**THE TRANSPARENCY PROJECT’S RESPONSE TO THE ENQUIRIES OF THE FPR RULES COMMITTEE**

Following our request that the FPR Rules Committee consider a change to the FPR to permit access to court by legal writers and bloggers, as described in our article in the Family Law Journal **(*Legal Bloggers - A Level Playing Field?* [2017] Fam Law 1267)**, we have been asked to respond to two queries :

1. *What is your proposed definition of “qualified lawyer”?*
2. *Secondly, what regulation would apply to anyone who misuses the authorisation in reporting anything e.g. if media report anything inaccurately there is record to the Press Complaints Commission. Is a similar sort of safeguarding proposed under your proposal and if so what would you consider to be the appropriate safeguards to support this amendment in practice?*

This document provides our answers, and at the foot of the document we have provided a composite proposed revised wording, for ease of reference.

**The starting point**

We have been asked to justify our proposal. We start by making an observation that the starting point in our justice system is open justice with limited exceptions to prevent the frustration of the administration of justice. We respectfully suggest that the starting point in considering whether or not this modest proposal should be adopted should be to ask “Why not?” if appropriate safeguards are put in place.

The current law permits journalists to attend court and, as long as they comply with the restrictions in place concerning anonymity and privacy (which vary from case to case) they are permitted to report proceedings freely. The current law permits journalists to report on family cases whether or not they have attended court, which many do not. Naturally, angles deemed newsworthy are prioritised. Frequently, though not uniformly, coverage by non-specialists is inaccurate and omits or distorts important public interest information.[[1]](#footnote-2) The current system of press regulation neither prevents nor entirely remedies that.

We are asking that the pool of those entitled to attend court be marginally expanded. Nothing in our proposal will affect the press’s ability to report family courts, and the impact of legal bloggers will be minimal compared to the international and national reach mainstream media. However, bloggers can play a vital role in complementing, explaining, and when necessary correcting, media reports; indeed informed blog commentary has sometimes been acknowledged as a useful source by the judiciary and cited in judgments.[[2]](#footnote-3) In the criminal context, the role of “legal commentators” alongside that of the media has been recognised in the rules concerning Twitter in the Criminal Practice Directions, which state at 16c.8 (our emphasis): “It is presumed that a representative of the media or a *legal commentator* using live text‐based communications from court does not pose a danger of interference to the proper administration of justice in the individual case”.[[3]](#footnote-4) This rule does not seem to have presented any problems. In view of the distinct context and special restrictions in the family courts, our proposed extension to the privileged access currently afforded to the media is far narrower than this.

**The structure of our proposal**

We have modelled the draft revised wording on the structure used in the 2009 rule changes which permitted accredited journalists to attend court. The scheme for journalists includes a straightforward system of identification via press card which acts as a proxy for court staff and judges to quickly identify members of the press, leaving those bodies who issue press cards to control their own criteria for accessing such cards.

In the case of lawyers, we propose that equivalent forms of identification could be used; in most instances production of a practising certificate will suffice.

We have provided a concept of “authorised lawyer”, such authorisation to be gained by production of the relevant identification. Any person holding a practising certificate will necessarily be a “qualified lawyer” for the purposes of whatever regulatory scheme is in place for lawyers practising in England and Wales, just as any press card holder will meet the criteria for that documentation applicable from time to time.

The reference to a “qualified lawyer” is to a person who has satisfied the academic and vocational / professional requirements for entry to the legal professions in England and Wales. i.e. any person who has complete a qualifying law degree, or a degree plus either the Common Professional Examination (CPE), or an approved Graduate Diploma in Law (GDL) course or Solicitors Qualifying Examination (SQE) AND who has completed a training contract or pupillage is a qualified lawyer (the SQE is a new alternative route of entry to the solicitors’ profession: http://www.sra.org.uk/sra/news/press/sqe-ensure-high-consistent-standards.page).

Having reflected on the question, we can see that the term “qualified lawyer” ought to be defined by insertion of a new 27.11 (11) that reads:

*For the purposes of this rule a “qualified lawyer” is a person who holds a current practising certificate authorizing them to conduct litigation or exercise rights of audience in the Family Court in England & Wales.*

We wish also to permit (non-practising) lawyers who are involved in relevant research or teaching to access family court hearings. Whilst that might theoretically include some lawyers who had not completed the vocational and professional elements of qualification and some who had never been in practice, many academic lawyers will at some stage have been in practice and all will hold legal knowledge above and beyond that held by the general public. In any event, even those lawyers who have not been in practice will be selected, monitored and accountable to their employer / Higher Education Institution (HEI) / funding body / University Ethics Committee.

Finally, we wish to permit (non-practising) lawyers who retain sufficient current knowledge to responsibly report to do so through an approved educational charity.

**Safeguards around lawyers**

We do not propose that anyone who is simply a law graduate should be able to attend court, without more. We propose that only those lawyers who are :

1. currently regulated by the BSB or SRA (and who can produce a practising certificate), or
2. currently employed or operating under the auspices of a HEI law school or department in a teaching or research capacity (and who can provide written confirmation of the same), or
3. operating via an approved educational charity

should be able to take advantage of this rule change. It would remain open to an individual court to give access to a non-practising law graduate who was not affiliated to any HEI or EC under the existing rules if they considered that appropriate, just as a court can permit any other person to attend even without a law degree or press card (e.g. a non legally qualified academic researcher, an NGO representative or other relevant professional).

As such, all three categories of lawyer would be accountable to their own regulator / supervising institution, which have rules and guidance on good conduct within legal and ethical frameworks, including media engagement and social media use.

In the case of a practising lawyer, we consider that these individuals would be mindful of their own professional reputations and the need to comply with their own codes of conduct and regulatory requirements. They would, we suggest, be very unlikely to act incautiously in the publication of material that was prohibited by section 12 AJA, partly because as qualified lawyers they would have a sufficient knowledge of the relevant restrictions or the legal knowledge to be able to appraise themselves of such restrictions, but more particularly because of the desire not to be censured or held in contempt of court or to commit a criminal offence pursuant to s97 CA 1989. Whilst in practice prosecutions / sanctions for the wrongful publication of material connected to family proceedings is rare, the risk of reputational damage or misconduct charges is sufficient to promote appropriately cautious conduct.

It is our experience that responsible legal bloggers wish to avoid any suggestion of improperly publishing information or of behaving inappropriately and this acts as a useful self-regulatory mechanism. In our work there have been a number of occasions where we have felt constrained *not to* publish information which the press have later gone on to publish. We think that the likelihood of misuse is very low, partly because of the inherent legal expertise of those attending, and partly because of the professional caution we describe. We think that the risk of willful misuse as opposed to inadvertent misuse would be very low indeed, because such conduct could be career ending.

The code of conduct for the bar includes the following relevant core duties:

* *You must observe your duty to the court in the administration of justice*
* *You must act with honesty and integrity*
* *You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession*

The equivalent document for solicitors contains similar provisions.

With respect to those lawyers who are operating under an academic banner, we anticipate that adequate disincentive against publishing inaccurate material or material that is in contempt of court would arise from their relationship with the HEI whereby the institution would wish to avoid reputational damage and the employee would wish to avoid a risk to research reputation and support and funding: any funded research project is likely to be subject to both the scrutiny of a University Ethics Committee and stringent funding conditions. We note that whilst academics (who may or may not be lawyers) are permitted to attend court under the auspices of an Approved Research Project (see PD 12G para 2.1), this is a lengthy process. Our proposal is intended to permit more flexible and fluid access to court hearings for qualified researchers. It would be a matter for any researcher meeting our proposed criteria to ensure that any information used for research publication is either authorized or not in contravention of provisions such as s12 AJA 1960. We suggest that the rules should require the HEI to confirm that the individual is employed or working in a teaching or research capacity for the law school or department of the relevant HEI.

With respect to those lawyers who are operating via an educational charity, we have proposed that this should be limited to those educational charities who have specifically been approved (probably by the President of the Family Division) to oversee the work of a lawyer attending court on their behalf. We anticipate that charities like The Transparency Project would be suitable for authorization, and this would enable our non-practising lawyer volunteers / staff members to attend court and report. The Transparency Project has built up considerable expertise in the restrictions applicable in the family court and is able to support and supervise non-practising lawyers to ensure that publications are both accurate and lawful. Charities are subject to approval and regulation by the Charity Commission and under a legal obligation to operate in the public benefit. For a small charity such as The Transparency Project there is a strong disincentive against making mistakes in this field for reputational reasons, and because our charitable objectives require us to work towards the furtherance of the administration of justice. There would be a strong disincentive against inappropriate reporting in that we would wish to avoid circumstances where our approved status were withdrawn.

**Comparison with safeguards around the press**

The question posed by the FPR rules committee refers to the self-regulatory industry body the Press Complaints Commission which no longer exists. It was replaced by the Independent Press Standards Organisation in 2014. Additionally, IMPRESS, which was recognized as an approved regulator by the Press Recognition Panel in 2016, operates as an alternative regulator (IPSO has not sought PRP recognition). We note that not all media organisations and not all press card holding journalists are regulated by IPSO, Impress or OFCOM or any external regulator (e.g. Guardian, FT, Independent, Buzzfeed are not subscribed to the IPSO scheme nor Impress, and fall outside Ofcom’s remit). Nor are accredited journalists required to hold any professional or regulatory qualification. Lawyers under our scheme would be under more robust professional regulation than journalists from any of these outlets, all of whom are currently given access to courts on an equal footing to those who are regulated by IPSO.

Having written about family courts and monitored the output of the mainstream press for a number of years, we would respectfully suggest that the current system of press regulation is not entirely effective in preventing difficulties arising from court reporting. There is as far as we are aware no suggestion that as a result the press at large should be prohibited from attending court.

Further, even leaving aside the question of press regulator, in the event that any person or organization published anything inaccurate or private, the usual forms of legal redress would be open to any person about whom inaccurate or private information had been published (contempt, defamation, misuse of private information, and data protection etc.). As has been often acknowledged by the judiciary it is no part of the function of the judiciary to attempt to exert editorial control over the press, and we see no reason for the judiciary to attempt to do so with regard to more modern forms of reporting (subject to our proposed conditions).

**Policy rationale**

One of the main rationales of our proposal to broaden entry to the courts to this category of reporter (colloquially described as legal bloggers) is to help redress the chronic inaccuracy of much existing mainstream media coverage. Legal bloggers in all fields of law have a good track record of producing clear, accurate and balanced explanations of cases where the mainstream media have failed. There is much tendentious, inaccurate, inflammatory and legally and factually inaccurate material published every day about family courts.[[4]](#footnote-5) At worst legal bloggers would add to that depressing picture, but in our view they would go some way towards providing a more reliable resource for the public than is currently provided by the mainstream media. This would also support a broader public interest in access to information, as protected by ECHR Article 10 (which extends to the right to receive, as well as impart, information).

For the avoidance of doubt, it is not possible for most legal bloggers to obtain a press card, primarily because the press card scheme rules require that the holder’s “employment (or self-employment) is wholly or significantly concerned with the gathering, transport or processing of information or images for publication in broadcast electronic or written media – including TV, radio, internet-based services, newspaper and periodicals” (www.ukpresscardauthority.co.uk). Since most legal bloggers operate voluntarily and not as part of formal employment, they are unable to secure such status. The effect is that legal bloggers who maintain a current knowledge of court workings through their practice as lawyers, and who might therefore be considered to be safe pairs of hands, are excluded from gaining access to this closed scheme, whilst journalists with no experience of journalism or court reporting or family court reporting (and potentially with limited legal expertise to ensure that they do not inadvertently breach privacy restrictions) are given free access.

We note that if there is a policy objective to encourage an improvement in the quality of coverage of family court cases, this scheme would support rather than detract from such an aim, partly by permitting an element of (non-commercial) competition for the mainstream media, and by enabling non-traditional commentators such as legal bloggers and educational charities to attend “on spec” with some confidence that they will not be excluded and that there will not have been a wasted journey. We have been discouraged from attending and requesting permission to attend on a case-by-case basis on a number of occasions where the press have been in attendance, because we cannot afford the risk of wasted time and travel expenses when operating as volunteers or on a restricted charitable budget. Although the amendment of the rules to grant default rights of access to the press has not resulted in a significant number of journalists regularly attending hearings, for economic reasons, it has enabled them to make a decision about whether to attend in the knowledge that they are at least unlikely to be turned away. As with journalists, we do not anticipate that a permissive change to the rules will result in significant numbers of legal bloggers or lawyers attending, and as such we consider that any disruption or resource implications would be minimal (and probably offset by the disruption caused when someone attends and has to make an application to be permitted entry pursuant to existing rule 27.11(2(g)).

**Lucy Reed**

**Chair, The Transparency Project**

**On behalf of The Transparency Project Team**

**December 2017**

**THE TRANSPARENCY PROJECT’S RESPONSE TO THE ENQUIRIES OF THE FPR RULES COMMITTEE :**

**PROPOSED AMENDMENTS (REVISED)**

**FPR 27.11(2) and 27.11(8)–(12) will be amended so that they read:**

*Rule 27.11…*

*(2) When this rule applies, no person shall be present during any hearing other than:*

*a.     an officer of the court;*

*b.     a party to the proceedings;*

*c.     a litigation friend for any party, or legal representative instructed to act on that party’s behalf;*

*d.     an officer of the service or Welsh family proceedings officer;*

*e.     a witness;*

*f.     duly accredited representatives of news gathering and reporting organisations;*

*g.     a duly authorized lawyer; and*

*h.     any other person whom the court permits to be present.*

*…(8) In this rule a ‘duly authorized lawyer’ means a lawyer who is authorized in accordance with any administrative scheme for the time being approved for the purposes of this rule by the Lord Chancellor.(9) In this rule ‘duly authorized lawyer’ means:*

*a.     a qualified lawyer who is currently entitled to conduct litigation or advocacy in the family court in England and Wales;*

*b.    a lawyer working for the Law School or Department of a Higher Education Institution in England and Wales in a teaching or research capacity; or*

*c.     a lawyer employed or acting on behalf of an authorized educational charity registered in England and Wales.*

*(10) An “authorized educational charity” is a charity that has been approved by the Lord Chancellor or the President of the Family Division as such.*

1. *(11) For the purposes of this rule a “lawyer” is a person who holds a qualifying law degree as defined by the Bar Standards Board or Solicitors Regulatory Authority, or*
2. *a degree, plus either the Common Professional Examination (CPE), an approved Graduate Diploma in Law (GDL) course or the Solicitors Qualifying Examination (SQE), or a postgraduate legal qualification.*

*(12) For the purposes of this rule a “qualified lawyer” is a person who holds a current practising certificate authorizing them to conduct litigation or exercise rights of audience in the Family Court in England & Wales.*

**Practice Direction 27C will include a new paragraph 4A as follows :**

*4A. Identification of lawyers as 'authorised' –*

*(1) Lawyers will be expected to carry with them identification sufficient to enable court staff, or if necessary the court itself, to verify that they are 'authorised' lawyers within the meaning of the rule.*

*(2) By virtue of para 8 of the rule, it is for the Lord Chancellor to approve a scheme which will provide for accreditation. The Lord Chancellor has decided that the following forms of identification provide sufficient information and production of such identification will be both necessary and sufficient to demonstrate authorised status:*

*a.     A current practising certificate accompanied by picture identification;*

*b.     Confirmation on headed notepaper from the relevant Higher Education Institution of the lawyer's position and qualification, accompanied by picture identification;*

*c.     Confirmation on headed notepaper from the relevant educational charity of the lawyer's position and qualification, accompanied by picture identification.*

1. E.g. *P (A Child)* [2013] EWHC 4048 (Fam) (but other examples can be provided). [↑](#footnote-ref-2)
2. For example, in *AB Ltd & Ors v Facebook Ireland Ltd* [2013] NIQB 14 (6 February 2013) [13], *Re B (A Child)* [2017] EWCA Civ 1579, *P (A Child)* [2013] EWHC 4048 (Fam), *R v Miller & Anor (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] UKSC 5 (24 January 2017). [↑](#footnote-ref-3)
3. **CPD I General matters 6C: Use of live text‐based forms of communication (including Twitter) from court for the purposes of fair and accurate reporting** [↑](#footnote-ref-4)
4. Evidence can be provided on both these points, if required. [↑](#footnote-ref-5)