

'Media Access to Family Courts' Pilot Scheme

Consultation Response

Introduction

1. The Bar Council is the regulatory and representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.
2. The Bar welcomes the opportunity to comment on the 'Media Access to Family Courts' Pilot Scheme proposal prepared by the shadow Family Justice Board Sub-Committee on Media Access to Family Courts. Representing the views of counsel working in every tier of the family courts, the Family Bar Association serves to ensure an independent and quality source of specialist legal advocacy in this area. The Bar previously provided a detailed [response](#) to the Review of Family Justice launched by the Lord Chief Justice and Lord Justice Gillen in 2017 which includes comments on the chapter focusing on open justice. The Bar welcomes the engagement to date by the Senior Family Judge on this topic and the FBA has been represented on the Sub-Committee during the development of the pilot proposals by Vice-Chair Andrew Magee BL.

Q1. Do you agree that, due to the sensitive nature of the cases involved, access to cases which fall under the pilot should be restricted to an agreed subset of journalists? Please give reasons for your answer.

3. The Bar recognises that concerns exist that the family courts are lacking in transparency and promoting media scrutiny may help to address public confidence and foster a greater understanding of the work of the family justice system across wider society. Cases heard within the Family Division of the High Court require the utmost sensitivity given the challenging nature of this area of law which often involves highly emotive and complex issues. Barristers representing all parties in these proceedings are acutely aware of the potential impact of this on the children and families involved. It is therefore vital that media access must be restricted to an agreed subset of accredited journalists who are permitted to attend cases listed for hearing and judgment during the pilot. Members broadly agree with the suggestion in the paper that these journalists must be 'accredited' individuals who can provide evidence of appropriate

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credentials and demonstrate an understanding of the sensitive and complex nature of the issues dealt with in these proceedings.

4. We also welcome the recognition at paragraph 2.8 that certain sensitive hearings will not be open to the media as part of this pilot, including placement and adoption order hearings, Financial Dispute Resolution hearings, some first hearings in children private law proceedings, Judicially assisted conciliation meetings and any hearings where the judge has previously decided that the media should be excluded from the entire proceedings or for that particular hearing.

Q2. Do you agree that the accreditation protocol at Annex C provides sufficient reassurance that participation in the pilot will be restricted to journalists with legitimate reporting interests in family cases? Please give reasons for your answer.

5. The Bar notes that the draft 'Protocol for Media Accreditation and Registration' at Annex C stipulates that individuals must register for the pilot with the Office of the Lord Chief Justice. Each individual journalist must provide valid press credentials, including a letter signed by the Editor of an independently regulated media organisation, a signed copy of the Memorandum of Understanding at Annex A and photographic identification. We also note that judicial discretion can be exercised to grant registration to any journalist who does not possess an Editor's letter but can "demonstrate a track record of responsible reporting evidenced by articles published in mainstream media organisations". Members are confident that each accreditation will be considered on a base by case basis ensuring that appropriate scrutiny will be applied to which journalists are permitted to attend court proceedings during the pilot.
6. Members have also previously expressed concerns around the potential for press reports to be sensationalised and therefore the restriction to accredited journalists provides a welcome safeguard. However, we would query the meaning of the term "legitimate reporting interests in family cases" and whether the accreditation scheme will require journalists to evidence this in any way to help ensure that the very complex and sensitive issues dealt with in these cases are conveyed accurately in any reports.

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Q3. Do you agree that the default position should be that the press are permitted to attend hearings in the Family Division, and that if exceptional circumstances exist to exclude attendance then objections may be raised? Please give reasons for your answer.

7. The Bar notes that paragraph 2.10 of the consultation paper proposes that the default position will be that those journalists who have duly registered with the pilot will be permitted access to the relevant hearings, subject to the court's power to exclude attendance. Meanwhile if a legal representative has reason to object to the attendance of the media in any particular proceedings then it is their responsibility to raise an objection with the Judge at the earliest opportunity. As outlined in paragraph 2.13, the permitting of reporting at the conclusion of a case will then become the "default" as opposed to granting permission on a case by case basis.
8. The Bar takes the view that the permission to report should only be permitted with the leave of the Court as this is in line with 2017's Review of Family Justice which stated at paragraph 18.51 that "the right of the media to attend in every case, however, should not mean that the press are at liberty to report everything that they see, hear or read within the proceedings... we are satisfied that permission to report should be only with the leave of the family court and the High Court".
9. In light of this statement within chapter 18 of the Review, the conclusion reached in FJ139 recommended "the law to remain that the media are unable to report what they saw, heard or read within the proceedings without permission of the court but the family court and the High Court at any stage of the proceedings should have the power to relax the prohibition on reporting on a case-by-case basis by means of a rule similar to FPR 2010, rule 12.73, save that the criteria for relaxation should be based on the court concluding that it is in the public interest to do so or for some other compelling reason why it should be published". It is worth noting that this conclusion was reached following extensive engagement with a range of stakeholders and full public consultation exercise with strong objections being raised by a number of respondents at paragraph 18.42, particularly in relation to the danger of jigsaw identification in a jurisdiction as small as Northern Ireland.
10. Consequently, the Bar believes that it would be preferable for the pilot to begin operation in line with recommendation FJ139 in terms of requiring the media to obtain permission from the court to report on a case by case basis rather than allowing it by default given that no media reporting from the family courts is

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presently permitted. In the event that the pilot proves to operate successfully then it would be appropriate for there to be the opportunity for further review led by the Senior Family Judge and consideration could then be given to extending it to allow reporting by default.

11. The Bar also notes that the President of the Family Division in England and Wales recently produced draft guidance on reporting in the Family Courtsⁱ aimedⁱⁱ at providing greater clarity and guidance for journalists around reporting restrictions following an appeal in *Re R (A Child) (Reporting Restrictions)* [2019] EWCA 482 Civ. This guidance frames the default position in a way which places a requirement on the press to ask permission from the court to report by way of application rather than placing the onus on the parties to object to the reporting with paragraph 2 of the guidance highlighting that "the right to attend hearings does not grant the right to report on proceedings or publish details of proceedings".

Q4. Do you agree that reporting (subject to any applicable statutory or discretionary restrictions) should only be permitted at the conclusion of a case? What, if any, circumstances do you feel it may be appropriate for the Judge to order otherwise?

12. The Bar agrees that reporting should only take place at the conclusion of a case. To permit otherwise will create a real risk that the fairness of the proceedings will be adversely impacted.

Q5. Do you agree that the Court of Judicature Daily List, which identifies family cases by their ICOS number only, does not provide sufficient information for the media to plan their court attendances? Please give reasons for your answer.

Q6. Do you agree that providing the media with a schedule of hearings for the coming term indicating a) the type of application and order sought and b) a synopsis of key issues as determined by the Judge, is sufficient information for their planning purposes? Please give reasons for your answer.

13. The Bar acknowledges that the Court of Judicature Daily List which identifies family cases by ICOS reference number provides no information at all about the cases listed and therefore in the absence of providing some anonymised details of the cases to the press in advance there is no way of journalists knowing what any case is about. However, we would highlight that in criminal cases in the

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Magistrates' Court or Crown Court the only information published is the defendant's name and reason for listing meaning that any journalist will have to sit in the court and decide on what to report on a case by case basis. The Bar notes at paragraph 2.12 that for planning purposes it is proposed that the media will be supplied with an advance list of hearings for the coming term with dates alongside the ICOS number, estimated duration, application type, order sought and a brief synopsis of the issues as determined by the Judge. We would query whether it is the role of the Court to be providing this level of information which would go further than the criminal courts and potentially allow the press to cherry-pick the most interesting cases to attend and report on. In England and Wales the only document given to the media is the cause list with no other documents being shown or given to journalists without an application being made to the court.

14. Meanwhile we also note that in England and Wales pilot Practice Direction 36J came into force on 1 October 2018 to allow certain lawyers to attend family proceedings in the Family Court and Family Division of the High Court with a view to reporting on proceedings as legal bloggers, in addition to accredited representatives of news gathering and reporting organisation. This pilot project is still ongoing yet further evaluation will likely be necessary in order to determine whether it would be appropriate for the media to receive any more detailed information in order to assist them in identifying which cases to attend, such as case outlines and skeleton arguments for any hearings. The Bar would be keen to consider how this project progresses in helping to inform the level of information that should be provided to the media for the purposes of the pilot in this jurisdiction.
15. The Bar welcomes the comment at paragraph 2.15 of this consultation paper that the media will not have access to court documents without specific leave of the court under this pilot project. We would highlight the need to ensure that any disruption caused by the attendance of reporters at family court hearings causes is minimised and that it does not generate additional workload unnecessarily for the various parties involved in the proceedings. In many family cases the relevant legislation, particularly in respect of children, is complex and detailed. Therefore we would query the level of detail it is envisaged will be included in any synopsis of the issues being given to assist the media for planning purposes at the outset of the legal term.

Q7. If you have experience of the 'Proof of Concept' phase are there any comments you wish to make about how the presence of the media in court has been received?

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16. One issue brought to the attention of the Family Bar Association involved a member and their client being unaware of the media presence in the courtroom until they were spoken to and asked questions. We welcome paragraph 14 of the proposed Memorandum of Understanding which states that the media should be “clearly identifiable to the Judge, court staff, legal representatives and other court users as members of the press, by using any designated press seating, wearing visible press passes, or other making themselves known as member of the press”. The Bar is also supportive of the proposed inclusion of the statement that “at no time, may they approach parties (as opposed to legal representatives) for further information or comment over and above what they are permitted to observe in court”.

Q8. Are there any other issues you would wish to raise concerning the proposed Pilot?

17. The Bar has no comment to make on this.

ⁱ Courts and Tribunals Judiciary of England and Wales, 'President of the Family Division's Draft Guidance on Reporting in the Family Courts' (May 2019) at <https://www.judiciary.uk/wp-content/uploads/2019/05/Presidents-Guidance-reporting-restrictions.pdf> (last accessed 08 August 2019)