

CHILDREN, SCHOOLS AND FAMILIES ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Family Proceedings

Section 11: Restriction on publication of information relating to family proceedings

45. **Section 11** provides for the proceedings which are to come within the new publication framework, and for the starting point that no information relating to such proceedings is to be published. There are three exceptions (authorised categories of information). These are authorised publications of relevant court orders or judgments or authorised news publications (both of which are covered in more detail in the sections which follow); and information the publication of which is authorised by rules of court (which will govern disclosure for various purposes much as is presently done by Part XI of the Family Proceedings Rules 1991, amended in April 2009).
46. **Subsection (1)** outlines which proceedings are covered. Family proceedings which the media, but not the general public, are entitled to attend will be included in the new framework.
47. **Subsection (2)** provides for the basic rule of no publication of information relating to proceedings within scope unless the publication comes within one of three authorised categories. It then sets out the three categories. Publication of information which is not within one of the authorised categories will be contempt of court (“publication” being defined in section 21 to include all instances of written and spoken communication, whether between two individuals or for mass consumption by way of press, broadcast media or internet, consistent with existing caselaw). **Subsection (3)** provides a saving for the general inherent jurisdiction of the court to permit publication, which is intended to allow the courts to continue the existing practice of permitting limited disclosures of information for specific purposes on a flexible basis which may not be covered in rules.
48. **Subsection (5)** is a transitional provision which applies the new regime to proceedings which fall under the definition of family proceedings at the time of commencement but later cease to be family proceedings because of changes to the definitions in section 65 of the Magistrates’ Courts Act 1980 and section 32 of the Matrimonial and Family Proceedings Act 1984 (referred to in subsection (4)).
49. **Subsections (4) to (9)** flesh out the detail of what “relevant family proceedings” are. “Family proceedings” will mean the same as in existing legislation, but “relevant family proceedings”, to which the new reporting scheme will apply, will not include the types of proceedings listed in **subsection (6)**, which are already subject to a different reporting regime (so the scheme under the 1926 Act is left in place for proceedings it already covers). The Lord Chancellor may by order amend the definition of “relevant family proceedings”, for example to bring new sorts of proceedings into the new reporting framework.

Section 12: Authorised publication of court orders and judgments

50. **Section 12** establishes what is an authorised publication of a relevant court order or judgment. These differ in their default position, as explained below.
51. *Subsection (1)* covers court orders, for which the default position is publication. Any publication of the text or a summary of the whole or a part of an order made in proceedings (other than adoption proceedings or parental order proceedings) which does not contain identification information (defined in section 21) relating to an individual involved in the proceedings is authorised, unless the court specifically directs otherwise. Thus, an order in relevant family proceedings other than adoption proceedings or parental order proceedings may be published provided it is anonymised or redacted so that no identification information relating to a person involved in the proceedings is included in the publication; but permission is required from the court to publish the identification information. Orders in adoption proceedings and parental order proceedings (defined in *subsection (5)*) may not be published unless the court expressly permits it and permission may be granted subject to conditions which the court may choose to impose (*subsection (4)* allows for the imposition of conditions).
52. *Subsection (2)* covers court judgments, for which the default position is non-publication. This (as with the similar position for orders in adoption or parental order proceedings) reflects the greater likelihood that the judgment will contain information which, if it were published, would carry a risk of harm to the welfare of a child or other person involved in proceedings. Any publication of the text or a summary of the whole or part of the judgment will be authorised only to the extent specifically directed by the court. Thus a judgment released for publication on the BAILII website, for example, will be publishable freely, while a judgment handed down with no other indication will not be publishable.
53. *Subsection (3)* allows for the court’s powers to permit, prohibit or restrict publication of orders and judgments to be exercisable not only on application but also on the court’s own initiative.

Section 13: Authorised news publications

54. **Section 13** makes provision for authorised news publications. There are five qualifying conditions for a publication to be classified as an authorised news publication. These can be summarised as that publication has to be—
- a) of information gathered by an accredited news representative through attending the proceedings;
 - b) by that representative, or with his consent or under a contract or similar arrangement, or taken from an existing authorised news publication;
 - c) not of identification information or sensitive personal information, unless expressly permitted by the court;
 - d) not of an order in adoption or parental order proceedings, or any judgment, unless expressly permitted by the court under section 12;
 - e) 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 under section 12.
55. Condition 1 (set out in *subsection (2)*) requires a news representative to be accredited. Section 21 defines “accredited news representative” to mean a representative of one or more news organisations who belongs to a class of representatives on which rules of court confer a right to attend the proceedings in question. The production of a UK Press Authority Card is set out in rule 10.28 of the Family Proceedings Rules 1991 as sufficient evidence of accreditation. Condition 1 also requires that the news representative acquired the information which is to be published by attending the

proceedings. Attendance at family proceedings is governed by rules of court: the Family Proceedings Rules 1991 (rule 10.28) were amended in April 2009 to give the media, but not the public more generally, a right to attend most family proceedings subject to discretion of the court to exclude their attendance in specific circumstances.

56. Condition 2 (set out in *subsection (3)*) requires publication to be by the accredited news representative who acquired the information, or with that representative's consent or pursuant to a contract or other agreement with that representative (for example, a report submitted to a newspaper by a staff journalist). Publication is also allowed by a person who has obtained the information from an authorised news publication (allowing further reporting of articles already classified as an authorised news publication).
57. Condition 3 (set out in *subsection (4)*) requires that the information is not "identification information" or "sensitive personal information" or "restricted adoption information" or "restricted parental order information"; or that if it is, then either the court has specifically permitted publication of the information, or the information identifies a professional witness and has not otherwise been specifically restricted by the court. "Identification information" and "professional witness" are defined in section 21, "sensitive personal information" in section 21 and Schedule 2 and "restricted adoption information" and "restricted parental order information" in section 15.
58. Condition 4 (set out in *subsection (5)*) in conjunction with Condition 5 (set out in *subsection (6)*), ensures that a publication of an order or judgment which would not qualify as an authorised publication within section 12 cannot qualify as an authorised news publication either.
59. Condition 5 (set out in *subsection (6)*) requires that the publication has not been prohibited by the court, and that it does not breach any restriction imposed by the court, either under the power of the court given in this subsection or under section 12(1)(b) in relation to an order.
60. *Subsection (7)* allows for the Court's powers to permit, prohibit or restrict publication of information under this section to be exercisable not only on application but also on the court's own initiative.

Section 14: Permitting publication for purposes of section 13: general

61. **Section 14** provides the conditions for the court to exercise its power to relax the automatic restrictions on publication of identification information or sensitive personal information (permitting publication of restricted adoption or parental order information is subject to different conditions provided for in section 15).
62. *Subsection (2)* requires the court to be satisfied of one or more of the matters listed in *subsection (3)* before it can permit the publication. The court is also required by *subsection (4)* to take account of any risk which publication would pose to the safety or welfare of any individual who is either involved in, referred to in or, more widely, connected with the proceedings. A person connected with the proceedings might be, for example, a relative of the child subject to care proceedings, who is not directly involved in the proceedings himself or herself but who frequently looks after the child.

Section 15: Permitting publication for the purposes of section 13: adoption etc

63. **Section 15** provides the conditions for the court to exercise its power to relax the automatic restrictions on publication of "restricted adoption information" or "restricted parental order information". This is information which would lead to the identification of any person as someone who is, or may be, an adopter or adopted person, or the equivalent for parental orders (as defined in *subsection (9)*). This includes information about the whereabouts of such a person.
64. *Subsection (4)* requires the court to be satisfied that the publication of any such information will not prejudice the welfare of the person subject to the adoption or

parental order where that person either is a child, lacks the capacity to consent to the publication or cannot be found. It should be noted that the reference to “welfare” does not relate to the upbringing of the child, and there is no intention in using that general term to indicate that the welfare checklist in section 1 of the Children Act 1989 is to be imported as a test.

65. *Subsection (5)* provides that where subsection (4) does not apply the court may not permit publication except with the consent of the person subject to the adoption or parental order.
66. *Subsection (6)* requires the court to have regard to whether any prospective or actual adopter of the child (or any parental order equivalent) has consented to the publication.
67. *Subsection (7)*, like section 14(4), requires the court to take into account any risk which publication would pose to the safety or welfare of any individual who is either involved in or, more widely, connected with the proceedings.

Section 16: Prohibiting or restricting publication for purposes of section 13

68. **Section 16** provides the conditions for the court to exercise its powers to impose restrictions on publication of information relating to the proceedings.
69. *Subsection (2)* requires the court to be satisfied that there is a real risk that publication would prejudice any one or more of three types of interest: the *safety* of any person, the *welfare* of a *child* or vulnerable adult, or the interests of *justice* in the proceedings in question. “Welfare” has the meaning explained in relation to section 15(4) (paragraph 64, above); and the reference to the interests of justice in the proceedings is intended to cover a wide range of matters, which might include undue impact on the privacy of a person involved in the proceedings.
70. *Subsection (3)* makes specific provision giving the court a power to restrict publication of information which would identify a professional witness. This information would otherwise be publishable in accordance with Condition 3 in section 13. This power may be exercised if the court is satisfied that the information published would lead to the identification of another person involved in or otherwise connected with the proceedings (other than another professional witness), or that the information is sensitive personal information relating to the proceedings. The power may also be exercised if the professional witness is, has been or will be, involved in providing care or treatment for a child or other person involved in or connected with the proceedings, other than for the purpose of being a professional witness. The court may also restrict publication on the ground of risk to safety of the professional witness or his or her family, under subsection (2).

Section 17: Defences to contempt of court

71. **Section 17** provides for defences available when information relating to proceedings has been published but is either automatically restricted or restricted by order of the court. The defences will not be available where the person publishing either knew, or had reason to suspect, that the information was restricted. Ignorance of the legislation will not be a defence.
72. There are three defences, all based on ignorance of the nature of the information. In *subsection (2)*, the defence is that the person did not know, and had no reason to suspect, that the information was information relating to the proceedings. In *subsection (3)*, the defence is that person obtained the information from a previous publication and did not know and had no reason to suspect that the previous publication was not an authorised news publication (for example, if it turned out that the previous publication involved information not all of which was obtained by an accredited news representative attending the proceedings in accordance with condition 1 in section 13, and the later publisher had no reason to suspect this). In *subsection (4)*, the defence is that, in a

case where all other conditions for a publication to be an authorised publication were met, except condition 3, the person did not know and had no reason to suspect that the information was identification information, sensitive personal information, restricted adoption information or restricted parental order information. (Condition 3 is defined above under section 13). The defence in subsection (4) would not be available to a person publishing in breach of a specific restriction imposed by the court.

Section 18: Appeals against decisions under section 12 or 13

73. **Section 18** ensures that provision will be made in rules of court, so far as is necessary, to provide for a system of appeals against decisions to permit or refuse publication.

Section 19: Power to alter treatment of sensitive personal information

74. This section introduces Schedule 1, which provides for amendments designed to change the way in which sensitive personal information is treated under the new reporting regime, from being a category of information which may not be published unless the court gives permission, to being information which, together with other information which is not identification information, may be published unless the court prohibits or restricts publication. These “Part 2 amending provisions” (as they are referred to in *subsection (2)*) include changes in the test which is to apply where the court is considering whether to restrict or prohibit the publication of information in section 16(2), to reflect the fact that information which is more sensitive will be more frequently in issue.
75. The Part 2 amending provisions will have effect only when commenced. *Subsections (3) to (6)* provide for preconditions for the exercise of the power to make an order commencing those provisions, to reflect the fact that the move in sensitive personal information from the starting version of the Act to the amended version is a significant one. The Lord Chancellor must first allow for a period of 18 months to elapse from commencement of section 11 (for any purposes, so that if it is commenced in relation to certain kinds of court, for example, that will start the time period running), and can then (and only then) arrange for a review of the operation of the reporting regime. The review must be carried out not by the Lord Chancellor, but by an independent person appointed by the Lord Chancellor; and the independent person must carry out public consultation as part of the review. A report setting out the conclusions of the review must then be laid before Parliament. Only when all three preconditions (18 month period, review by independent person, laying of report) have been fulfilled may the Lord Chancellor make the commencement order bringing the Part 2 amending provisions into force; and the commencement order itself is subject to affirmative resolution procedure. The Lord Chancellor does not have to commission a review or lay a report before Parliament; but may not commence the Part 2 amending provisions without having done so.

Section 20: Independent review

76. The Part 2 amending provisions will have effect only when commenced. *Subsections (1) and (2)* of section 20 provide preconditions for the exercise of the power to make an order commencing those provisions, to reflect the fact that the Part 2 amending provisions are significantly different from the Part 2 provisions themselves. Not only must the Lord Chancellor first (as with the precondition in subsection (4) of section 19) allow for a period of 18 months to elapse from commencement of section 11, but also a full review of the findings from the pilot scheme for publication of judgments in family proceedings must have been completed. Only when both conditions have been fulfilled may the Lord Chancellor commission an independent review and evaluation of the operation of the reporting regime.
77. This independent review and evaluation must include an evaluation of Part 2 of the Act and the impact of the changes to rules governing media attendance at family proceedings made in April 2009. A report setting out the conclusions of the review must

then be laid before Parliament. Only when all three preconditions (18 month period, independent review, laying of report) have been fulfilled may the Lord Chancellor make the commencement order bringing the Part 2 amending provisions into force; and the commencement order itself is subject to affirmative resolution procedure. The Lord Chancellor does not have to commission a review or lay a report before Parliament; but may not commence the Part 2 amending provisions without having done so.

Section 21: Interpretation of Part 2, etc

78. **Section 21** defines various terms used in the preceding sections. *Subsection (1)* defines specific terms; *subsection (2)* supplements the definition of “identification information” by listing matters, particulars of which will be identification information in relation to an individual if they are likely to lead members of the public to identify the individual; *subsection (3)* explains the meaning of “involved in the proceedings”; and *subsection (4)* empowers the Lord Chancellor to amend subsection (1) to change the definition of professional witness and the list of sensitive personal information set out in Schedule 2, by statutory instrument subject to affirmative resolution procedure (see *subsection (6)*).
79. The definition of “identification information” refers to “someone who is or has been involved in or otherwise connected with the proceedings”. This reference to “has been” confers indefinite anonymity on those who have been involved in, referred to in or otherwise connected with the proceedings (with the exception of professional witnesses, as defined in section 21).
80. *Subsection (7)* provides for courts to retain their existing powers, other than under these sections, to prevent or restrict the publication of information in relevant family proceedings. These may relate to different sorts of confidential information, for example.
81. *Subsection (8)* is a transitional provision which applies the new regime to proceedings commenced or still active after the legislation comes into force but leaving the existing law to apply to proceedings which were concluded before the commencement of the legislation.