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On November 19 2009 the Government published the Children, Schools and Families Bill, which includes new provisions relating to media attendance of and reporting of family proceedings. The provisions principally relate to cases involving children.

The proposals come in two stages. The first, which would be implemented without delay, expands to a limited extent the scope of information which can be published about family cases. It also broadens the range of cases which accredited media representatives are entitled to attend to include the first stage of adoption proceedings at which children are freed for adoption.

The second stage, which would only be implemented after a delay of at least 18 months and a review of stage 1, would radically change the current reporting regime, and would sweep away most of the restrictions currently in place.

The provisions also tighten the restrictions on identifying those involved in most family proceedings. Under the existing law, the only restriction on identifying parties and witnesses in most family cases is that contained within s97 of the Children Act, which prohibits publications during the currency of proceedings which would identify children as being involved in those proceedings[1]. Under the new provisions, any party to or witness in those family cases covered by the Bill would be granted anonymity. That anonymity would be lifelong. This is a major change.

It had been widely anticipated that the government would seek to widen media access to documents from family cases. However, the Bill says nothing about access to documents. The current regime, under which the media has no presumptive right to see any documents, but the court may permit access if a request is made, would therefore remain unchanged[2].

Stage One
The provisions in the Bill as to what, during stage one, can be reported, by whom and in what circumstances are highly complex. Most significantly, they permit publication of information about most family proceedings which is not 'sensitive personal information relating to the proceedings'.

'Sensitive personal information' is defined in the Bill as being

- information given by a child involved in or referred to in the proceedings to someone expected to be a witness, or information given by the child which is expected to be referred to in the case; or
- information relating to a medical, psychological or psychiatric condition of any person and which is expected to be referred to in the case; or
- information which relates to a medical, psychological or psychiatric examination of any person, and which is expected to be referred to in the case; or

- information relating to health care, treatment or therapy which is being, has been or is proposed to be given to any person and which is expected to be referred to in the case.

These categories are of wide compass. They include not just evidence actually relied upon in a case, but extend to information which is expected to become evidence. Most cases involving children are likely to turn on consideration of evidence which falls within these provisions.

The Bill sets out the circumstances in which the court may permit publication of 'sensitive personal information'. These are where (a) publication is in the public interest; or (b) publication is appropriate to avoid injustice to a person involved in the case; or (c) publication is necessary in the interests of a child or vulnerable adult involved in the case; or (d) the application to publish is made by a party or on behalf of a child who is subject of the case, and publication is appropriate in all the circumstances. In assessing such application, the court must have regard to the 'safety or welfare of any individual involved in the case'.

Thus, in so far as 'sensitive personal information' is concerned, the proposals would appear to be more restrictive than the regime currently in place. At present, courts have a broad discretion when considering whether to permit publication of any class of information from family proceedings[3]. The court must balance the Convention rights engaged, and in conducting that exercise the welfare of the child will be a crucial consideration. However, at present the court need not be satisfied that any of the specific criteria included in the Bill are met.

A further feature of the new regime is that permissible reports – labelled 'authorised news publications' by the Bill – are only allowed where

- The information was obtained by an accredited news representative who attended the Family Court hearing; and
- The information was published by that representative, with the consent of or pursuant to a contract with that representative, or the publication repeated a previous 'authorised news publication'.

These curious provisions appear to be directed at ensuring that information about proceedings can only be published if a media representative has attended the case. This means that if a party or witness wishes a newspaper to report what has happened in a case, he must ensure an accredited journalist is there during the hearing. He cannot go to the press and report what happened, or at least not without the permission of the judge.

Further, these provisions appear to afford exclusivity, at least for initial reports, to publishers whose journalists took the trouble of attending cases. They may give rise to awkward questions in newsrooms as to whether stories put into the public domain by, for example, a blogger were properly 'authorised' and can therefore be repeated in a newspaper. They could lead to difficult enquiries about the contractual arrangements between media organisations and, where questions are asked about how stories were obtained, to problems about disclosing journalistic sources[4].

The overall effect of the interim regime under stage 1 could therefore be to make it more, not less, difficult to report family cases involving children. The byzantine nature of the provisions (of which the above is only a partial summary) will make publishers tread very carefully, particularly given that falling foul of the provisions is a contempt – although the Bill does set out various defences available where contempt is alleged.

Stage 2

The Bill states that Stage 2 would only be reached after a delay of 18 months, and only after the Lord Chancellor has carried out a review of stage 1, and put these conclusions in a report which has been laid before Parliament.

Under stage 2, the restrictions on publication of 'sensitive personal information' would be removed. Thus

the media could report anything from most family proceedings unless the court orders otherwise.

The Bill provides that the court may only prohibit or restrict the publication of information which could otherwise be published if there was a real risk that publication would prejudice the safety of any person, the welfare of a child or vulnerable adult or the interests of justice in the proceedings.

This would obviously represent a radical change to the existing regime. It would also seem to make it more difficult for a party to restrict the publication of information from family proceedings than is the case in, for example, proceedings in the Queen's Bench Division[5].

The stringent restrictions on identification of parties and witnesses would, however, remain in place. All professional witnesses could be also named – under stage 1, only those professional witnesses who had been paid to give evidence (i.e. not practitioners such as treating nurses and A&E doctors) would be identifiable.

Conclusion

The Bill is intended to increase transparency in family proceedings while bolstering the regime for ensuring the anonymity of participants in family cases. It is questionable whether the convoluted interim regime introduced under stage 1 will achieve this end. It would seem that any debate as to the difficult and pressing question, which is whether the media should be allowed to report family cases, is to be deferred until stage 1 has been in place for at least 18 months, i.e. until well into the next Parliament.

Adam Wolanski is a barrister specialising in media law at **5RB**. He has appeared in numerous cases concerning media access to family courts. He was amicus curiae in Re Child X (Residence and Contact – Rights of media attendance) [2009] EWHC 1728 (Fam), and appeared in Clayton v Clayton, Norfolk County Council v Webster and Kent CC v B.

Notes

[1] **Clayton v Clayton** [2006] EWCA Civ 878; [2006] Fam 83
[2] **President's Guidance**, 22 April 2009
[3] **Norfolk County Council v Webster** [2006] EWHC 2733 (Fam); [2007] EMLR 199
[4] See section 10 Contempt of Court Act 1981
[5] CPR 39.2