

Transparency in the Family Courts: The Reporting Pilot Rollout



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1. On 29 January 2024, the Family Court Transparency Reporting Pilot (“the Pilot”) will expand from three court centres, to almost half the Family Courts in England and Wales. Its expansion marks a watershed moment in the operation of the Family Courts, and many may feel some trepidation about this departure from the long-established confidentiality of such proceedings.
2. This note will provide a brief overview of the existing statutory framework governing attendance and confidentiality in the Family Courts before considering the Pilot and the associated ‘Transparency Order’ (from [67]), in the hope of demystify this brave new world.

Background

3. The default confidentiality of family proceedings is an exception to the principle of open justice which has long been the subject of considerable criticism, both from the press, who perceive ‘secret courts’ and from senior members of the judiciary. Successive Presidents have sought to address the difficulty in reconciling the apparent conflict between the confidentiality of the child, and the societal interest in transparency. In his report, “Confidence and Confidentiality: Transparency in the Family Court” (October 2021), Sir Andrew McFarlane P concluded:

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[35] My overall conclusion is that the time has come for accredited media representatives and legal bloggers to be able, not only to attend and observe Family Court hearings, but also to report publicly on what they see and hear. Reporting must be subject to very clear rules to maintain both the anonymity of the children and family members who are before the court, and confidentiality with respect to intimate details of their private lives. Openness and confidentiality are not irreconcilable, and each is achievable. The aim is to enhance public confidence significantly, whilst at the same time firmly protecting continued confidentiality.

4. Acting on his conclusions, the President convened the Transparency Implementation Group (TIG) in November 2021 and commenced the Transparency Reporting Pilot, which permitted the contemporaneous reporting of proceedings at three court centres (Carlisle, Leeds and Cardiff), in January 2023. This commenced with Care proceedings, but as of May 2023 the Pilot has also included private law proceedings in these court centres.
5. On 29 January 2024, the Pilot will be expanded to include:
 - (1) North West: Liverpool, Manchester;
 - (2) North East: West Yorkshire, Kingston-upon-Hull;
 - (3) Midlands: Nottingham, Stoke, Derby, Birmingham;
 - (4) London: Central Family Court, East London, West London;
 - (5) South West: Dorset, Truro; and
 - (6) South East: Luton, Guildford, Milton Keynes.
6. Simultaneously, a Reporting Pilot will commence in the Financial Remedies Courts ("FRC") at Birmingham, Leeds and the Central Family Court. It is not known to the author whether separate guidance will be issued in respect of the FRC Pilot in advance of its implementation. This note is prepared by reference to the existing guidance issued in respect of the Pilot in Children Act proceedings, much of which is likely to be transferrable.

The Statutory Framework Governing Confidentiality in the Family Courts

7. The Pilot represents a derivation from the established statutory framework which provides for the confidentiality of family proceedings. This is a complex area of law involving an overlapping tapestry of statutory provisions, rules and case law. The following is a brief summary of the primary provisions with which the Pilot interacts.

Permitted attendance at hearings held in private

8. Family Procedure Rule ("FPR") 27.10 provides that, subject to a rule, enactment or direction of the court to the contrary, proceedings to which the FPR apply shall be held in private.
9. FPR 27.11(2) sets out that where a hearing is held in private, no person shall be present other than:
 - (a) an officer of the court;
 - (b) a party to the proceedings;
 - (c) a litigation friend for any party, or legal representative instructed to act on that party's behalf;
 - (d) an officer of the service or Welsh family proceedings officer;
 - (e) a witness;
 - (f) duly accredited representatives of news gathering and reporting organisations; ...
 - (ff) a duly authorised lawyer attending for journalistic, research or public legal educational purposes; and
 - (g) any other person whom the court permits, or who is required by any practice direction, to be present.

10. Therefore, members of the accredited press may attend private hearings (either in person, or remotely) as of right unless the hearing, or that part of the hearing is held:
 - (1) for the purpose of judicially assisted conciliation or negotiation; or
 - (2) to consider a free-standing application under section 54A of the Human Fertilisation and Embryology Act 2008 or part 14 of the Family Procedure Rules

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(rules governing applications in adoption, placement and related proceedings)
(FPR 27.11(1)).

11. The court retains the power to exclude any person who would otherwise be permitted to attend (FPR 27.11(3)). This power may be exercised of the court's own motion or on application by any party, witness, the children's guardian (if appointed) or the child, if of sufficient age and understanding. Persons attending under the provision of FPR 27.11(2)(f) and (ff) should be invited to make representations on any such application and the court should give reasons for its decision (PD 27B 5.5). However, there is no expectation that the hearing should be adjourned to accommodate representations by members of the press who are not present at the hearing (PD 27B 6.1).
12. The grounds for exclusion are set out at FPR 27.11(3)(a) and (b) which state that the court may exercise its discretion where:
 - (a) *this is necessary—*
 - (i) *in the interests of any child concerned in, or connected with, the proceedings;*
 - (ii) *for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or*
 - (iii) *for the orderly conduct of the proceedings; or*
 - (b) *justice will otherwise be impeded or prejudiced.*
13. PD 27B 5, gives guidance on the exercise of the court's discretion under this provision. Perhaps of particular note is that the court should consider to what extent the risk (or risks) identified from the list in rule 27.11(3) can be addressed by the exclusion of the media or duly authorised lawyers from only part of a hearing or part of the proceedings. Clearly the emphasis is on ensuring the minimum possible interference with the attendance of the press.
14. However, the extent to which accredited members of the press or authorised lawyers can publish or otherwise communicate information relating to the proceedings that

they have observed is, absent the granting of a Transparency Order under the Pilot, governed by the same statutory framework which applies to all other attendees.

Statutory restrictions on communication or publication

15. The anonymity of the child is preserved by s. 97 of the Children Act 1989 ("s. 97 CA"), which provides:

(2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify:

(a) any child as being involved in any proceedings before the High Court or the family court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or

(b) an address or school as being that of a child involved in any such proceedings.

16. However, s. 97 CA ceases to have effect upon the conclusion of proceedings (**Clayton v Clayton [2006] EWCA Civ 878, [2005] Fam 83**). After this time, the only enduring statutory restriction on the disclosure of material relating to proceedings in the Family Courts is Section 12 of the Administration of Justice Act 1960 ("s. 12 AJA"), which provides that:

(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—

(a) where the proceedings—

(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;

(ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002; or

(iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;

(b) where the proceedings are brought under the Mental Capacity Act 2005, or under any provision of the Mental Health Act 1983 authorising an application or

reference to be made to the First-tier Tribunal, the Mental Health Review Tribunal for Wales or the county court;

...

(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

17. The nature and extent of the restrictions imposed by s.12 AJA was considered by Munby J in **Re Webster in Norfolk County Council v Webster [2007] 1 FLR 1146**, where the previous case law was drawn together at [49]:

There is no need on this occasion for any detailed exegesis of section 12. It suffices for present purposes to note that the effect of section 12 is to prohibit the publication of accounts of what has gone on in front of the judge sitting in private, as also the publication of documents (or extracts or quotations from documents) such as affidavits, witness statements, reports, position statements, skeleton arguments or other documents filed in the proceedings, transcripts or notes of the evidence or submissions, and transcripts or notes of the judgment. On the other hand, section 12 does not of itself prohibit publication of the fact that a child is the subject of proceedings under the Children Act 1989; of the dates, times and places of past or future hearings; of the nature of the dispute in the proceedings; of anything which has been seen or heard by a person conducting himself lawfully in the public corridor or other public precincts outside the court in which the hearing in private is taking place; or of the text or summary of any order made in such proceedings. Importantly, it is also to be noted that section 12 does not prohibit the identification or publication of photographs of the child, the other parties or the witnesses, nor the identification of the party on whose behalf a witness is giving or has given evidence.

18. **Re Webster [2007]** makes it clear that, in stark contrast to the provisions of s. 97 CA, s. 12 AJA is not concerned with protecting the anonymity of any party, witness or even the child who is subject to proceedings.

19. Further, in **A v Ward [2010] 1 FLR 1497 [112]**, Munby LJ considered in detail whether s. 12 AJA prevented the publication of all documents which have been 'before the court' and the proper construction of the words 'relating to proceedings'.
20. In essence, a document prepared solely for the purposes of proceedings is likely to be covered by s. 12 AJA, but the information contained within it, absent any context linking them to proceedings, is not. Likewise, documents prepared outside proceedings, which are later placed before the court are not brought within the restrictions of s. 12 simply by doing so.
21. FPR 12.73, 12.75 and PD 12G provide some specific exceptions to the restrictions set out above. While these are principally concerned with ensuring that parties are able to communicate with, or in less happy circumstances, to pursue complaints about, their legal advisors, the detailed provisions (which fall outside the scope of this note) reward examination.

The Reporting Pilot and Transparency Orders

22. The following is intended to provide a brief summary of the key aspects of the Pilot. Detailed guidance can be found in 'The Transparency Reporting Pilot: Guidance from the President of the Family Division' ("the Pilot Guidance") and updated in the 'TIG First Bulletin' published in April 2023. First hand consideration of these documents is recommended.

Hearings to which the Pilot applies

23. The pilot applies to:
 - (1) All applications for public and private law orders, including FDAC cases, and applications to enforce, vary or discharge existing orders;

- (2) All applications for Placement Orders where made within Care proceedings up to the point that the Placement Order is made, or the application for a Placement Order is otherwise concluded;
 - (3) All applications under the inherent jurisdiction of the High Court including deprivation of liberty cases;
 - (4) The Pilot only applies to proceedings in the Family Court or the Family Division of the High Court before, Lay Justices, District, Circuit, and High Court Judges. It does not extend to proceedings before the Court of Appeal.
24. The Pilot does not apply to applications under the Family Law Act. Nor does it extend to proceedings in the Financial Remedies Courts unless involved in the FRC Reporting Pilot (in Birmingham, Leeds and Central Family Court commencing 29 January 2024).

Contemporaneous reporting and anonymisation

25. The Pilot establishes an exception to s. 12 AJA in the participating court centres, permitting contemporaneous reporting of proceedings by accredited members of the press and authorised lawyers ("Pilot reporters"). This is referred to as the 'transparency principle'.
26. The transparency principle is subject to the 'anonymity principle', that the identity of any children involved in proceedings should be protected unless the judge orders otherwise.
27. The Judge may depart from the transparency principle in any case where appropriate, having regard for (and balancing) the parties' Articles 6, 8 and 10 rights as well as the Article 10 rights of the public and the media. It is likely that any such departure from the transparency principle will require the application of the 'ultimate balancing test' (***Re S (Identification: Restrictions on Publication)*** [2004] UKHL 47; [2005] 1 AC 593, at [17]) and associated line of case law relating to the publication and anonymisation of judgments.

28. In ***Tickle v Father and Ors* [2023] EWHC 2446**, Lieven J succinctly draws together and summarises the relevant case law ([22-41]) and principles ([42-52]) in this area. This judgment perhaps also highlights the existence of misunderstanding, even amongst parts of the judiciary, of the existing provisions relating to transparency in the Family Courts, including the *prima facie* right of the press to attend hearings held in private [6].
29. Attendance at hearings covered by the Pilot remains governed by FPR 27.11, including the power to exclude persons from the hearing under FPR 27.11(3). The First Bulletin clarified that Non-Lawyer Review Hearings in the FDAC cases are a form of judicial conciliation, and therefore, consistent with FPR 27.11, press attendance is not ordinarily permitted. Similarly, Financial Dispute Resolution appointments will be excluded from the FRC Reporting Pilot.
30. Where a pilot reporter attends, their names should be recorded on the order (as should the reasons for any decision to exclude them from the hearing). The Court will consider the making of a Transparency Order whenever there is such attendance, and may vary, discharge or otherwise restrict reporting at any time.
31. Reporters are encouraged to give the court and the parties (if known) notice of their plan to attend a particular hearing, by emailing the family inbox or telephoning the court. However, such notice is not required.
32. A standard form of Transparency Order was annexed to the Pilot Guidance and updated in the First Bulletin. It can now be found as a free-standing document on the Courts and Tribunals Judiciary website. It will ordinarily remain in place until any child to whom the proceedings relate reaches the age of 18. This creates an exception to s. 12 AJA while simultaneously strengthening the anonymity provided to the child by s. 97 CA, which would otherwise expire on the completion of proceedings.
33. The standard order restricts communication of the following information without permission of the court:

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- (1) The name or date of birth of any subject child in the case;
 - (2) The name of any parent or family member who is a party or who is mentioned in the case, or whose name may lead to the child(ren) being identified;
 - (3) The name of any person who is a party to, or intervening in, the proceedings;
 - (4) The address of any child or family member;
 - (5) The name or address of any foster carer;
 - (6) The school/hospital/placement name or address, or any identifying features of a school of the child;
 - (7) Photographs or images of the child, their parents, carer or any other identifying person, or any of the locations specified above in conjunction with other information relating to the proceedings. This includes photographs of the parents or other parties leaving the Court building;
 - (8) The names of any medical professional who is or has been treating any of the children or family members;
 - (9) In cases involving alleged sexual abuse, the details of such alleged abuse; and
 - (10) Any other information likely to identify the child as a subject child or former subject child.
34. In complex cases with a number of parties or children, the court is encouraged to include a schedule to the Transparency Order, setting out the permitted form of anonymisation (Child A, etc).
35. When considering the appropriate anonymisation of reporting, reference should be made to the President's 2018 'Practice Guidance: Anonymisation and Avoidance of the Identification of Children and the Treatment of Explicit Descriptions of Sexual Abuse of Children in Judgments Intended for the Public Arena'.
36. Unless the court orders otherwise, the following may be named:
- (1) The local authority;
 - (2) The director of children's Services (but not usually the social workers working directly with the family, including the Team Manager, unless the Court so orders);

- (3) Senior personnel at Cafcass, but not normal the reporting officer or the children's guardian in the case;
 - (4) Any NHS Trust;
 - (5) Court appointed experts;
 - (6) Legal representatives and judges; and
 - (7) Anyone else named in a published judgment.
37. The TIG First Bulletin clarified that ISWs instructed solely by the local authority are to be treated as employees of the local authority for the purposes of anonymisation, but where jointly instructed by the parties, they are to be treated as experts in the case and therefore not normally anonymised.
38. Finally, the Pilot provides retrospective permission for parties to invite reporters to proceedings, expanding the exceptions in FPRs 12.73, 12.75 and PD 12G.

Interviews with the press

39. Lawyers are permitted to approach the Pilot Reporters for the purposes of giving interviews if instructed to do so by their client (subject, as always, to their own professional codes of conduct and associated guidance). Conversely, any interview requests must be made through a party's lawyer (if represented).
40. While parties are permitted to discuss the case with Pilot reporters, and reporters are permitted to quote from such conversations (subject to the terms of the Transparency Order), the parties themselves are not permitted to publish information from the proceedings which would not otherwise be permitted under s. 12 AJA or the Rules of Court. This includes re-publishing any articles written about the case, if accompanied by comment that might identify the child concerned.
41. Particular care is urged before making a Transparency Order in cases subject to criminal charges, investigation or proceedings, applications made without notice, cases where the anonymity of the child will be particularly difficult to achieve or maintain and FDAC cases, in particular where there is no legal representation.

Access to documents

42. The Transparency Order should direct that Pilot reporters must be provided with a copy of the Transparency Order, and (upon request at or before the hearing) be permitted to see *and quote from*, documents drafted by the advocates (or parties if in person) such as case outlines, skeleton arguments, summaries, position statements, threshold documents and chronologies as well as the indices from the Court bundle. However, where these contain quotes from documents which the reporter is not entitled to see, such as source material, the reporter is not entitled to quote such passages without permission of the Court.
43. Documents are to be provided by the party or advocate responsible for drafting them. It is not expected that hard copies must be taken to court for this purpose and electronic service to a secure email address (provided by the reporter) is encouraged, either at the hearing or within a reasonable time thereafter. There is no requirement to redact the document and the onus is placed on the Pilot reporter to ensure that any quotes from the document comply with the terms of the Transparency Order.
44. The Court may permit further disclosure to Pilot reporters at the outset of the hearing to assist in their understanding of proceedings subject to a condition that their contents may not be reported.

Conclusion

45. The principles and provisions governing transparency, publication and anonymisation of family proceedings are complex and nuanced and have hitherto held some fear for more advocates than might care to admit it. The established case law, guidance and statutory framework around the anonymisation of published judgments will remain highly relevant in marginal cases where a 'standard' approach to anonymisation could result in jigsaw identification. However, the Pilot and associated Transparency Order

provide a clear and consistent template for increased transparency in the Family Courts which couples a presumption in favour of contemporaneous reporting with an appropriate framework of anonymisation to safeguard the confidentiality of subject children which will be suitable for the majority of cases. While considerations around reporting or publication will for the first time become a routine part of hearings for advocates in the Family Courts, these are likely, in time, to be navigated without fanfare.



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Law is correct as at 17 January 2024

Whilst every effort has been taken to ensure that the law in this article is correct, it is intended to give a general overview of the law for educational purposes. Readers are respectfully reminded that it is not intended to be a substitute for specific legal advice and should not be relied upon for this purpose. No liability is accepted for any error or omission contained herein.

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