

## **PRACTICE DIRECTION 4A – HEARINGS (INCLUDING REPORTING RESTRICTIONS)**

*This practice direction supplements Part 4 of the Court of Protection Rules 2017*

### **General**

1. Under rules 4.1 to 4.3, the default position is that hearings before the court will be in private but the court may order that the whole or part of any hearing is to be held in public. Practice Direction 4C sets out the circumstances in which the court will ordinarily make such an order, and the terms of the order it will ordinarily make. The court also has power to—

- (a) authorise the publication of information about a private hearing;
- (b) authorise persons to attend a private hearing;
- (c) exclude persons from attending either a private or public hearing; or
- (d) restrict or prohibit the publication of information about a private or public hearing.

2. Part 1 of this practice direction applies to any application for an order under rules 4.1 to 4.3, but not to any case where the court makes an order pursuant to Practice Direction 4C.

3. Part 2 of this practice direction makes additional provision in relation to orders founded on Convention rights which would restrict the publication of information. Part 2 does not apply where the court makes an order pursuant to Practice Direction 4C, but will apply if different or additional restrictions on the publication of information relating to the proceedings are imposed in a subsequent order.

(Section 1 of the Human Rights Act 1998 defines 'the Convention rights'.)

### **PART 1**

#### **Applications under rules 4.1 to 4.3**

4. An application for an order under rule 4.1, 4.2 or 4.3 must be commenced by filing an application notice form using COP9 in accordance with Part 10.

5. For the purposes of rules 4.1 to 4.3, a statement of truth in an application notice may be made by a person who is not a party.

6. For an application commenced under rule 4.1, 4.2 or 4.3, the court should consider whether to direct that the application should be dealt with as a discrete issue.

### **PART 2**

#### **Powers of the court to impose reporting restrictions**

##### *Court sitting in private*

7. Section 12(1) of the Administration of Justice Act 1960 provides that, in any proceedings brought under the Mental Capacity Act 2005 before a court which is sitting in private, publication of information about the proceedings will generally be contempt of court. However, rule 4.2(1) makes it clear that there will be no contempt where the court has

authorised the publication of the information under rule 4.2 or the publication is authorised in accordance with Part 3 of this Practice Direction. Where the court makes an order authorising publication, it may (at the same time or subsequently) restrict or prohibit the publication of information relating to a person's identity. Such restrictions may be imposed either on an application made by any person (usually a party to the proceedings) or of the court's own initiative.

8. The general rule is that hearings will be in private and that there can be no lawful publication of information unless the court has authorised it or the publication is authorised in accordance with Part 3 of this Practice Direction. Where reporting restrictions are imposed as part of the order authorising publication, they will simply set out what can be published and there will be no need to comply with the requirements as to notice which are set out in Part 2 of this practice direction. But if the restrictions are subsequent to the order authorising publication, then the requirements of Part 2 should be complied with.

#### *Court sitting in public*

9. Where a hearing is to be held in public as a result of a court order under rule 4.3, the court may restrict or prohibit the publication of information about the proceedings. Such restrictions may be imposed either on an application made by any person (usually a party to the proceedings) or of the court's own initiative.

#### **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 at 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 4.3(2) of its own initiative.

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

- (a) the court has made an order for the publication of information about proceedings which are conducted in private and, after the order has been made—
  - (i) an application founded on P's Convention rights is made to the court for an order under rule 4.2(4) which would impose restrictions (or further restrictions) on the information that may be published, or
  - (ii) of its own initiative, the court is considering whether to impose such restrictions on the basis of P's Convention rights; or
- (b) the court has already made an order for a hearing to be held in public and—

- (i) an application founded on Convention rights is made to the court for an order under rule 4.3(2) which would impose restrictions (or further restrictions) 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 CopyDirect service, to which national newspapers and broadcasters subscribe as a means of receiving notice of such applications. 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.

14. CopyDirect will be responsible for notifying the individual media organisations. Where the order would affect the world at large this is sufficient service for the purposes of advance notice. The website: <http://www.medialawyer.press.net/courtapplications> gives details of the organisations represented and instructions for service of the application.

### **Notice of an application to be given by applicant**

15. A person who has made an application founded on Convention rights should give advance notice of the application to the national media via the Press Association's CopyDirect service. He or she should first telephone CopyDirect (tel. no 0870 837 6429). Unless an order pursuant to rule 5.11 has been made, a copy of the following documents should be sent either by fax (fax no 0870 830 6949) or to the e-mail address provided by CopyDirect—

- (a) the application form or application notice seeking the restriction order;
- (b) the witness statement filed in support;
- (c) any legal submissions in support; and
- (d) an explanatory note setting out the nature of the proceedings.

16. It is helpful if applications are accompanied by an explanatory note from which persons served can readily understand the nature of the case (though care should be taken that the information does not breach any rule or order of the court in relation to the use or publication of information).

17. Unless there is a particular reason not to do so, copies of all the documents referred to above should be served. If there is a reason for not serving some or all of the documents (or parts of them), the applicant should ensure sufficient detail is given to enable the media to make an informed decision as to whether it wishes to attend a hearing or be legally represented.

18. The CopyDirect service does not extend to local or regional media or magazines. If service of the application on any specific organisation or person not covered is required, it should be effected directly.

19. The court may dispense with any of the requirements set out in paragraphs 15 to 18.

## **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.

## **Responding to a notice**

21. Where a media organisation or any other person has been notified of an application or own-initiative order, they may decide that they wish to participate in any hearing to determine whether reporting restrictions should be imposed. In order to take part, the organisation or person must file an acknowledgment of service ('the acknowledgment') using form COP5 within 14 days beginning with the date on which the notice of the reporting restrictions was given to them by CopyDirect.

22. The acknowledgment must be filed in accordance with rule 9.15.

23. A person who has filed an acknowledgment will not become a party to the substantive proceedings (i.e. the proceedings in relation to which an application form was filed) except to such extent (if any) as the court may direct.

## **The hearing**

24. Any application or own-initiative order which invokes Convention rights will involve a balancing of rights under Article 8 (right to respect for private and family life) and Article 10 (freedom of expression). There is no automatic precedence as between these Articles, and both are subject to qualification where (among other considerations) the rights of others are engaged.

25. In the case of an application, section 12(4) of the Human Rights Act 1998 requires the court to have particular regard to the importance of freedom of expression. It must also have regard to the extent to which material has or is about to become available to the public, the extent of the public interest in such material being published and the terms of any relevant privacy code.

26. The same approach will be taken where the court is considering an own-initiative order imposing reporting restrictions.

## **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 or 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. In cases where the court receives expert evidence the identity of

the experts (as opposed to treating clinicians) is not normally subject to restriction, unless evidence in support is provided for such a restriction.

#### *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.

### **PART 3**

#### **Communication of Information Relating to Proceedings Held in Private or Subject to Reporting Restrictions**

##### **Introduction**

30. Rule 4.2 deals with the communication of information (whether or not contained in a document filed with the court) relating to proceedings in the Court of Protection which are held in private. Rule 4.3 permits the court to impose restrictions on the publication of information where proceedings are heard in public.

31. Subject to any direction of the court, information may be communicated for the purposes of the law relating to contempt in accordance with paragraphs 33 to 37.

32. Nothing in this Part of this Practice Direction permits the communication to the public at large or any section of the public of any information relating to the proceedings.

##### **Communication of information – general**

33. Information may be communicated where the communication is to—

- (a) a party;
- (b) the legal representative of a party;
- (c) an accredited legal representative or a representative within the meaning of rule 1.2;
- (d) a professional legal adviser;
- (e) the Director of Legal Aid Casework;
- (f) an expert whose instruction by a party has been authorised by the court for the purposes of the proceedings;

- (g) any person instructed to make a report under section 49 of the Mental Capacity Act 2005;
- (h) the Official Solicitor (prior to the Official Solicitor becoming a litigation friend);
- (i) the Public Guardian;
- (j) a Court of Protection Visitor appointed under section 61(4) of the Mental Capacity Act 2005.

### **Communication of information for purposes connected with the proceedings**

34. (1) A party or the legal representative of a party, on behalf of and upon the instructions of that party, may communicate information relating to the proceedings to any person where necessary to enable that party—

- (a) by confidential discussion, to obtain support, advice or assistance in the conduct of the proceedings;
- (b) to engage in mediation or other forms of non-court dispute resolution;
- (c) to make and pursue a complaint against a person or body concerned in the proceedings; or
- (d) to make and pursue a complaint regarding the law, policy or procedure relating to proceedings in the Court of Protection.

(2) Where information is communicated to any person in accordance with sub-paragraph (1)(a), no further communication by that person is permitted.

(3) When information relating to the proceedings is communicated to any person in accordance with sub-paragraphs (1)(b),(c) or (d)—

- (a) the recipient may communicate that information to a further recipient, provided that—
  - (i) the party who initially communicated the information consents to that further communication; and
  - (ii) the further communication is made only for the purpose or purposes for which the party made the initial communication; and
- (b) the information may be successively communicated to and by further recipients on as many occasions as may be necessary to fulfil the purpose for which the information was initially communicated, provided that on each such occasion the conditions in sub-paragraph (a) are met.

### **Communication of information by a party etc for other purposes**

35. A person specified in the first column of the following table may communicate to a person listed in the second column such information as is specified in the third column for the purpose or purposes specified in the fourth column—

A party	A lay adviser, a McKenzie Friend, or a person arranging or providing pro bono legal services	Any information relating to the proceedings	To enable the party to obtain advice or assistance in relation to the proceedings
A party	A health care professional, or a person or body providing counselling services for persons lacking capacity or their families	Any information relating to the proceedings	To enable the party or a member of the party's family to obtain health care or counselling
A party	The European Court of Human Rights	Any information relating to the proceedings	For the purpose of making an application to the European Court of Human Rights
A party, any person lawfully in receipt of information or a court officer	A person or body conducting an approved research project	Any information relating to the proceedings	For the purpose of an approved research project
A legal representative or a professional legal adviser, and the Public Guardian	A person or body responsible for investigating or determining complaints in relation to legal representatives or professional legal advisers	Any information relating to the proceedings	For the purposes of the investigation or determination of a complaint in relation to a legal representative or a professional legal adviser
A legal representative or a professional legal adviser	A person or body assessing quality assurance systems	Any information relating to the proceedings	To enable the legal representative or professional legal adviser to obtain a quality assurance assessment
A legal representative or a professional legal adviser	A professional indemnity insurer	Any information relating to the proceedings	To enable the professional indemnity insurer to be notified of a claim or complaint, or potential claim or complaint, in relation to the legal representative or professional legal adviser, and the legal

			representative or professional legal adviser to obtain advice in respect of that claim or complaint
A party, or the Public Guardian	A police officer	Any information relating to the proceedings	For the purpose of a criminal investigation
A party or any person lawfully in receipt of information	A member of the Crown Prosecution Service	Any information relating to the proceedings	To enable the Crown Prosecution Service to discharge its functions under any enactment
A party or any person lawfully in receipt of information	(a) an Independent Mental Capacity Advocate acting pursuant to section 35 of and Schedule A1 to the Mental Capacity Act 2005;  (b) a relevant person's representative appointed in accordance with Part 10 of Schedule A1 to the Mental Capacity Act 2005;  (c) an independent advocate acting pursuant to section 67(2) of the Care Act 2014 or a person exercising equivalent functions under the Social Services and Well-being (Wales) Act 2014;  (d) a professional acting in furtherance of adult safeguarding or the protection of children	Any information relating to the proceedings	To enable the recipient to discharge their functions under any enactment
A legal representative or a professional legal adviser	An accreditation body	Any information relating to the proceedings providing that it	To enable the legal representative or professional legal



		does not, or is not likely to, identify any person involved in the proceedings	adviser to obtain accreditation
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### Communication to and by Ministers of the Crown and Welsh Ministers

36. A person specified in the first column of the following table may communicate to a person listed in the second column such information as is specified in the third column for the purpose or purposes specified in the fourth column—

A party or any person lawfully in receipt of information relating to the proceedings	A Minister of the Crown with responsibility for a government department engaged, or potentially engaged, in an application before the European Court of Human Rights relating to the proceedings	Any information relating to the proceedings of which he or she is in lawful possession	To provide the department with information relevant, or potentially relevant, to the proceedings before the European Court of Human Rights
A Minister of the Crown	The European Court of Human Rights	Any information relating to the proceedings of which he or she is in lawful possession	For the purpose of engagement in an application before the European Court of Human Rights relating to the proceedings
A Minister of the Crown	Lawyers advising or representing the United Kingdom in an application before the European Court of Human Rights relating to the proceedings	Any information relating to the proceedings of which he or she is in lawful possession	For the purpose of receiving advice or for effective representation in relation to the application before the European Court of Human Rights
A Minister of the Crown or a Welsh Minister	Another Minister, or Ministers, of the Crown or a Welsh Minister	Any information relating to the proceedings of which he or she is in lawful possession	For the purpose of notification, discussion and the giving or receiving of advice regarding issues raised by the information in which the relevant departments have, or may have, an interest

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37. (1) This paragraph applies to communications made in accordance with paragraphs 35 and 36 and the reference in this paragraph to ‘the table’ means the table in the relevant paragraph.

(2) A person in the second column of the table may only communicate information relating to the proceedings received from a person in the first column for the purpose or purposes—

- (a) for which he or she received that information;
- (b) of professional development or training, providing that any communication does not, or is not likely to, identify any person involved in the proceedings without that person's consent; or
- (c) of fulfilling a statutory process.

38. In this Practice Direction—

“accreditation body” means—

- (a) The Law Society, or
- (b) the Lord Chancellor in exercise of the Lord Chancellor's functions in relation to legal aid;

“approved research project” means a project of research—

- (a) approved in writing by a Secretary of State after consultation with the President of the Court of Protection, or
- (b) approved in writing by the President of the Court of Protection;

“body assessing quality assurance systems” includes—

- (a) The Law Society,
- (b) the Lord Chancellor in exercise of the Lord Chancellor's functions in relation to legal aid, or
- (c) The General Council of the Bar;

“body or person responsible for investigating or determining complaints in relation to legal representatives or professional legal advisers” means—

- (a) The Law Society,
- (b) The General Council of the Bar,
- (c) The Institute of Legal Executives,
- (d) The Legal Services Ombudsman; or
- (e) The Office of Legal Complaints;

“criminal investigation” means an investigation conducted by police officers with a view to it being ascertained—

(a) whether a person should be charged with an offence, or

(b) whether a person charged with an offence is guilty of it;

“health care professional” means—

(a) a registered medical practitioner;

(b) a registered nurse or midwife; or

(c) a clinical psychologist;

“lay adviser” means a non-professional person who gives lay advice on behalf of an organisation in the lay advice sector;

“McKenzie Friend” means any person permitted by the court to sit beside an unrepresented litigant in court to assist that litigant by prompting, taking notes and giving advice;

“professional acting in furtherance of adult safeguarding or the protection of children” includes—

(a) a social worker or any other officer of a local authority exercising adult safeguarding or child protection functions;

(b) a police officer who is—

(i) exercising powers under section 46 of the Children Act 1989; or

(ii) serving in a child protection unit or a paedophile unit of a police force;

(c) an officer of the National Society for the Prevention of Cruelty to Children; or

(d) a member or employee of the Disclosure and Barring Service, being the body established under section 87(1) of the Protection of Freedoms Act 2012.