



SCHEDULE TO JUDGMENT

The Transparency Pilot and reporting restrictions orders in serious medical treatment cases

1. The Transparency Pilot provides for attended hearings to be heard in public with restrictions being put in place on the publication of information about the proceedings.
2. It does not apply to serious medical treatment cases to which Practice Directions 9E and 13A continue to apply.
3. The Transparency Pilot provides that if it conflicts with Practice Direction 13A it takes precedence and the order set out in the Annex to the Transparency Pilot Direction Practice Direction (the Pilot Order) is in different terms to the precedent used for reporting restrictions orders in serious medical treatment cases (see for example *In re M (A Patient) (Court of Protection Reporting Restrictions)* [2011] EWHC 1197 (Fam); [2012] 1 WLR 287) which was used in this case (a PD 13A Reporting Restrictions Order).

The injunctive relief

4. Both a Pilot Order and a PD 13A Reporting Restrictions Order link what cannot be published to the existence of proceedings in the COP. But they do so in differing ways and there are other differences between them.
5. The Pilot Order provides that:
 - (5) (A) The following persons (the Persons Bound by the Injunctive Order) are bound by this injunctive order:
 - (i) the parties and their representatives,
 - (ii) the witnesses,
 - (iii) all persons who attend all or any part of an attended hearing,
 - (iv) all persons who by any means obtain or are given an account or record of all or any part of an attended hearing or of any order or judgment made or given as a result of an attended hearing, and
 - (v) any body, authority or organisation (and their officers, employees, servants and agents) for whom any such person works or is giving evidence.
 - (B) The material and information (the Information) covered by this injunctive order is:
 - (i) any material or information that identifies or is likely to identify that

(a) [X] and members of X's family are respectively the subject (and so a P as defined in the COPRules 2007) or members of the family of a subject of these proceedings, or that

(b) [--- ANONYMISED REFERENCE TO ANY OTHER PARTY --] is a party to these proceedings, or that

(c) [----- ANONYMISED PERSON WHOSE IDENTITY SHOULD NOT BE PUBLISHED -----] (who the Court has so identified to the parties in private) [-----] has taken a part in / or been referred to in -----] these proceedings; and

(ii) any material or information that identifies or is likely to identify where any person listed above lives, or is being cared for, or their contact details.

(C) Subject to further order of the Court and save as provided by sub-paragraph (D) the Persons Bound by this Injunctive Order shall not by any means directly or indirectly:

(i) publish the Information or any part or parts of it, or

(ii) cause, enable, assist in or encourage the publication of the Information or any part or parts of it.

(D) Subject to further order of the Court this injunctive order does not prevent the Persons Bound by this Injunctive Order from communicating information relating to these proceedings on the basis that Part 3 of Practice Direction 13A to the COPRules 2007 (which relates to proceedings held in private) applies to these proceedings.

(6) Subject to further order of the Court any transcript of a hearing of and any judgment or order given in these proceedings shall be anonymised so that it shall contain no reference by name or address to the persons or bodies referred to in paragraph (5)(B) and shall refer to them by their descriptions therein.

6. The intention is that in most cases the Information that cannot be published will be limited to that defined in paragraph (5)(B)(i)(a) and so to:

[X] and members of X's family are respectively the subject (and so a P as defined in the COPRules 2007) or members of the family of a subject of these proceedings

7. So the Pilot Order:

i) is directed to those who attend or find out what happened at an attended public COP hearing,

ii) does not contain a schedule identifying those who cannot be identified,

iii) does not contain an equivalent list to that in a PD 13A Reporting Restrictions order of what is not restricted by the order and so, for example, it is not qualified so as not to cover information already in the public domain or which will be put in the public domain by a court sitting in public, and

iv) is limited in time by reference to a further order of the court being made and not to a date, or to P's death.

8. Practice Direction 13A provides that:

Scope of order

Persons protected

27 The aim should be to protect P rather than to confer anonymity on other individuals or organisations. However, the order may include restrictions on identifying or approaching specified family members, carers, doctors organisations or other persons as the court directs in cases where the absence of such restriction is likely to prejudice their ability to care for P, or where identification of such persons might lead to identification of P and defeat the purpose of the order. -----

Information already in the public domain

28 Orders will not usually be made prohibiting publication of material which is already in the public domain, other than in exceptional cases.

Duration of order

29 Orders should last for no longer than is necessary to achieve the purpose for which they are made. The order may need to last until P's death. In some cases a later date may be necessary, for example to maintain the anonymity of doctors or carers after the death of a patient.

9. And, in contrast to a Pilot Order, a PD 13A Reporting Restrictions Order:
- i) is directed to the world at large,
 - ii) generally includes a provision prohibiting the seeking of information from identified people,
 - iii) includes a list of what is not restricted,
 - iv) often expires on the death of P or at a fixed date, and
 - v) refers to a schedule identifying the people whose identities are not to be published or who are not to be approached.

Notification to the media

10. Under the Transparency Pilot the media is not normally given notice on a case by case basis that a Pilot Order imposing restrictions on publication will be made as and when an order for an attended public hearing is made.
11. In contrast, notice of the intention to apply for a PD 13A Reporting Restrictions Order should normally be given to the media.
12. Practice Direction 13A contains the following:

Part 2

Notification in relation to reporting restrictions

10. In connection with the imposition of reporting restrictions, attention is drawn to section 12(2) of the Human Rights Act 1998. This means that where an application has been made for an order restricting the exercise of the right to freedom of expression, the order must not be made where the

person against whom the application is made is neither present nor represented unless the court is satisfied -

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

11. The need to ensure that P's Convention rights are protected may be an issue when the court is considering whether to make an order that a public hearing should be held. Part 2 of this practice direction should therefore be complied with where the court is considering making an order under rule 92 (2) of its own initiative.

12 In summary, the requirement to notify in accordance with the requirements of Part 2 of this practice direction will apply in any case where:

(a) ---

(b) the court has already made an order for a hearing to be made in public and:

(i) an application founded on Convention rights is made to the court for an order under rule 92 (2) which would impose restrictions (or further restriction) on the information that may be published, or

(ii) of its own initiative, the court is considering whether to vary or impose further such restrictions.

Notice of reporting restrictions to be given to national news media

13 Notice of the possibility that reporting restrictions may be imposed can be effected via the Press Association's Copy Direct service ----- . Such service should be the norm. The court retains the power to make orders without notice (whether in response to an application or of its own initiative) but such cases will be exceptional.

Notice of own initiative order to be given by court

20 In any case where the court gives advance notice of an own initiative order to the national media, it will send such of the information listed in paragraph 15 as it considers necessary.

13. I have never found these terms of this Practice Direction easy to follow in respect of "own initiative" orders particularly if they are made contemporaneously with an order for a public hearing. But in practice an "own initiative" order is rare and when an application is being made for a reporting restrictions order the Practice Direction requires notice to be given to the media.

14. The public note that I wrote in respect of the Transparency Pilot states:

Notification of the media and others

The practice direction takes precedence over Practice Direction 13A (see paragraph 1.2).

The media and others will not normally be notified on a case by case basis that the court will be considering whether or not to make a Pilot Order under Rule 92. Such a process is unnecessary because any such order will be based on the standard form and will generally be made pursuant to the Practice Direction.

Also, such a process would not be practicable and would cause unnecessary delays and expense.

However if the court is of the view that it may make significant alterations to the standard Pilot Order it should consider directing that notice be given to the media and others before it makes any such order.

Additionally, the time span between the making of the Pilot Order and the hearing date is likely to be such that notification of the hearing date and of the Pilot Order made can be given a sufficient time before the hearing to provide reasonable notice (i) of the date of the attended public hearing, and (ii) for the making of any applications under paragraph (10) of the standard Pilot Order to vary or discharge or in respect of the publication of matters already in the public domain.

However if that is not the case the court should consider directing that notice be given to the media and others before an attended hearing takes place in public.

Notification of when attended hearings are to take place (i) in public and (ii) in private if a Pilot Order is not made is of central importance to enable attendance, to provide evidence of the split between public and private hearings and to enable applications and enquiries to be made by non-parties in respect of both.

It is intended that the COP (at First Avenue House, the RCJ and each court hub) and the national and local media will provide each other with contact and service details.

It is also intended that the COP (at First Avenue House, the RCJ and each court hub) will publish on a regular basis a list of all hearings fixed in the courts for which it is responsible which will show with an appropriate description of its subject matter all attended hearings that are to be held in public on the basis that a Pilot Order has been made and all attended hearings that are to be heard in private because no Pilot Order has been made.

If the Court is minded on an application or of its own motion not to make a Pilot Order it may, but generally will not, give notice to parties, the media and others before it makes that decision. Clearly the parties will know of that decision and it is intended that the media will be informed of it through the judgments and lists that are published. In some cases the court may direct that the media are notified by other means that an attended hearing will be in private.

It is intended that as soon as is practicable after the date for a further attended hearing has been fixed in any case in respect of which a Pilot Order has been made the media will be notified of that hearing date.

The differences

15. The differences between the Transparency Pilot and the PD 9A and 13A processes and the terms of the two order were deliberate.
16. They are not simply based on pragmatism.
17. The focus on attending the hearing and so to acquiring the Information removes:

- i) the need for a schedule which identifies people to those served with the order but who do not attend the hearing or get information from those who do, and so
 - ii) possible misuse of the information in the schedule before the injunction sought is made and the problems of publishing such a schedule outside the court to inform members of the public of the Pilot Order.
18. The point that the reporting restriction in both orders is to making the link between the relevant people and the COP proceedings avoids or ameliorates problems relating to an accidental publication of a name or photograph.
19. If experience shows that stories / accounts / assertions / internet or social media communication that are based on information obtained through or because of the COP proceedings are published without making the connection to the proceedings and they engage and breach Article 8 rights both forms of order may need to be changed.
20. It also seems to me that:
 - i) the list relating to what is not restricted by a PD 13A Reporting Restrictions Order merits re-visiting. In particular, and as was accepted in the note of leading and junior counsel acting for some of the media Respondents dated 28 January 2016, the provision relating to material that is already in the public domain would not always be appropriate. It seems to flow from an approach that fails to have proper regard to the now established point that further publication can cause harm and can be prevented by injunction (see for example *Goodwin v NGN Ltd* [2011] EMLR 27 at paragraph 85), and on the other hand
 - ii) the inclusion of such a list in the Pilot Order may assist and, for example, it might be appropriate to expressly address the position in respect of hearings in other courts sitting in public in the Pilot Order.
21. It also seems to me that many of the points made in my note on notification of the media could apply to the making of a PD 13A Reporting Restrictions Order on the first directions hearing. My experience is that the media (apart from the Press Association) rarely attend such hearings and I am not aware of a case where the order has been objected to on such a hearing. Indeed, although the existing precedent of a PD 13A Reporting Restrictions Order is not used rigidly its general overall effect is accepted as a standard or default position that is based on established and solid legal foundations (i.e. the COP Rules and the *Scott v Scott* exceptions).
22. It is at least arguable that under the PD 13A procedure prior notification of an application at the first directions hearing for a PD 13A Reporting Restrictions Order adds little, if anything, to service of the order particularly if that order and the listing information contains a description of the subject matter of the proceedings (and so mirrors the Transparency Pilot). Urgency, particularly if substantive relief is sought on the first or an early directions hearing may require notice of that hearing but equally may provide the “compelling reason”

why notice was not given. Different issues arise when, as in this case, an application is made after judgment and the expiry of the original reporting restrictions order.

23. Even in urgent cases, and many serious medical treatment cases are urgent, it is the substantive issues and the content of the evidence that informs the balance that has to be carried out between Articles 8 and 10. This means that it is unlikely that this balancing exercise can be properly argued and considered at a directions hearing and so disputes on the grant / extent of reporting restrictions are likely to be best dealt with at later stages of the proceedings.
24. To my mind proper notification to the media of the existence of the proceedings and of the date of the public hearing of a case relating to serious medical treatment and the terms of any reporting restrictions order made when a public hearing is directed is what really matters. And when that order follows a standard process referred to in a practice direction or rules it seems to me that:
 - i) there are compelling reasons why the parties bound by the reporting restrictions order need not be notified of the application (see s. 12(2) of the HRA 1998), particularly if they are defined by reference to those who attend the public hearing (or get information from those that do), and
 - ii) this view is supported by the approach of the Court of Appeal in *X v Dartford and Gravesend NHS Trust (Personal Injury Bar Association and another intervening)* [2015] 1WLR 3647 in particular at paragraphs 25 to 35.
25. If those bound by the order (and so the media) have such notification they can then attend the hearing knowing, in general terms, what the case is about and the terms of the reporting restrictions order and they can challenge that order then or at another time.

Assessment of the Transparency Pilot

26. The assessment of the Transparency Pilot will inform the issues set out above. Some of them have already been discussed with representatives of some media organisations.
27. It is highly likely that the ad hoc Committee on the COP Rules (which I chair) will want to consider whether separate practice directions and different standard orders should continue in respect of serious medical treatment cases and/or whether the existing practice/template order in such cases should be changed. This will be informed by the assessment of the Transparency Pilot.
28. Comment and contributions from the media and others on the points made above and generally on the practice relating to and the terms of Pilot Orders and PD 13A Reporting Restrictions orders would be most welcome.

29. The ad hoc Committee on the COP Rules regard the Transparency Pilot as an important exercise that is directed to finding the best approach to achieving the result that, on a case by case basis, the COP identifies and directs the correct balance between Articles 8 and 10 and thereby correctly promotes the powerful public interests they engage and reflect.