



Confidentiality and openness in family courts

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Until April 2009, cases in family courts involving children were usually heard in private in order to protect the identity of the children concerned, and reporting on such cases was very limited. The provisions requiring such privacy attracted considerable criticism. Following calls for the press and public to be allowed to attend family proceedings, and also for the relaxation of reporting restrictions, changes were made to court rules, effective from April 2009. New regulations enable duly accredited media representatives (but not the wider public) to attend certain family proceedings held in private, subject to a power for the court to direct their exclusion.

The new court rule changes did not alter the statutory reporting restrictions framework for family proceedings, meaning that the media are able to report only limited information about the proceedings they are now able to attend. Provisions intended to amend these reporting restrictions were enacted in Part 2 of the *Children, Schools and Families Act 2010* (CSFA 2010) although these provisions have not yet been brought into effect. On 14 July 2011 the House of Commons Justice Select Committee published its report, *Operation of the Family Courts*. The Committee reported that it had not heard from any witness who was in favour of the scheme for media access in the CSFA 2010. In October 2011, the Government accepted the Committee's recommendation that these provisions should not be commenced at this time.

In its interim report published on 31 March 2011, the Family Justice Review expressed the view that people, including the media, should be able to attend court hearings but not be allowed to do or say anything that might identify the parties in public. It is anticipated that a final report will be published before the end of 2011.

In September 2011, the Ministry of Justice published its review of the Family Courts Information Pilot which had tested the feasibility of providing written judgments to parties in certain types of family cases and posting anonymised versions on a public website. The review found that there was support for greater transparency, but that there were concerns about the protection of the privacy of the families involved.

This note deals generally with the law in England and Wales.

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1 Background

1.1 The family courts

The family courts deal with:

- matrimonial proceedings;
- proceedings relating to children, including *Children Act 1989* matters (in particular inter-parental 'private law' disputes following a relationship breakdown, and 'public law' care proceedings);
- domestic violence; and
- adoption applications.

Information about the family court system is set out in a report of the Constitutional Affairs Committee (now Justice Committee), *Family Justice: the operation of the family courts*.¹

1.2 Protection of identity of children

Section 97(2) of the *Children Act 1989* makes it a criminal offence to publish, to the public at large or to any section of the public, any material which would identify, or which would be likely to identify, a child as being involved in family courts proceedings (unless a specific order has been made dispensing with this provision).

In addition, under section 12 of the *Administration of Justice Act 1960*, it may also be a contempt of court to publish information relating to certain proceedings affecting children before a court sitting in private, unless the court gives permission to do so.²

1.3 Pressure for change

Until April 2009, cases in family courts involving children were usually heard in private in order to protect the identity of the children concerned, and reporting on such cases was very limited.

The provisions requiring such privacy were criticised by family groups, Members of Parliament and the media. Members of the press argued that confidentiality rules prevented them from highlighting perceived injustices, with care proceedings and adoption cases specifically singled out for criticism. Fathers' rights groups claimed that the practice of hearing child contact and residence cases in private added to the perception of court bias against fathers.

The *Times* newspaper ran a family justice campaign to open up the family courts. In a leading article, *The Times* said that it was "impossible to know the extent to which miscarriages of justice may be occurring, because the whole system is shrouded in secrecy".³

¹ Constitutional Affairs Committee, *Family Justice: the operation of the family courts*, 2 March 2005, HC 116 2004–05, pp5-6

² *Administration of Justice Act 1960*, section 12(2)

³ "A Conspiracy of Silence", *The Times*, 7 July 2008

In response, Sir Mark Potter, who was then the President of the Family Division and Head of Family Justice, said that the present system was “far from perfect” but spoke of the distinction between privacy and secrecy.⁴

1.4 Constitutional Affairs Committee reports

The issue of transparency in the family courts was examined in 2005 and in 2006, by the Constitutional Affairs Committee as part of its *Family Justice* inquiry.⁵ Many of the witnesses who gave evidence to the Committee called for more open access to the family courts. The Committee called for a greater degree of transparency, and said that an “obvious move” would be to allow the press and public into the family courts under appropriate reporting restrictions, subject to the judge’s discretion to exclude the public.

1.5 Consultations by the previous Government

Against a background of increasing pressure to improve transparency in the family courts, the previous Government engaged in two public consultation exercises on the issue: in 2006, *Confidence and confidentiality: Improving transparency and privacy in family courts*,⁶ and in 2007, *Confidence & confidentiality: Openness in family courts – a new approach*.⁷ At that time, the Government said that it had decided to focus on providing better information about family proceedings to the public, but that it would not proceed with proposals to allow the media into family courts as of right, although it was intended that the court would still have discretion to allow media attendance on application.⁸

The announcement in 2007, that the media would not be given automatic rights to attend family proceedings, was followed by a further Government announcement in December 2008 that the rules of court *would* be changed to allow the media (but not members of the general public) to attend family proceedings.⁹ Jack Straw, who was then Secretary of State for Justice and Lord Chancellor, also stated that the provision of written judgments would be piloted and that the rules on the disclosure of information in family proceedings would be relaxed.¹⁰ Although most of the proposals were to be brought about by changes to rules of court, others, including media attendance in relation to placement and adoption, were to require primary legislation.

On the same day, the previous Government published *Family Justice in View* which included a summary of responses to the 2007 consultation, along with details of the proposals for the media to attend family proceedings.¹¹ The proposals were based on three key principles: to improve confidence; to protect the interests of children and vulnerable adults; and to enable more access to support.

⁴ “Family justice is private - not secretive”, *The Times*, 11 July 2008

⁵ Constitutional Affairs Committee, *Family Justice: the operation of the family courts*, 2 March 2005, HC 116-I 2004–05; Constitutional Affairs Committee, *Family Justice: the operation of the family courts revisited*, HC 1086; 11 June 2006

⁶ CP 11/06

⁷ Cm 7131

⁸ Ministry of Justice press notice, *Confidence and confidentiality: Openness in Family Courts - A new approach*, 20 June 2007

⁹ HC Deb 16 December 2008 cc980-1

¹⁰ HC Deb 16 December 2008 c981

¹¹ Cm 7502

2 The new rules

2.1 The rules

On 27 April 2009, new rules came into force. The *Family Proceedings Courts (Miscellaneous Amendments) Rules 2009* deal with proceedings in Magistrates' Courts¹² and the *Family Proceedings (Amendment) (No. 2) Rules 2009*¹³ deal with proceedings in the county courts and the High Court. These instruments make changes to the rules of court to allow for the attendance, during family proceedings, of accredited media representatives, (without allowing for attendance by the public more generally), and in relation to the communication of information relating to proceedings concerning children. Similar principles now apply at all levels except placement and adoption proceedings¹⁴ and financial dispute resolution hearings. Previously, the media had only been able to attend family court cases in family proceedings courts; the new provisions now allow for media attendance in the county courts and High Court.

The rules enable duly 'accredited media representatives' to attend proceedings held in private, subject to a power for the court to direct their exclusion for all or a part of the proceedings for one of the specified reasons. Anyone entitled to be present at the hearing may request that media representatives be excluded. The media are not allowed to identify children who may be involved in family proceedings and such proceedings must remain private.

The rules also deal with the communication of information relating to proceedings relating to children. Communication is generally allowed to parties and their legal representatives and certain associated officers and professionals or where the court specifically gives permission.

An [Explanatory Memorandum](#) published with the new rules set out how the rules would implement the policy principles set out in *Family Justice in View*:

There are three inter-related principles underpinning the overall package:

- Improve confidence
- Protect the interests of children and vulnerable adults
- Enable more access to support.

Media access addresses, in part, the first principle. The second principle, relating to protecting children and vulnerable adults, is dealt with in relation to media access by giving the courts discretion to exclude the media in certain circumstances. Currently the media have a right to attend family proceedings (except placement and adoption) in magistrates' courts. The new provisions aim to provide a consistent approach across all tiers of court [...]

The new provisions governing communication of information relating to proceedings deal in part with the third principle of more access to support. Following amendments to the current rules in 2005, it is clear that the existing provisions still cause confusion and make it hard for parties to seek the help they need. The new provisions remove many of the restrictions about to whom information can be communicated by parties, focusing more instead on the purpose for which it is communicated. There are also

¹² [SI 2009/858](#)

¹³ [SI 2009/857](#)

¹⁴ The *Family Justice in View* paper sought views on how adoption proceedings could be more open, pp 34-35

changes relation to the extent to which further onward communication may be permitted.

Other aspects of the package of measures (reporting restrictions, and media attendance in relation to placement and adoption) require amendments to primary legislation ...¹⁵

The then President of the Family Division, Sir Mark Potter, issued two Practice Directions alongside the new rules to provide guidance to the courts on:

- the identification of accredited media representatives;
- the handling of applications to exclude media representatives from the whole or part of a hearing and
- the exercise of the court's discretion to exclude media representatives whether upon the court's own motion or any such application.¹⁶

Further information about [Privacy and the Family Courts](#) is set out on the website of the Judiciary of England and Wales. This includes links to two HMCS leaflets:

- [EX710: Can I talk about my case outside court?](#)
- [EX711: Can the media attend my court case?](#)

2.2 Ministry of Justice study

In January 2010, the Ministry of Justice published [A study of the impact of changes to court rules governing media attendance in family proceedings](#). This concluded that the impact of the rule change had been minimal:

The study does provide evidence to suggest that the impact of the media attendance rules in the family courts in England and Wales has been minimal. The vast majority of contributors to this study have had little or no experience of the media attending proceedings since the attendance rules were changed in April 2009.

As the media already had the right to attend hearings in the Family Proceedings Court the main change introduced in April 2009 was to allow the media to attend County and High Court hearings. An assumption could have been made that impact would have mostly fell to these courts but responses to this study do not reveal any evidence to support this.

This study has identified a range of challenges experienced by courts associated with the practicalities of implementing the media attendance rules. These included (but were not limited to) the need for more comprehensive training for staff and the media and consideration of advice on how best to accommodate the media.¹⁷

3 Reporting restrictions: the *Children, Schools and Families Act 2010*

Some commentators expressed disappointment that the new rules allowing media attendance did not go as far as had been hoped. The new court rule changes did not alter the statutory reporting restrictions framework for family proceedings; this required primary

¹⁵ [Explanatory memorandum to the Family Proceedings \(Amendment\) \(No. 2\) Rules 2009](#), paras 7.1-7.4

¹⁶ [Practice Direction 27B](#); [Practice Direction 27C](#)

¹⁷ p17

legislation. This meant that the media were able to report only limited information about the proceedings they were now able to attend.

Provisions intended to amend these reporting restrictions were enacted in Part 2 of the [Children, Schools and Families Act 2010](#), although these provisions have not yet been brought into effect. The provisions would not apply to the publication of information from family proceedings governed by the *Judicial Proceedings (Regulation of Reports) Act 1926* (which deals with reporting of divorce and related proceedings).

3.1 The provisions in Part 2

What information would be publishable?

There would continue to be a general restriction on publication by any person of information relating to relevant family proceedings, and this would be extended to cover an indefinite period after the proceedings had concluded. However there would be three exceptions to this general restriction for types of authorised publication:

- authorised publication of a court order or judgment;
- authorised news publication; and
- authorisation by way of provision made in rules of court.

Publication of information which is not within one of the authorised categories would be contempt of court.

The provisions are summarised in the [Explanatory Notes](#) which accompany the Act:

Of the three exceptions, publication of court orders and judgments will be possible in much the same way as at present, and it is anticipated that the rules of court will continue to permit similar sorts of disclosure of information as at present; but the "authorised news publication" exception is new and will allow for wider reporting of family proceedings than at present. In addition to these three exceptions, the court will also retain a general discretion to permit the publication of information relating to family proceedings.

The exception for authorised news publication of proceedings is for reporting of information acquired by an accredited media representative who has attended the proceedings in question. The news reporting scheme turns on automatic prohibition on reporting of certain sorts of information which is particularly sensitive, with other information being reportable unless the court specifically imposes restrictions. Thus:

- a) publication of any information likely to lead to the identification of children, parties or witnesses (save professional witnesses) in the proceedings or of other sorts of particularly sensitive information is prohibited, but with the court having power to relax the prohibition and allow publication;
- b) publication of all other information is permitted, but with the court having power to prohibit or restrict publication.

The [Explanatory Notes](#) contain a detailed explanation of each of the provisions in Part 2.

Authorised news publications

Five conditions would have to be met before a publication would be classified as an authorised news publication. These are complicated and have a number of elements; two of the conditions have many exceptions. In summary, a publication would have to be:

- of information gathered by an accredited news representative through attending the proceedings;
- by that representative, or with his consent or under a contract or similar arrangement, or taken from an existing authorised news publication;
- not of identification information or sensitive personal information, unless expressly permitted by the court;
- not of an order in adoption or parental order proceedings, or any judgment, unless expressly permitted by the court;
- not of information which the court has ordered not to be published, or of an order which the court has ordered not to be published.

3.2 Implementation

The provisions in Part 2 have not yet been brought into effect. In a written ministerial statement made on 11 October 2010, Jonathan Djanogly, Parliamentary Under-Secretary of State for Justice, announced that a decision on whether to change the restrictions on media reporting of family court hearings would not be made until after the publication of the Family Justice Review's final report.¹⁸ This is now anticipated to be "before the end of the year".¹⁹ Since then, the Government has accepted a recommendation from the House of Commons Justice Select Committee that Part 2 of the *Children, Schools and Families Act 2010* should not be commenced at this time.²⁰

The Act provides for the provisions in Part 2 to be implemented in two stages. The second stage of provisions may not be implemented until after the conclusions of an independent review of the reporting regime, to be conducted 18 months after implementation of the first stage, have been laid before Parliament. The implementation provisions are complex and are explained in detail in the [Explanatory Notes](#) published with the Act.

3.3 Reaction

Some media organisations and other critics have argued that the reforms in the Act will actually have the effect of making reporting of family cases more difficult than it is at present.²¹

Giving the [2010 Hershman-Levy Memorial Lecture](#) on 1 July 2010, Lord Justice Munby referred to the Act as a "lost opportunity":

¹⁸ HC Deb 11 October 2010 c7WS

¹⁹ Cm 8189, [Government Response to Justice Committee's Sixth Report of Session 2010–12: Operation of the Family Courts](#), October 2011, p3

²⁰ Cm 8189, [Government Response to Justice Committee's Sixth Report of Session 2010–12: Operation of the Family Courts](#), October 2011, pp31-2. Further information about the Justice Committee's inquiry is set out in section 5 of this note, below

²¹ See, for example, Newspaper Society, [Family Courts: New Act Won't Enhance Openness and Public Confidence](#), September 16, 2010; Frances Gibb, "Family courts: 'the changes were a misguided, politically motivated fudge'", [Times Online](#), 6 May 2010

The new 'scheme', if that is what one can call it, is far from comprehensive. Divorce and ancillary relief are scarcely affected; the adult inherent jurisdiction not all. A greater degree of consistency has been achieved – the different treatment of the County Court and the Family Proceedings Court will now be a thing of the past – but at the heavy price of an increase in the areas covered, for the first time, by reporting restrictions. And at the same time it is far from obvious that the supposed relaxation of the reporting restrictions in children cases – surely the crux of the problem – will actually have the desired effects, if, indeed, any effect at all.

What the overall impact will be of the Act, assuming that it is ever brought into force, and more generally of the recent reforms, is difficult to predict, not least given the complexity and technicality of the new statutory provisions. One view voiced by various commentators, and a view I am inclined to share, is that if anything the Act is likely to reduce, rather than increase, the amount of information about children and other family proceedings which finds its way into the public domain.

Truly, it may be thought, a lost opportunity.

4 Family Justice Review

The Family Justice Review is a review of the family justice system commissioned by the Ministry of Justice, the Department for Education, and the Welsh Assembly Government. The review is being led by a panel of experts with an independent chair, David Norgrove. The review's [interim report](#) was published on 31 March 2011.²² It outlined a number of reforms to public and private law and the family justice system as a whole. The consultation on the interim report ended on 23 June 2011. It is anticipated that a final report will be published before the end of 2011.²³

The Interim Review indicated that the issue of transparency in the family justice system had been considered but that the review had not taken evidence on the subject of public access. Therefore, the Interim Review did not include recommendations on the subject of openness of the family courts but did include comments. The Interim Review expressed the view that the general principle should be that people, including the media, should be able to attend court hearings but not be allowed to do or say anything that might identify the parties in public:

3.16 Our terms of reference asked us to have regard to transparency. We are aware of concerns about the balance between a right to privacy and the need for public understanding on the one hand, and how that affects public confidence in the system on the other. Our own work has not led us to share concerns that arbitrary or ill-founded decisions are taken. In fact the reverse is the case. We have been impressed by the great care taken by the courts and all those involved in these difficult decisions. We recognise, of course, that the public are not granted the access that we have been afforded. However, we have not taken evidence on the controversial issue of public access and none of our recommendations affects, or needs to affect the openness or otherwise of the family courts. We can therefore only offer our own comments.

3.17 The family courts deal with issues that are hugely sensitive to the people involved in them. This would not, in itself, be enough reason to restrict access and reporting of proceedings. But the involvement of children makes the difference and they are absolutely clear that they would not want any publicity about their cases. We can all

²² [Family Justice Review Interim Report](#), March 2011

²³ Cm 8189, [Government Response to Justice Committee's Sixth Report of Session 2010–12: Operation of the Family Courts](#), October 2011, p3

imagine, from our own childhoods, how devastating it could be at school and with friends (and other children who are not friends) if our family circumstances were laid out in the local or national media.

3.18 On the other hand, panel members who travelled to Australia were impressed by the way in which members of the public and those waiting for their own cases to be heard could sit at the back of the court while other proceedings were in progress. This had advantages in terms of parties – particularly people representing themselves – being able to see how their own cases would be handled, and no one we met identified any problems with it. The media in Australia are not permitted to report anything that identifies parties or expert witnesses.

3.19 Legislation in this area has to cover a range of circumstances and the detail of which cases can be open and which not (for example final adoptions) matters. In our view, based on our limited consideration of the issue, the general principle should be that people – including the media – should be able to attend court hearings but not be allowed to do or say anything that might identify the parties in public.

5 Justice Committee inquiry

On 14 July 2011 the House of Commons Justice Select Committee published its report, *Operation of the Family Courts*.²⁴

5.1 The Committee's recommendations

As part of its inquiry into the operation of the family courts, the Justice Committee considered media and public access to the family courts and the impact of the changes in the *Children, Schools and Families Act 2010* (CSFA 2010).

The Committee reported that it had not heard from any witness who was in favour of the scheme for media access in the CSFA 2010, although reasons for disliking the measures had varied. Representatives of the media considered that the approach in the 2010 Act actually reduced the amount that could be published, rather than increasing it. The process by which the legislation was developed was also “condemned”:

Several witnesses pointed out that the impact of the changes to the Family Procedure Rules had not been assessed before the new scheme had been drafted. Dr Julia Brophy, who carried out research on behalf of the Children's Commissioner on young people's attitudes to reporting proceedings in the family courts, describing the Act as “rushed [and] ill-thought out”, told us that the impact on the children involved in court cases had not been assessed before the 2009 Rule change either. Napo thought the legislative process was flawed. While Napo do “not oppose more information being published about Family Court decisions...we are concerned that these changes were rushed through in the ‘wash up’ before the dissolution of the last parliament. We are concerned that inadequate thought has been given to protecting the identities of children.”²⁵

Tim Loughton, the Children's Minister, had acknowledged the opposition to the measures, and the impact the way the legislation had been passed had on its quality:

I think it was a piece of legislation in haste, which managed, remarkably, to unite just about everybody in opposition to it—from the judiciary, who thought it could be too intrusive, to the children's charities, who thought it would compromise the welfare and

²⁴ Justice Committee, *Operation of the Family Courts*, 14 July 2011, HC 518 2010-12

²⁵ Paragraph 277 (footnotes omitted)

confidentiality of children, to the editors of newspapers, who felt that it did not go far enough and was a fudge. I remember having all of them in front of a Bill Committee giving evidence and united from completely different angles on why this was a wholly unsatisfactory fudge. It was always going to have to be returned to. It was legislation which was put through in haste.²⁶

The Committee acknowledged the need for transparency in the administration of family justice, and the equally important need to protect the interest of children and their privacy, but, in the light of the opposition expressed by witnesses, recommended that Part 2 of CSFA 2010 should not be implemented:

...our witnesses were united in opposing implementation of the scheme to increase media access to the family courts contained in Part 2 of the Children, Schools and Families Act 2010. While their reasons for doing so differed, and were sometimes contradictory, such universal condemnation compels us to recommend that the measures should not be implemented, and the Ministry of Justice begin afresh. We welcome the Government's acknowledgement that the way the legislation was passed was flawed, and urge Ministers to learn lessons from this outcome for the future.²⁷

Witnesses to the Committee disagreed on the best way to achieve greater openness and transparency in the family courts. The Committee considered two questions:

- what is the aim of greater openness in the family courts; and,
- how is that objective best achieved?

Evidence to the Committee indicated that the primary aim of greater openness in the family courts is increased public confidence. Some witnesses emphasised a lack of public confidence in the family courts. Others highlighted the child's right to privacy over their personal information; safety concerns arising from the publication of information that could identify the child involved; and the need for children to be able to speak freely to all those with a role in presenting their experiences and views to the court. The Committee noted that research on behalf of the Children's Commissioner had found that children and young people involved in cases in the family courts were unhappy at the suggestion that details of their cases could enter the public domain:

The research makes plain that children involved in family court cases fear identification by their community to such an extent that knowing a case may be reported in the media could inhibit them from giving vital information to family justice service professionals.²⁸

The Committee concluded that the principle that all decisions must be made in the best interests of the child should also apply to the formulation of media access policy:

There is a tension between allowing the media to publish even limited information about cases in the interests of increasing public confidence and a child's right to keep personal information about them and their experiences private. There is a danger that justice in secret could allow injustice to children, or a perception of injustice. We believe the underpinning principle of the family court system, that all decisions must be

²⁶ Paragraph 280

²⁷ Paragraph 281

²⁸ Paragraphs 288-290 (footnotes omitted)

made in the best interests of the child, must apply equally to formation of Government policy on media access to the family courts.²⁹

5.2 The Government's response

The Government published its response to the Justice Committee report in October 2011.³⁰

The Government accepted the recommendation that Part 2 of the *Children, Schools and Families Act 2010* should not be commenced at this time:

Ministers advised Parliament in October 2010 that no decision would be taken on commencement of these provisions before the outcome of the Family Justice Review. However, in light of the committee's findings, we have decided to bring forward that decision.

The Government stated that "this complicated and sensitive area of law" needed to be reviewed carefully, including gathering the views of children who have experience of the family courts. Further legislative change would not be brought forward in the near future but other measures would be considered:

We will instead look at measures that can increase the amount of publicly available information about the work of the family courts, including encouraging judges to publish more family court judgments. In particular, Ministers will examine the results of the family court information pilot, which trialled the online publication of family court judgments in an anonymised form.³¹

6 The Family Courts Information Pilot

The Family Courts Information Pilot ran from November 2009 to December 2010. It was designed to test the feasibility of providing written judgments to parties in certain types of family cases, and posting anonymised versions on a public website, the British and Irish Legal Information Institute (BAILII). The pilot also looked at options for retaining written judgments for later life access by children.³²

In September 2011, the Ministry of Justice published its review of the Family Courts Information Pilot.³³ The review found that there was support for greater transparency and better public understanding of the family justice system, but that there were concerns about the protection of the privacy of the families involved. It questioned whether there would be "any real benefit in a national roll-out which would include each and every case falling within the criteria, as tested in the pilot, or whether the cases to be published might be sampled in some way".

²⁹ Paragraph 294

³⁰ Cm 8189, *Government Response to Justice Committee's Sixth Report of Session 2010–12: Operation of the Family Courts*, October 2011

³¹ pp31-2

³² Ministry of Justice website, *Review of the Family Courts Information Pilot* (at 17 October 2011)

³³ Ministry of Justice, *The Family Courts Information Pilot November 2009- December 2010*