POLICY NOTE

ACT OF SEDERUNT (RULES OF THE COURT OF SESSION AND SHERIFF COURT RULES AMENDMENT NO. 3) (REPORTING RESTRICTIONS) 2015

S.S.I. 2015/85

This Act of Sederunt is made in exercise of the powers conferred by section 32 of the Sheriff Courts (Scotland) Act 1971 and section 5 of the Court of Session Act 1988. It is laid under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Background

1. The general principle is that judicial proceedings are heard and determined in public; there should accordingly be public access to judicial determinations, including the reasons given for them and the identity of parties.

2. This general principle can only be departed from in the following ways:

   a. where Parliament has made statutory provision conferring, in specified circumstances, an order making power on the court to do so;

   b. where a court makes an order to ensure that it does not act in a way which is incompatible with the European Convention on Human Rights ("the Convention"); or

   c. where the court makes an order in furtherance of its inherent power to do so.

3. In light of developments in the law concerning the arrangements for notifying the media of court orders restricting the reporting of proceedings, it is proposed that Chapter 102 of the Rules of the Court of Session (reporting restrictions under section 4(2) of the Contempt of Court Act 1981) be extended to all instances where the court is considering making an anonymisation order which might affect the media's Article 10 rights in terms of section 12 of the Human Rights Act 1998 and modified to provide that an order is not made, or does not become final, until the media have had an opportunity to be heard.

4. These proposals derive from a related review carried out by Lord Woolman and Sheriff Principal Lockhart on the approach of the Scottish Judiciary to the making of orders under section 46 of the Children and Young Persons (Scotland) Act 1937 and the current practice in respect of anonymising Opinions which appear on the internet.

5. Although the Court of Session Rules Council and the Sheriff Court Rules Council instructed draft rules to be prepared to give effect to the proposals, consideration was postponed pending the conclusion of the proceedings in *Application of BBC Scotland re: A v Secretary of State for the Home Department* [2012] CSOH 185. The application was subsequently appealed to the Inner House (*Application of BBC Scotland re: A v Secretary of State for the Home Department* [2013] CSIH 43) and thereafter to the UK Supreme Court (*A v British Broadcasting Corporation* [2014] UKSC 25).

6. The Scottish Civil Justice Council took over responsibility for the draft rules at its first meeting on 10 June 2013. It instructed that a public consultation be carried out on the draft rules while awaiting the outcome of the appeal to the Supreme Court. Following the

issue of that judgment on 8 May 2014, the Scottish Civil Justice Council considered the draft rules again at its meeting on 30 June 2014 and agreed that once equivalent provisions for the sheriff court had been drafted, the draft rules should be submitted to the Court of Session for consideration.

7. Parallel rules for the criminal courts were then prepared and considered by the Criminal Court Rules Council at its meeting on 24 October 2014.

Policy Objectives

8. The Scottish Civil Justice Council considers that the present rules concerning the arrangements for notifying the media of court orders restricting the reporting of proceedings should be extended to all instances where the court is considering making an anonymisation order. As the present rules are restricted to orders made under section 4(2) of the Contempt of Court Act 1981, it is necessary to make this Act of Sederunt to extend their scope.

9. Additionally, the Scottish Civil Justice Council is of the view that the present procedures should be improved by ensuring that the media is given an opportunity to be heard before a final order restricting the reporting of proceedings is made.

10. This Act of Sederunt accordingly provides that, where the court is considering making an order, it may make an interim order and that interim order is to be sent to any person who has asked to see such orders, and whose name is on a list kept by the Lord President. Where the court makes an interim order, an interested person may make representations before the final order is made. If representations are made, then a hearing is fixed (and this may take place urgently if the interested person gives reasons as to why that is necessary). Where no representations are made, the matter is placed before the court in chambers to resume consideration of whether an order should be made. If no order is to be made, the interim order must be recalled.

11. If a final order is made, the court sends copies to any interested person and it is published on the Scottish Court Service website. Any person who is aggrieved by the order may then seek its recall or variation, which should if possible be dealt with by the judge or judges who made the order, and that decision is appealable, unlike the present position.

Consultation

12. The Scottish Civil Justice Council issued its Reporting Restrictions Consultation[1] on 24 July 2013 and it closed on 2 October 2013. It was accompanied by draft rules containing provision for the Court of Session, and views were sought on a range of issues, including whether the provisions should be replicated for the sheriff court and for the criminal courts.

13. 10 responses were received from bodies within the legal profession, members of the judiciary, local authorities and representatives of media organisations. All respondents considered that new rules should be made, and that the media should be given the opportunity

[1] The SCJC Reporting Restrictions Consultation is available here:
http://www.scottishciviljusticecouncil.gov.uk/publications/consultation-on-rules-on-reporting-restrictions

to be heard before an order is made restricting reporting. An analysis of consultation responses was published in March 2014[2].

14. At its meeting on 30 June 2014, the Scottish Civil Justice Council considered draft rules which had been revised in light of the consultation responses and the Supreme Court judgment, and agreed that they be submitted to the Court of Session once sheriff court provisions had been drafted.

Lord President's Private Office
26 February 2015

[2] The Analysis of Responses is available here:
http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/consultation-on-reporting-restrictions/rr-consultation-analysis---published.pdf?sfvrsn=2