

**Memorandum submitted by Ceridwen Roberts and Robert H George,
University of Oxford, to the Children, Schools and Families Bill Public Bill
Committee**

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Introduction

1. Ceridwen Roberts is Senior Research Fellow at the Department of Social Policy and Social Work at the University of Oxford. Robert George is Lecturer in Law at the University of Oxford.
2. The Department of Social Policy and Social Work (SPSW) at the University of Oxford, is an international, interdisciplinary centre for research and teaching in social policy and the systematic evaluation of social interventions.
3. The Oxford Centre for Family Law and Policy (OXFLAP) is part of the Department of Social Policy and Social Work, and has published briefing papers on a range of social policy issues.
4. The views expressed here are those of the authors and not necessarily those of OXFLAP or the Department of Social Policy and Social Work or Law Department.

Summary position on the Bill

5. The proposals in Part 2 of the Children, Schools and Families Bill will allow the media to report on the details of family court cases for the first time. The level of access to court documents is without international precedent.
6. Relaxing the restrictions on media reporting of family court cases could put the personal privacy of vulnerable children and families at risk.
7. Under the new proposals, journalists will not be able to report information that could compromise a person's anonymity, but they *will* be able to report details of people's private lives; if the local community or others are aware that a court case is underway, publishing this personal information could identify parties in the case even if a name is not published in the wider media.
8. The lack of adequate protection of privacy may violate people's right to respect for their private lives under Article 8 of the Human Rights Act 1998.
9. The Government's stated goal in introducing this legislation is to increase the openness and transparency of family courts, but the evidence from similar countries such as Australia and New Zealand does not show that allowing greater media access will achieve that goal.
10. Alternative options to provide greater openness and accountability in the family courts have not been fully explored. One such alternative is the publication of anonymised family court judgements, currently being piloted in Leeds, Cardiff and Wolverhampton.

Privacy

11. The Bill would go some way to protecting anonymity (i.e. people's identities), but details of their private lives would be made publicly available. There is a difference between anonymity and privacy. Anonymity means that a person's **identity is kept secret** – privacy means that information about a person's **private life is kept secret**.
12. Section 41(1) of the Bill defines 'identification information' as 'information the publication of which is likely to lead one or more person to identify the individual as someone who is or has been involved in, referred to in, or otherwise connected with the proceedings'. This definition does not go far enough in making clear what would count as identifying a person. Clearer guidance is needed about when information is likely to identify an individual.
13. In Australia for example, the publication of any information likely to identify an individual is prohibited (Australia's Family Law Act 1975). This includes: a person's name, title, pseudonym or alias; a person's home or work address, or its locality; a person's physical description or mode of dress; a person's job, or any position they hold; a person's relationship to someone else who is named; a person's recreational interests; a person's political or religious beliefs; details about any property in which a person has an interest; a picture of a person; a recording of a person's voice.
14. The Bill would increasingly allow the media to invade people's privacy by reporting details of their private lives. Family Court cases are immensely personal. Even in Phase 1, the media would be able to report intimate details of people's private lives, other than information about medical conditions/treatments and children's views – and in Phase 2, even these most personal things could be reported.
15. A recent story in the *Daily Mail* (20 November 2009) gives a good example of why clear guidance is needed. The Family Court moved a child from his mother to his father. The paper did not report details of the parents or their dispute, but did state the father's recent marital status, his home county, and the size and cost of his house. While the general public would not be able to identify the individuals involved, people in the locality or who vaguely knew the family might well work out who the father was. It is not clear why these details were reported or what the public interest in knowing them was.
16. Expert witnesses play a vital role in family courts giving specialist advice. The Bill proposes that under Stage 1 experts who are paid by the court could be named and under Stage 2 this could be extended to all expert witnesses. There is concern that experts might stop providing their services to Family Courts as a result.
17. In addition opening up expert witness reports could infringe doctor-patient confidentiality.
18. Given the emotions often aroused by Family Court cases, there is also a serious concern that this will lead to doorstepping of parties and witnesses by elements of the media and pressure groups, as already happens to judges. It is unclear how this will help the parties or the broader public interest.
19. This raises serious concerns for the children and families involved in the Family Court, as well as for those who attend as witnesses. Cases of professional malpractice can already be discussed with appropriate people (e.g. MPs, professional bodies) following the changes made in April.

Timing

20. It is inappropriate to rush ahead with these proposals at this time. The Government concluded only two years ago that media access to the Family Courts was a bad idea, and that the focus should instead be on improving the information coming out of the courts (*MoJ, 2007; DCA, 2007*). Nothing of substance has changed in the last two years to alter that conclusion.
21. The original rationale for reforming the Family Court was to help the public to understand how Family Courts work and reach the decisions they do. One idea, which received widespread support, was to make Family Court judgments available to the parties and to the public. Anonymised judgments of Family Court cases are generally more widely available in other jurisdictions than in England and Wales. Greater access to judgments may strike a good balance between respecting the privacy of those involved in these highly personal cases, and enabling the public to see more clearly how the Family Courts work.
22. A 12-month pilot programme started on 2 November 2009. Family Courts in Leeds, Cardiff and Wolverhampton are publishing judgments online to test the effectiveness of the plan, and to assess whether the same could be done by all Family Courts. This programme has the potential to improve the openness and transparency of family justice, and to clarify the use of expert evidence in the Family Courts. A media representative who sat through a case and then received an anonymised copy of the judgment would be well placed to report effectively on the proceedings they had seen.
23. Why is the Government rushing ahead with legislation about media reporting, rather than waiting for the results of its pilot study?

Resource implications

24. The Family Court is already stretched in terms of resources, with long delays for hearings and a shortage of available facilities in and around courts (*Woolf, 2009*). Will the proposals lead to greater delays and consequent miscarriages of justice in urgent cases? Who is to pay for preliminary hearings about media attendance? What will the impact be on the Legal Aid bill?

Evidence from other jurisdictions

25. New Zealand and Australia are culturally and legally similar to England and Wales, and so make good comparators. However, the proposals about media reporting in the Children, Schools and Families Bill, and the procedure for accessing court documents introduced by the President's April guidance, go far beyond what any other jurisdiction has contemplated.
26. Media access to Family Court hearings and court documents in these jurisdictions varies, but the Family Courts are not as open as is often claimed. The basic rules allow for media attendance, but there is considerable judicial discretion to exclude the press, and reporting is very restricted.
27. The summary below compares the law in these jurisdictions with the current law in England and Wales, and with the two Phases of the proposals under the Bill.

Summary table: what can the media do in England and Wales under the current law and under the Bill proposals, compared with New Zealand and Australia?

	England & Wales: the law since April 2009	England & Wales: the CSF Bill Phase 1	England & Wales: the CSF Bill Phase 2	New Zealand	Australia
Attend cases between separated parents	U	U	U	U	U
Attend cases about child protection	U	U	U	U	UN
Attend adoption cases	N	U	U	N	N
Attend other family law cases, e.g. divorce	A	A	A	A	A
Report things that identify individuals involved	N	UN	UN	UN	N
Report the substance of the case	UN	A	A	U	U
Report/summarise the judgement	UN	UN	UN	U	U
Report/summarise the court order	UN	U	U	U	U
Report things that identify experts paid by the court	UN	U	U	N	N
Report things that identify other experts	UN	UN	U	N	N
Report children's wishes and feelings	N	UN	U	N	N
Report medical/psychiatric information	N	UN	U	N	N
Access documents in the court file	?	?	?	N	N
Report the substance of documents seen	N	varies	varies	N	N

Key to symbols

A - Always, or restrictions only in exceptional cases

UN - Usually not, but sometimes possible

U - Usually but restrictions possible

N - Never, or possible only in exceptional cases

References

Department for Constitutional Affairs (2007) 'Young People's Guide to the Confidence and Confidentiality Response Paper'

Ministry of Justice (2007) 'Confidence and Confidentiality: Openness in the Family Courts – A New Approach'

Woolf, J (2009) 'Family Courts Need More Resources' *Counsel*, August 2009, p 5