have the power to restrain publicity so as to protect a person's Convention rights. Typically, such cases concern Article 8 rights to respect for private and family life, but also, as the recent case of *BBC Applicants* 2013 SLT 749 illustrates, Article 2 and 3 rights are also engaged. Yet, despite these developments, the procedures provided by our Court Rules have not kept pace. This proposal by the Council, following the comments by the Lord President in *BBC Applicant* is opportune.

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 ☐

The principles involved are identical for all Courts and the changes in the Rules ought to be replicated in all Courts and procedures.

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

The long-standing practice so far as amendments to Court Rules which have application to all Courts is that separate Acts of Sederunt are promulgated to deal with each Court and procedure separately. While that approach leads to a considerable amount of repetition within the Acts themselves, and duplication between the Sheriff Court and Court of Session (see for example those Acts dealing with vulnerable witnesses and the equality enactments) that approach does at least have the great merit of maintaining for each Court and each procedure a reasonably comprehensive code applicable to each Court and procedure which in turn makes the task of ascertaining the current applicable rules relatively straightforward. The alternative of providing a standalone set of rules to deal with this one issue would reduce that advantage and would be anomalous. While we appreciate that there are likely to be a large number of changes in the content and structure of Court rules in all Courts in the future, in which consideration may well be given to a common set of rules applicable to all Courts, we suggest that for the time being, the usual approach be taken.

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.**

☐ yes ☒ No ☐ No Preference

The terms of the draft Act of Sederunt are refreshingly free of detailed procedural stipulations leaving the devising of consequential procedure to meet the needs of the particular case to the judge. It appears to us therefore that the draft Act of Sederunt accompanying the consultation paper is cast in terms which would allow ready application to all procedures in the Sheriff Court without modification.

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

We broadly agree with this approach for the reasons given at paragraph 24 of the consultation paper. However, we think that it is important that there is provided in the new rules a clearer definition of the meaning of the term referred to in this question. One possible definition might be along the following lines:"...being any order of the Court, whether made in terms of the Contempt of Court Act 1981, the Children and Young Persons (Scotland) Act 1937, the Criminal Procedure (Scotland) Act 1995 or any other rule of law, having the effect of restricting the extent to which any particulars concerning the proceedings or the parties may be publicised.".

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

Our experience is that media organisations, especially the BBC and the major newspapers have the resources to act very quickly, and in practice do so, wherever there is a matter which they wish to contest. The 48 hour period is sufficient we believe for those believing themselves to be affected by the proposed order to be able to intimate their interest, thus triggering the fixing of a hearing to be heard sometime later which ought to provide adequate opportunity for the parties to prepare effectively for the hearing.

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

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 ☐ Disagree ☐ No Preference

There will always be some cases, perhaps rare, where the purpose of the application for the reporting restriction might be defeated were the identified third parties, including the media, to be given prior notice that such an order was being considered by the Court. If for example the purpose of the application was to seek to prevent information falling into the hands of the media, it might be that "compelling reasons" within the meaning of section 12(2)(b) HRA could be advanced justifying the absence of prior notification of the proposed order to interested persons, such as the media. We therefore agree that this rule ought to be in place However, we are puzzled by the reference in the consultation paper to this proposed rule 102.4 introducing the possibility of "super-injunctions".

The term "super injunction" is authoritatively described and explained at Chapter 2 in the report of the Committee on Super-Injunctions chaired by Lord Neuberger in 2011: http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf It is an interlocutory injunction which has, in addition to the conventional prohibitive order (for example restricting publication of an allegation and anonymising the identity of the claimant) a prohibition on publicising the existence of the order and the proceedings (the "super" element). As so defined, it does not seem immediately apparent to us that this rule would have the effect of introducing to Scotland the equivalent of a super-injunction as opposed to an order *ex parte.*

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

☒ Yes ☐ No

1) Proposed rule 102.6(5) provides that the decision of the Court on an application for variation or revocation is final. We do not see any explanation for that in the consultation paper. We do not see any justification for such a provision. It seems anomalous that there should be no appeal, especially since the most recent case on this matter, the one that prompted this consultation, was itself the result of an appeal to the Inner House. In any event, even if such a provision were to be strictly interpreted, challenge would we believe still be available by way of judicial review or an appeal to the *nobile officium.* We doubt that media organisations would be reluctant to take such routes in the case of decisions they dislike. Furthermore, this is a still developing area of the law and it seems to us that the explication of law and practice which could be offered by the senior courts were a normal appeal route to be permitted would be to the benefit of all, not least those adjudicating in the lower Courts. Appeals are permitted in England against the granting of interlocutory injunctions.

2. We note from the Lord Neuberger Committee Report referred to above that there is a recommendation that Practice Guidance be issued to deal with a number of practice points concerning the granting of 'interim non-disclosure orders'. It may be that consideration should be given at some point to the provision of similar Guidance in Scotland.

3. The current procedure allows a "person aggrieved by the terms of an order " to apply for variation or revocation. The proposed rules retain that provision (rule 102.6) but also allow "A person who would be directly affected by the making of the order" to make representations before an order is made. There is no discussion in section 3 of the consultation paper of what exactly is meant by these terms or why different terminology is adopted for the different stages dealt with by 102.3 and 102.6. While it appears at first sight that one difference between these two terms is that "a person aggrieved" is a wider class than the class than those "who would be directly affected", we are puzzled why the class of those entitled to object to the making of the order should be different from the class of those entitled to seek recall of the order once granted. We suggest that reconsideration be given to this apparent differential and also to definition of the term or terms used.

4. A minor drafting point concerns comparison of the proposed rules 102.3(3)(a) and 102.6(3)(a). The terminology is concerned with similar points of procedure yet the terminology is different. It might be better for the sake of consistency for similar formulations to be used.

5. A further very minor point of drafting is in rule 102.2(3) ("setting out the circumstances out of which…"). We think "…in which…" is preferable.