

Disclosure of information from financial remedy and children proceedings

Resolution's response to the Family Procedure Rule Committee

Resolution's 6,500 members are family lawyers, mediators and other family justice professionals, committed to a non-adversarial approach to family law and the resolution of family disputes.

Resolution members abide by a [Code of Practice](#) which emphasises a constructive and collaborative approach to family problems and encourages solutions that take into account the needs of the whole family, particularly the best interests of any children.

Resolution is committed to developing and promoting best standards in the practice of family law amongst both its members and amongst family lawyers in general.

We also campaign for better laws and better support and facilities for families and children undergoing family change.

This response has been prepared by our Children and Finance, Pensions and Tax Committees, with input from our International Committee.

Children Proceedings before a Transparency Order is made

1. Should some/all/any written information from proceedings that would normally be disclosable under the template Transparency Order (as provided for in Practice Direction 12R), be disclosable by a party to a Reporter before a Transparency Order has been made without amounting to contempt of court:

(i) Before the Reporter attends a hearing (e.g., to help them decide whether to attend)?

No, this potentially goes too far in the case of children proceedings.

We welcome the Transparency Order process and the clarity it provides on whether disclosure is allowed or not. If a Transparency Order has not been made there would still be concern about being in contempt of court.

We have concerns about disclosure of any written information or documentation without specific court authorisation and some advance warning, especially the potential risk of the inadvertent sharing of sensitive information and the potential for abuse, particularly in cases involving domestic abuse allegations where a party may seek to use the proceedings and disclosure of information to perpetuate ongoing post separation abuse. It would be very concerning if a party was unaware that information referencing proven or alleged behaviours, or one party's mental health, had been released by the other.

We are unclear how this would sit with police disclosure and where an undertaking would be required from a Reporter.

There are also potential risks of litigants in person not understanding what information would normally be disclosable under the template Transparency Order, and what is not to be disclosed without the court's permission.

The current PD require Transparency Orders to be specific - this seems right to us. The considerations for the court set out in paragraph 7 are important and there for good reason.

Members of our Children Committee have suggested that Transparency Orders could perhaps be considered and made if the court wishes to do so earlier at the gatekeeping stage to provide clarity on what can be disclosed, with any objections to the order made required to be based on specific grounds such as human rights arguments. Others have suggested that parties should be required to give other parties notice of an intention to provide written information or documents to ensure there is an opportunity to object. We doubt though that any separate hearing on transparency only to review the making of a Transparency Order or proposed disclosure would be covered by legal aid.

Generally, we would ask the Family Procedure Rule Committee to have in mind the resource and funding impact of making any changes in legally aided children cases, in particular the unremunerated time involved in considering disclosure, liaising with reporters, and undertaking redaction. In most cases this work will fall within fixed fees and, unless matter escapes, will simply have to be absorbed by the legal aid provider's firm.

(ii) When the Reporter attends a hearing (remotely or in person)?

Some of the same concerns as outlined in response to question 1(i) apply. If the Reporter is already in attendance, is there much to be gained by all concerned not waiting for a clear Transparency Order to be made?

If all the parties are attending a hearing in person, the attendance of the Reporter in person would generally aid all parties and the Reporter to have a shared understanding of the position.

(iii) In each scenario, what practical issues or safeguards should be considered?

In our Children Committee members' experience, litigants in person often don't understand the current position around transparency and contempt of court, and require more guidance.

In both scenarios safeguarding against lack of understanding by unrepresented parties, and the sharing of sensitive information or of information by a party to the proceedings intended to cause distress and harm to another party in the proceedings should be considered.

Without clear guidance and the clarity of a Transparency Order, we consider that parties and indeed any legal representatives would likely take a cautious approach, potentially delaying appropriate transparency measures. The Transparency Order naturally takes care of appropriate safeguards along with appropriate redactions.

Implementing a Transparency Order process from the earliest stage, rather than allowing what would amount to informal disclosures, could provide clearer guidance and help to avoid these potential issues. Otherwise, consideration should be given to whether disclosure of written information should require notice to the other parties before disclosure. The practical issue of legal aid provision around any setting aside objections hearings would however need to be addressed.

We would also bring to the Family Procedure Rule Committee's attention the potential challenges and complications faced by legal professionals when dealing with media inquiries and/or managing clients without proper Transparency Orders in place. This already arises, for example, where a client wants to speak to the media but their solicitor advises against it.

Generally, it would be helpful for there to be more information and guidance on how information is to be kept by Reporters, what should happen to it at the end of a hearing/proceedings and the timeframe for it to be disposed of. 'No longer than necessary' seems to us to be too open ended.

2. Should information about the proceedings be disclosable orally to Reporters, before a Transparency Order has been made, without amounting to contempt of court:

(i) Before the Reporter attends the hearing (e.g., to help them decide whether to attend)?

No.

We assume that this question also only applies to information normally disclosable under template Transparency Orders. We are even more concerned about information about the proceedings being disclosable orally to Reporters pre-hearing, with the potential for oral information disclosure to lead to litigation and disputes over what was disclosed/ who said what when taking up court time and increasing costs. We doubt that the scope of legal aid would currently extend to covering transparency related hearings leaving vulnerable parties unrepresented when dealing with those arguments.

The potential to continue the abuse of victims of domestic abuse through information being shared orally (without an order and any paper trail) is also of real concern to us. The motives for the sharing of information will not always be good or clear, and if it can all be done orally, that raises risks.

How would oral information shared with a Reporter be properly recorded, and by whom? There is too much potential for oral information to be inaccurate or misinterpreted. Parties often get it wrong. This all seems potentially difficult to police.

(ii) When the Reporter attends the hearing (remotely or in person)?

No, again we would not be comfortable with this.

(iii) In each scenario, what practical issues or safeguards should be considered?

Reporters might need to be obliged to keep notes of their conversations, while we note that reporters traditionally protect their sources.

Again, we consider that clarity through a Transparency Order process from the outset is preferable to allowing unsupervised disclosure, and the risks of information being shared inaccurately or inappropriately. A structured approach with specific court oversight at the gatekeeping stage would better serve transparency goals while protecting parties' privacy.

Please also see our response to question 1(iii).

3. If (following from question 1) written information is capable of being shared by a party with a given Reporter without amounting to contempt, should that Reporter be able to share that information with other Reporter(s) before a Transparency Order is made?

No, that Reporter should not be able to share that information with other Reporter(s) before a Transparency Order is made. Otherwise, where does it stop and what should the restrictions be? This would seem to us to muddy the waters too much, and be too removed from Transparency Orders which are specific to a journalist and who they are working for.

Seeking the consent of all parties and maintaining a clear record if any sharing were to occur and limited disclosure to Reporters as currently defined by the PD would seem to us to be essential, with clarity on how any written information will be stored and for how long. But how would any record be accessed?

We are also concerned that parties might not even know that information had been shared further unless a court order has been made covering such. They could never be sure who has the information.

(i) If yes, should there be any restrictions about if/when one Reporter may disclose to another?

Not applicable.

4. If (following from question 2) oral information is capable of being shared by a party with a given Reporter without amounting to contempt, should that Reporter be able to share that information with other Reporter(s) before a Transparency Order is made?

No, this would go too far. There is surely too much potential for oral information to be inaccurately shared or misinterpreted when transmitted to and between Reporters. And please see our response to question 3.

(i) If yes, should there be any restrictions about if/when one Reporter may disclose to another?

Not applicable.

5. Should it be possible for a party to discuss their case (before a hearing, so before a Transparency Order has been made) with a media representative who does not have UK Press Card Authority, without that amounting to contempt of court?

No, the same concerns as set out above would apply in terms of discussions before a hearing and before a Transparency Order is made. And including those without UK Press Card Authority would bring more risk. Anyone could call themselves a journalist or media representative. We have concerns about unregulated organisations and lack of control around the use of information.

We also think this would present too many challenges around data privacy and different approaches to data protection between different jurisdictions. At least equivalence to our UK Press Card Authority and/or a very clear definition of accreditation for foreign members of the press (which Resolution is not in a position to suggest), and data protection regulations would need to be in place. Any provision under this theme would require

Our International Committee has advised that once the proceedings are disclosed in another jurisdiction, it will be difficult to retain any privacy in this jurisdiction, for children or finance proceedings, irrelevant of any Transparency Order/ reporting restrictions made by the family courts here. As foreign media are outside the jurisdiction of the English court, they may consider themselves at liberty to publish the identities of the parties even if an order restricting publication is made, and there is a particularly high risk of such identification on social media. Even if nothing is reported in the UK media which could in itself lead to identification of the parties, there is a real risk that information about who the parties are will leak out, enabling identification to occur overseas:

- Other jurisdictions may have very different attitudes to whether family proceedings are generally confidential – for example in France and Spain you can read details of some family cases which we would not be publishing in general. It cannot be assumed that an overseas journalist would have a generalised “understanding” of the confidentiality which attaches to our family proceedings. Generalised expectations of privacy are very different and most overseas companies would not know the rules on contempt of court or have any idea if they were doing anything wrong.
- Cases which are newsworthy to the overseas press are not necessarily obvious to us which makes it difficult for the court to predict which cases may be problematic. A classic example would be a placement order made in relation to a child of overseas nationals. In much of the world an adoption order without parental consent is simply not possible and reporting can cause outrage elsewhere.

- Our International Committee’s experience of the overseas press is that many of the journalists are “stringers” such that they are independent and so have every reason to provide as much salacious detail as possible or they cannot sell their stories to the overseas media companies. For the purposes of attempting to penalise any breach of a Transparency order the only threat is often only imprisonment as they will have no assets in this jurisdiction. If they leave the country then of course there is absolutely no penalty for a breach of a Transparency order and for the right case the financial benefit may outweigh the fact that they have to leave the country – remembering of course that there is no extradition for contempt of court.

It is also the case that some countries have a very different approach to confidentiality in relation to lawyer to lawyer confidentiality. Press reporting could inadvertently cause foreign lawyers to breach their confidentiality conduct rules.

In our strong view, the position as set out in paragraphs 15 and 16 of the consultation paper is sufficient.

If yes:

Not applicable.

- (i) Should this only be in specified circumstances, for example if their case has an international element such that there may be interest in reporting on it outside of the UK?**
- (ii) Should the person have to meet specified criteria? If so, what should they be?**
- (iii) Should this include both written and oral information?**
- (iv) Are there data privacy or cross border data transfer concerns that need to be addressed?**

Financial remedy proceedings before a Transparency Order is made

1. Should some/all/any written information from proceedings be disclosable by a party to a Reporter before a Transparency Order has been made without amounting to contempt of court:

- (i) Before the Reporter attends a hearing (e.g., to help them decide whether to attend)?**

Important context is the lack of retrospective permission provided for in the template Transparency Order for financial remedy proceedings. We do not consider retrospective permission should be available, instead clearer guidance should be available at the outset as to what is disclosable. The danger of retrospective permission is to excuse behaviour that would otherwise be a serious breach of the implied undertaking as to confidentiality (Clibbery v Allan [2002] EWCA Civ 45).

Our Finance, Pensions and Tax Committee consider that given the serious restrictions imposed by the existing guidance on Transparency Orders, as to what documents are provided even after the making of an order, no written documentation should be disclosable

to a Reporter before a Transparency Order has been made, be it prior to attending or when the Reporter attends. Insofar as written information, we consider this should be limited to: the parties' names (as they appear on the court list) and a neutral assessment of the issues in the case, albeit we have concerns about how unrepresented parties may deal with this. This is expressly on the basis that no written documentation be provided.

Generally, we would ask the Family Procedure Rule Committee to have in mind the resource and funding impact of making any changes in legally aided children cases, in particular the unremunerated time involved in considering disclosure, liaising with reporters, and undertaking redaction. In most cases this work will fall within fixed fees and, unless matter escapes, will simply have to be absorbed by the legal aid provider's firm.

(ii) When the Reporter attends a hearing (remotely or in person)?

Please see our response to Question 1(i) immediately above.

(iii) In each scenario, what practical issues or safeguards should be considered?

Upon a Transparency Order being made, we endorse the President's guidance dated 11.12.2023 at paragraphs 26-27. The Transparency Order naturally takes care of appropriate safeguards along with appropriate redactions.

2. Should information about the proceedings be disclosable orally to Reporters, before a Transparency Order has been made, without amounting to contempt of court:

(i) Before the Reporter attends the hearing (e.g., to help them decide whether to attend)?

Please see our response to question 1 immediately above.

Prior to a Transparency Order being made, a Reporter can be told of the parties' names (as they appear on the court list) and a neutral assessment of the issues in the case. We suggest this is something that should be capable of being communicated to a Reporter in advance of the hearing, preferably in writing for the sake of transparency.

It is essential that the neutral assessment of the issues in the case is in effect anonymous and in no way jeopardises the confidentiality of the proceedings or the information disclosed therein.

In the event one party objects to the information being shared, this can be addressed at the start of the hearing and if necessary, appropriate restrictions placed on what the Reporter can report.

(ii) When the Reporter attends the hearing (remotely or in person)?

The extent to which information, beyond the above, is provided to the Reporter should they attend the hearing, is already provided for by existing guidance and any further information/documentation can be the subject of discussion as to the scope of a

Transparency Order. We do not consider a Reporter should have an entitlement to receive any further information without a Transparency Order first being made.

(iii) In each scenario, what practical issues or safeguards should be considered?

By way of practical safeguard, we suggest that should either party seek to inform a Reporter of a hearing, they seek to agree the narrative of any neutral assessment of the issues in the case to be shared with the Reporter with the other party in advance. In the event that there is an oral conversation where one party is not present/represented, an attendance note of that oral conversation should be provided and/or Reporters might need to be obliged to keep notes of their conversations.

3. If (following from question 1) written information is capable of being shared by a party with a given Reporter without amounting to contempt, should that Reporter be able to share that information with other Reporter(s) before a Transparency Order is made?

No, our Finance, Pensions and Tax Committee would consider it fundamentally inappropriate for a Reporter to have licence to share information with whichever other Reporter they choose. The Reporter should seek consent to share the information with third parties from both parties to the litigation.

In seeking consent, the Reporter should identify the third party and their credentials, the expectation being that only an accredited member of the press may be nominated to be passed information.

If consent is not provided by one or both parties, this can be a preliminary issue at the start of the hearing.

(i) If yes, should there be any restrictions about if/when one Reporter may disclose to another?

See our response to question 3 immediately above. This should only be possible with the consent of both parties. Maintaining a clear record if any sharing were to occur and limited disclosure to Reporters as currently defined by the PD would seem to us to be essential, with clarity on how any written information will be stored and for how long.

4. If (following from question 2) a party can discuss their case with a Reporter without that amounting to contempt, should that Reporter be able to share that information with another Reporter(s) before a Transparency Order is made?

No, our Finance, Pensions and Tax Committee would consider it fundamentally inappropriate for a Reporter to have licence to share information with whichever other Reporter they choose. The Reporter should seek consent to share the information with third parties from both parties to the litigation.

In seeking consent, the Reporter should identify the third party and their credentials, the expectation being that only an accredited member of the press may be nominated to be passed information.

If consent is not provided by both parties, this can be a preliminary issue at the start of the hearing.

(i) If yes, should there be any restrictions about if/when one Reporter may disclose such information to another?

See our response to question 4 immediately above. This should only be possible with the consent of both parties. Maintaining a clear record if any sharing were to occur and limited disclosure to Reporters as currently defined by the PD would seem to us to be essential, with clarity on how any written information will be stored and for how long.

5. Should it be possible for a party to discuss their case (before a hearing, so before a Transparency Order has been made) with a media representative who does not have UK Press Card Authority, without that amounting to contempt of court?

No. In principle, transparency only works where reporters are trusted. An accreditation is key to that sense of trust. It suggests regulation and accountability. Complaints against UK press can be made to IPSO or IMPRESS. Foreign media representatives would not be regulated by these regulators and so would be beyond domestic sanction for improper behaviour. There are broader concerns about the enforceability of say contempt of court.

And please see our response to Question 5 in relation to children proceedings.

In any event, given we consider there should be such a strict limitation on what can be discussed in advance of a Transparency Order, this is potentially academic.

If yes:

- (i) Should this only be in specified circumstances, for example if their case has an international element such that there may be interest in reporting on it outside of the UK?**
- (ii) Should the person have to meet specified criteria? If so, what should they be?**
- (iii) Should this include both written and oral information?**
- (iv) Are there data privacy or cross border data transfer concerns that need to be addressed?**

Financial remedy proceedings after a Transparency Order is made

1. Are there any additional categories of documents that could (or should) be disclosable to Reporters beyond those listed in the Financial Remedy Pilot and template financial remedy Transparency Order?

Once a Transparency Order is made, we consider it 'safer' for a broader range of documents to be disclosed. The objective behind any disclosure has to be ensure that the Reporter has a sufficient understanding of the case, its issues and the basis for those issues to be able to report fairly and properly, without jeopardising the parties' confidentiality.

We suggest that the documents below should be considered for disclosure beyond what is provided for by the current guidance (with suitable redactions/confidentiality provisions). However, disclosure will need to be determined on a case by case basis.

- ES2 (as a minimum, addresses and company names should be removed).
- Expert reports where a disputed valuation/issue is at the crux of an important issue in the case (i.e. not merely just a disputed value). However, the confidentiality of the document takes precedence over its legibility, i.e. if redactions mean that the document becomes impossible to understand then the document would not be disclosable.

(i) If yes, should any specific redactions be required before disclosure?

If it is felt that proper confidentiality cannot be preserved by the terms of the Transparency Order itself, then the documents will need to be redacted.

As a default minimum level of redaction, we consider that the names of children, their schools and the parties' places of work should be redacted, together with any information which might lead to their identification by jigsaw identification. As set out in response to question 1 immediately above, any documentation containing financial information should also be redacted to remove reference to addresses and company names and again any information which might lead to their identification by jigsaw identification. Private financial information like bank account numbers should also be removed.

(ii) Who should be responsible for carrying out any necessary redactions?

Any necessary redactions should be undertaken by the parties' legal representatives. If only one party is legally represented, their legal representative should probably undertake this task.

Again, generally, we would ask the Family Procedure Rule Committee to have in mind the resource and funding impact of making any changes in legally aided children cases, in particular the unremunerated time involved in considering disclosure, liaising with reporters, and undertaking redaction. In most cases this work will fall within fixed fees and, unless matter escapes, will simply have to be absorbed by the legal aid provider's firm.

For further information please contact:

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