



**Scottish
Civil Justice
Council**

Consultation on Draft Court Rules in Relation to Reporting Restrictions

JULY 2013

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RESPONDING TO THIS CONSULTATION PAPER

We are inviting written responses to this consultation paper by Wednesday 2 October 2013.

Please send your response with the completed Respondent Information Form (see "How we will treat your response" below) to:

scjc@scotcourts.gov.uk

or

Lisa Gamble
Scottish Civil Justice Council
Parliament House
Edinburgh
EH1 1RQ

If you have any queries, please contact Lisa Gamble on 0131 240 6040.

We would be grateful if you (if appropriate) would use the consultation questionnaire provided or could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

This consultation, and all other Scottish Civil Justice Council (SCJC) consultation exercises, can be found on the consultation web pages of the SCJC website at: <http://www.scottishciviljusticecouncil.gov.uk/consultations>

How we will treat your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form with your response (at Annex A) as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the SCJC is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Where respondents have given permission for their response to be made public (see the Respondent Information Form at Annex A) and after we have checked that they contain no potentially defamatory material, responses will be made available to the public on the SCJC website.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help the SCJC reach a view on draft rules for reporting restrictions. It is intended to publish a consultation report on the SCJC website, following the meeting of the SCJC on 18 November 2013.

Feedback

If you have any comments about how this consultation exercise has been conducted, please send them to:

Name:

Lisa Gamble

Address:

Scottish Civil Justice Council
Parliament House
Edinburgh
EH1 1RQ

0131 2406040

E-mail:

scjc@scotcourts.gov.uk

SECTION 1 INTRODUCTION

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:
 - where Parliament has made statutory provision conferring, in specified circumstances, an order making power on the court to do so;
 - 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 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. The Scottish Civil Justice Council (SCJC), which has responsibility for preparing draft civil procedure rules for consideration by the Court of Session, considered proposals to amend the Rules of the Court of Session in respect of reporting restrictions at its meeting of 10 June 2013.¹ It agreed to publicly consult on the proposals prior to considering the draft rules further.
5. The draft rules being consulted on only make provision for the Court of Session. However, it is suggested that these rules should be replicated in the other rules of court, including the Criminal Procedure Rules. Rules for criminal proceedings (known as Acts of Adjournal) are made by the High Court of Justiciary and are prepared by the Criminal Court Rules Council.² The results of this consultation will therefore be shared with that Council to assist it in its consideration of the Criminal Procedure Rules.

¹ The existing civil procedure rules on Reporting Restrictions are available here: <http://www.scotcourts.gov.uk/docs/default-source/cos---rules/chap102.pdf?sfvrsn=2>.

² Further information on the Criminal Courts Rules Council is available at: <http://www.scotcourts.gov.uk/rules-and-practice/rules-councils/criminal-court-rules-council>.

SECTION 2 BACKGROUND

6. Orders made under statute that restrict the publication of information are the most common exception to the general principle mentioned above. Examples of such orders can be found in the Contempt of Court Act 1981 (“the 1981 Act”) and the Children and Young Persons Act 1937 (“the 1937 Act”).³
7. Section 4(2) of the 1981 Act provides that a court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.⁴
8. Section 46(1) of the 1937 Act provides that a court may direct that reporting of proceedings shall not reveal the name, school, address, picture, or any other details that could lead to the identification of persons involved in the proceedings under the age of 17.⁵ The most common effect of such an order is to prohibit the media from the reporting the proceedings in full (i.e. the names of the parties). The media will not ordinarily be a party to the proceedings in which the order was made.

Arrangements to Date

9. Pre-1999 the position was that, as the media were not a party to the proceedings, then they would not be permitted to make representations to the court either prior to or after the making of an order. However, as a result of the decisions of the court in *Scottish Daily Record and Sunday Mail Ltd, Petitioners* 1999 SLT 624 and *Galbraith v HMA* 2001 SLT 465 an informal practice was put in place whereby a temporary order would be made and the media would have 48 hours to make representations before it became final.

³ A helpful list of statutory reporting restrictions and privileges across the UK jurisdictions, prepared by the Secretariat to the Scottish Government’s Leveson Group, can be found at:

<http://www.scotland.gov.uk/Resource/0041/00416260.pdf>.

⁴ See Section 4(2) Contempt of Court Act 1981, available at:

<http://www.legislation.gov.uk/ukpga/1981/49/section/4>.

⁵ Section 46 applies only to civil cases, having been repealed, insofar as it relates to criminal proceedings, by Schedule 10 of the Criminal Procedure (Scotland) Act 1975. The current arrangements in respect of criminal proceedings concerning children can be found at section 47 of the Criminal Procedure (Scotland) Act 1995 (currently subject to proposed amendments at section 11 of the Victims and Witnesses (Scotland) Bill, which would apply the arrangements to persons under 18, rather than under 16.

10. As was observed in *BBC Petitioners* 2002 JC 27, copies of orders pronounced by the courts under section 4(2) were being sent immediately by email to various newspapers and broadcasting organisations and to their agents. The fact that an order had been made was also being published on the Scottish Court Service website.⁶
11. That system operated until 7 December 2010 when the European Court of Human Rights issued its opinion in the case of *Mackay and BBC Scotland v The United Kingdom*, concerning a petition by the BBC and Mackay for the recall of a section (4)(2) order.⁷
12. The ECtHR held that there had been a violation of Article 13 (lack of an effective remedy) of the Convention, read in conjunction with Article 10 (freedom of expression and information). The Court criticised the “informal nature” of the practice governing challenges to section 4(2) orders. It noted that a Scottish Court which makes such an order is under no obligation to hear representations from the media, and even where it does so, this is not required within a reasonable time or even prior to the proceedings to which the order relates.
13. The Court found that current Scottish practice provides “too slender a basis for the safeguards which are required” by Article 10 (para. 32); and that the applicants’ ability to apply for recall of the interim order did not constitute an effective remedy in terms of Article 13 (para. 33).
14. At the request of the Scottish Government, rules of court were prepared to give effect to this judgment. The rules provided that where a court makes an order under section 4(2) of the 1981 Act, the clerk of court shall arrange for notification of the making of the order to be made and that a person aggrieved by the terms of such an order (usually the media) may apply to the court that made the order for its variation or revocation. Provision was made in the Criminal Procedure Rules, the Rules of the Court of Session (RCS) and the sheriff courts rules (ordinary cause and summary applications).⁸

⁶ <http://www.scotcourts.gov.uk/>

⁷ *Mackay and BBC Scotland v The United Kingdom*, available at [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":\["mackay"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-102141"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{).

⁸ For the current rules see: Chapter 56 Act of Adjournal CPR 1996 SI 1996/513, available at, <http://www.scotcourts.gov.uk/docs/default-source/scr---criminal-procedure/chapter-56.doc?sfvrsn=4>, and related Practice Note No.1 of 2007 (Anonymising Opinions Published on the Internet) <http://www.scotcourts.gov.uk/docs/default-source/scr-rules-notes/pn-hcj-on-anon-opinion-19-june-2007.pdf?sfvrsn=2>

Chapter 102 RCS, Reporting Restrictions Under the Contempt of Court Act 1981, available at, <http://www.scotcourts.gov.uk/docs/default-source/cos---rules/chap102.pdf?sfvrsn=2>;

15. At the time of those rules being made however it was recognised that the difficulties encountered in the *Mackay* case were not limited to the imposition of section 4(2) orders and that this may be require to be looked at, perhaps by way of a working group, at a later date.
16. At or around the same time, the previous Lord President (Hamilton) asked Lord Woolman and Sheriff Principal Lockhart to lead a review of two related matters: the approach of the Scottish Judiciary to the making of orders under section 46 of the 1937 Act; and the current practice in respect of anonymising Opinions which appear on the internet.
17. One of the conclusions of the review was that the rules of court relating to reporting restrictions under the 1981 Act should be extended to all instances where the court is considering making an order which might affect the media's Article 10 rights in terms of section 12 of the Human Rights Act 1998⁹ and modified to the extent that an order is not made, or does not become final, until the media have had an opportunity to be heard; this would involve communicating to the media the basis on which the order is being sought.
18. Draft rules were prepared on this basis; however, their consideration by the relevant rules councils 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. In that case Lord Glennie made a similar recommendation to that of the review:

"More generally, I see no reason why there should not be a system established on the lines of the present caveat system. Any media organisation wishing to be notified of applications for orders prohibiting publication could enter their names and contact details in a register (paper or electronic), and they would be notified whenever notice of such a motion was received by the court offices. If a motion was made at the bar,

Chapter 48 OCR, Reporting Restrictions Under the Contempt of Court Act 1981, available at:

<http://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/sheriff-court--civil-procedure-rules/ordinary-cause-rules>;

Chapter 3, Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999, available at, <http://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/sheriff-court--civil-procedure-rules/summary-applications-statutory-applications-and-appeals-etc-rules>.

⁹ Section 12, among other things, provides that the court must not grant a remedy which might affect the exercise of the Art. 10 ECHR right to freedom of expression where the affected person is not present or represented, unless the applicant has taken all practicable steps to notify the affected person, or there are compelling reasons against notification. It further provides that the court must have "particular regard" to the right to freedom of expression and to the extent to which it is in the public interest to publish material or conduct which is, or is claimed to be "journalistic, literary or artistic".

then, if there was time, notice of that motion could be given before the motion was heard.

*This would need working out in more detail, but I do not see why it should cause great difficulty. A paper (i.e. non-electronic) version of this is hinted at in Rule of Court 102.2, dealing with orders made under section 4(2) of the Contempt of Court Act 1981, though I note that it is limited to providing a means of notifying interested parties of an order having been made. That Rule was brought in, as I understand it, in response to the decision of the ECHR in *Mackay and BBC Scotland v United Kingdom* (7 December 2010). I am not persuaded that the Rule goes far enough, since it does not even attempt to set up a system for the giving of advance notice of any application for an order (whether under section 4(2) or section 11 of the Contempt of Court Act 1981 does not matter for this purpose) but leaves it for the media to apply after the order has been made. Further, if I am correct in my interpretation of the scope of section 12 of the Human Rights Act 1998, which, if applicable, requires advance notice of any application, then for that reason too the Rule does not go far enough. It is a matter that the Rules Council might wish to consider."*

19. The Inner House went on to agree (*Application of BBC Scotland re: A v Secretary of State for the Home Department* [2012] CSIH 43):

"The obvious answer is that the procedural deficiency that this appeal has highlighted should be considered against a broader background by the Scottish Civil Justice Council, no doubt after thorough consultation with interested parties. "

20. At its meeting of 10 June 2013, the Scottish Civil Justice Council considered a draft instrument proposing to amend the Rules of the Court of Session in respect of reporting restrictions. The Council agreed to publicly consult on the proposals prior to considering the draft rules further.

SECTION 3 DISCUSSION OF PROPOSALS AND CONSULTATION QUESTIONS

Discussion of Proposals

21. For the purpose of this consultation a draft Act of Sederunt has been prepared. Although it only makes provision for the Court of Session it is suggested that the amendments contained in the draft rules be replicated in the existing rules for the sheriff court and for the criminal courts. Consultees' views are sought on this approach, and whether there should be a standalone set of rules for the civil courts (which would have the effect of extending the arrangements to summary cause and small claims proceedings) or whether there should be separate rules for each.
22. The rules, which are restricted to orders made under section 4(2) of the 1981 Act, provide that the clerk of court shall arrange for notification of the making of the order to be made and that a person aggrieved by the terms of such an order (usually the media) may apply to the court that made the order for its variation or revocation. The proposed new rules, which would apply to all orders that restrict the reporting of proceedings, introduce an opportunity for the media to make representations to the court before such an order is made. The existing rules that relate to the procedure that is followed and is available after an order is made are incorporated. The draft rules propose to substitute for existing Chapter 102 (reporting restrictions under the Contempt of Court Act 1981) new Chapter 102 (reporting restrictions), in relation to the Court of Session procedure for all court orders to restrict the reporting of proceedings.
23. The following paragraphs explain each rule in detail.
24. Rule 102.1 (application of this Chapter). This rule explains that the Chapter applies to orders which restrict the reporting of proceedings. The application of the Chapter is necessarily wide as it has to cover all statutory orders, common law orders and orders made by the court in respect of the Convention. A benefit of adopting this broad approach, as opposed to listing each and every order, is that new provisions would automatically be caught without amendment of the rules.
25. Rule 102.2 (notification of consideration of reporting restriction). This rule provides that where the court is considering making an order it shall send (in practice by email) a copy of the draft order, together with a note of the circumstances in which the making of the order is being considered, to those persons who have asked to see such orders (usually the media and their agents - see paragraph 7 above). The information received by the media at this point

should be sufficient to allow them to make representations (see rule 102.3) to the court before an order is made or to seek its variation or revocation (see rule 102.6) at a later date.

26. Rule 102.3 (representations). This rule allows a person who would be directly affected by the making of an order (ordinarily the media) the opportunity to make representations to the court before an order is made. The representations are to be made by note in process and lodged with the court within 48 hours. 48 hours is thought to be an appropriate period of time given when the likely need for an order to be in place and the short life span of a news cycle are taken in account. If no representations are made then the court is free to make the order.
27. Rule 102.4 (non-notification). This rule allows the court, where there are compelling reasons not to inform the media, to dispense with rule 102.2 and 102.3. An example of a compelling reason would be where a party has applied to the court for an interdict against a party from disclosing private information to the media and a reporting restriction is being considered. If the media were informed about this before those orders were granted then it could defeat the purpose of the application for interdict.
28. Though there may be a concern that this rule introduces to Scotland what are known as “super-injunctions” (a court order prohibiting the publication of information concerning a party and which further prohibits the publication or disclosure of the existence of the order and proceedings) in England and Wales, it simply reflects what is provided for in section 12(2)(b) of the Human Rights Act 1998.¹⁰ Further, it is not thought that this rule will be relied upon to the same extent as its counterpart in England and Wales as Scotland has not seen, for various reasons, the same frequency or type of privacy cases that have been seen in England and Wales; it is not expected that this rule will change this.
29. Rule 102.5 (notification of reporting restrictions). This rule provides that where the court has made an order then it will be published on the Scottish Court Service website and emailed to the media. This draft rule incorporates current RCS rule 102.2.
30. Rule 102.6 (applications for variation or revocations). This rule allows the media, at any time, to seek the variation or revocation of an order. This draft rule incorporates current RCS rule 102.3.

¹⁰ Section 12(2)(b) provides that there must be compelling reasons for not notifying an affected person when the court is considering granting a remedy that might affect the exercise of their ECHR right to freedom of expression in their absence.

Consultation Questions

1. Do you agree or disagree that new rules should be made in respect of reporting restrictions?
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?
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?
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.
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.
6. Do you consider the 48 hour period for making representations to the court under rule 102.3 to be appropriate? Please give reasons.
7. If you answered “no” to question 6, what alternative period do you consider would be appropriate?
8. Do you agree or disagree with the terms of rule 102.4 in respect of non-notification? Please give reasons for your answer.
9. Do you have any other comments on the proposals contained in this paper?

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

Title *(Please tick as appropriate)*

1.

Mr Ms Mrs Miss Dr

Other *Please state:*

Surname

Forename

2. Postal Address

Postcode:

Phone

Email

Permissions

I am responding as an:

Individual (*complete section (a)*) 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 No

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

Comments

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

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

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

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

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

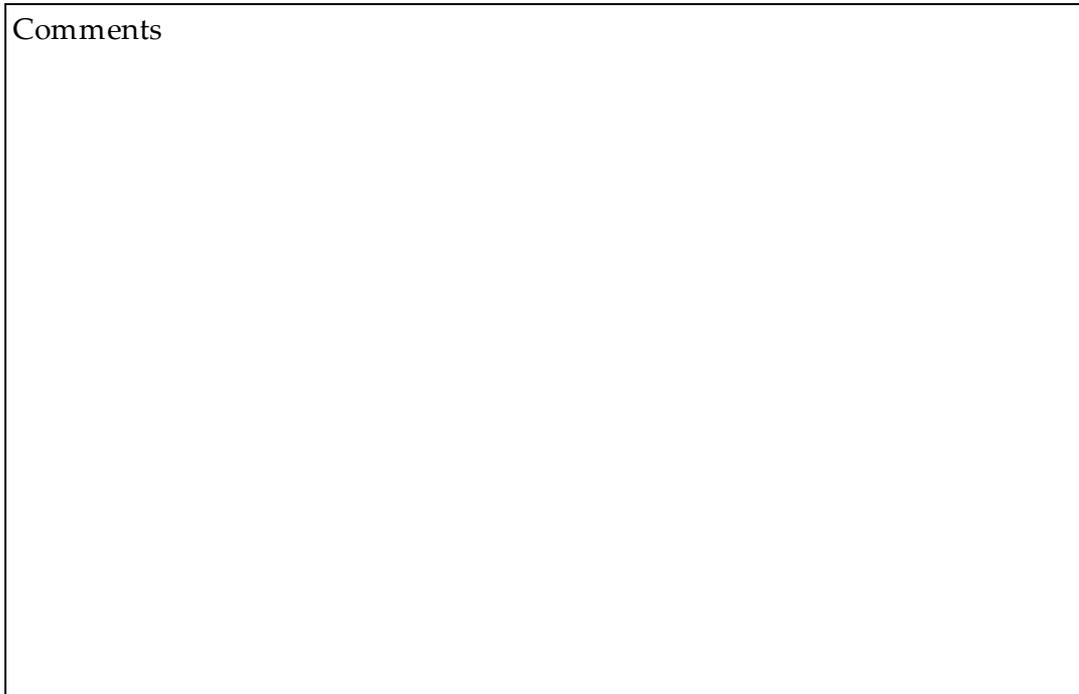
No

No Preference

Comments

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

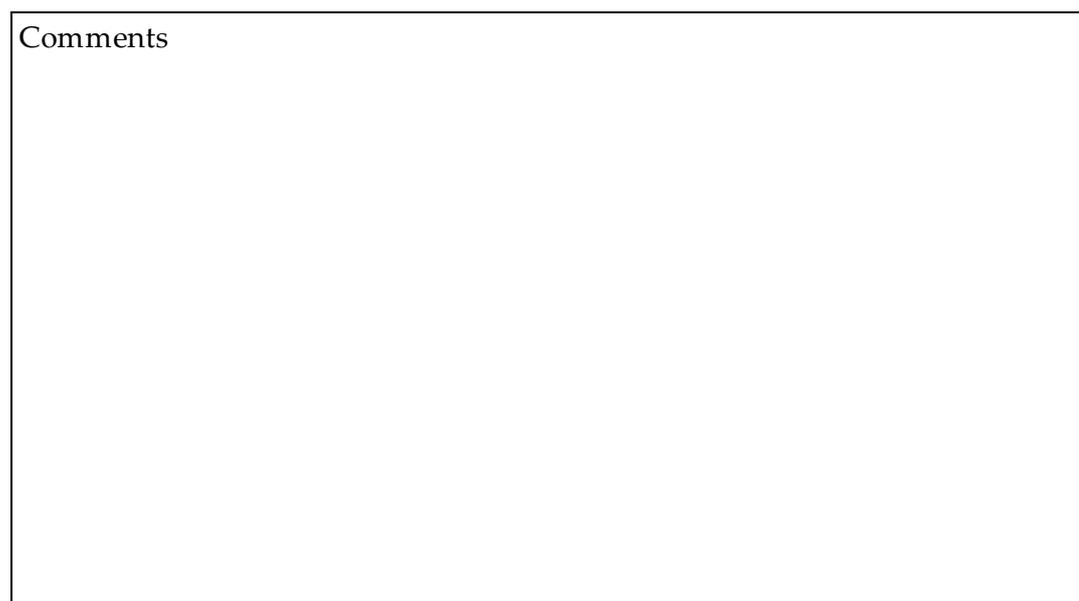
Comments



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

Comments



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

Yes

No

Comments



In addition to those members of the media and their agents who are routinely notified of anonymisation orders, this consultation paper has been sent to the following people or organisations. However, responses from all those with an interest in the subject matter are invited.

Administrative Justice and Tribunals Council (AJTC)
Association of Children's Reporters
Association of Commercial Attorneys
Association of Directors of Social Work
Association of Personal Injury Lawyers
Citizens Advice Scotland
Convention of Scottish Local Authorities (COSLA)
Criminal Courts Rules Council
Crown Office and Procurator Fiscal Service
Edinburgh Bar Association
Equality and Human Rights Commission
Faculty of Advocates
Families Need Fathers Scotland
Forum of Scottish Claims Managers
Glasgow Bar Association
Govan Law Centre
Law Society of Scotland
Mental Welfare Commission
Part-Time Sheriffs Association
Royal Faculty of Procurators in Glasgow
Scottish Association of Law Centres
Scottish Association of Care and Rehabilitation of Offenders
Scottish Child Law Centre
Scottish Court Service
Scottish Human Rights Commission
Scottish Justices Association
Scottish Law Agents Society (SLAS)
Scottish Law Commission
Scottish Legal Action Group (SCOLAG)
Scottish Legal Aid Board (SLAB)
Scottish Legal Complaints Commission (SLCC)
Scottish Local Authorities
Scottish Women's Aid
Scottish Government Justice Directorate
Sheriffs' Association

Sheriffs Principal
Society of Legal Scholars
Society of Local Authority Chief Executives and Senior Managers
(SOLACE)
Society of Local Authority Lawyers and Administrators (SOLAR)
Society of Solicitor Advocates
Society of Solicitors in the Supreme Courts in Scotland
Solicitors Regulation Authority
WS Society