



## **Family Proceedings and Disclosure into Criminal Proceedings**

### **1. Introduction**

- 1.1 Lawyers representing clients in criminal proceedings will often seek information and documents from family proceedings which may help their client's case. However, the rules that govern separate proceedings can cause difficulties for lawyers in navigating jurisdictions. This note aims to act as a short guide for criminal practitioners in the use of family documents for their purposes.
  
- 1.2 There are fundamental differences in the framework of criminal and family proceedings. In public family proceedings the rules and ethos often aim to encourage admissions with less restrictive rules on the admissibility of evidence. This is illustrated by section 98 of the Children Act 1989, which provides that a statement or admission made in certain family proceedings shall not be admissible in evidence for a criminal offence other than perjury (although we shall see this is not an insurmountable obstacle to the use of such admissions in criminal proceedings). All family proceedings involving children are held in private. Conversely, criminal trials are open to the public and have different expectations as to the admissibility of evidence. A criminal trial is more adversarial, whereas family proceedings aim to be more constructive with the child's welfare paramount.

1.3 There are an array of documents from family proceedings which may be of interest in to (potential) concurrent criminal proceedings (e.g.):

- Parties' statements;
- Expert reports;
- Transcripts of evidence;
- Transcript of judgments where findings have been made or not.

## **2. Family Procedural Rules**

2.1 Proceedings under the Children Act 1989 (care proceedings and child arrangements proceedings) are private and information relating to those proceedings should not be published or shared. Section 12 Administration of Justice Act 1960 states that:

*“The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt in court except...where the proceedings are brought under the Children Act 1989 (or otherwise relate wholly or mainly to the maintenance or upbringing of a minor).”*

- Rule 12.73 of the Family Procedure Rules set out the basic rules on the communication of information related to family proceedings involving children.
- Rule 12.73 states that ‘for the purposes of the law relating to contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court) may be communicated’ in the following circumstances.

- Rule 12.73(1)(a) sets out a number of bodies and individuals who may require knowledge of such information within proceedings (experts, lawyers etc). No criminal justice bodies are included.
- Rule 12.73(1)(b) states that the court can give permission for information to be communicated.
- Rule 12.73(1)(c) states that information can be communicated ‘subject to any direction of the court, in accordance with rule 12.75 and Practice Direction 12G’.

2.2 PD12G sets out circumstances whereby communication of information relating to child proceedings may be communicated to another for a certain purpose. In a criminal context, the following is of relevance:

A party	A police officer	The text or summary of the whole or part of a judgment given in 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		To enable the Crown Prosecution Service to discharge its functions under any enactment

2.3 Therefore, the broad position is:

- There are limited documents the police are entitled to as of right (like the judgment), and even then it can only be used in a criminal investigation with further considerations as to its admissibility at a criminal trial (see below).
- Any other document created for the purposes of family proceedings will require the permission of the family court before it can be disclosed (for example to the criminal defence).
- Documents created before family proceedings, or for other purposes that form part of the proceedings, can be disclosed.

2.4 These are explained further in the ‘2013 Protocol and Good Practice Model: disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings’<sup>1</sup>. This document (“The Protocol”) offers guidance and instruction as to the process of information being used in a criminal investigation or passed to the CPS and criminal defence (and nuances to the passing of information to the CPS and police).

### 3. **2013 Protocol**

3.1 This is a document to which the Senior Presiding Judge, the President of the Family Division and the Director of Public Prosecutions on behalf of the CPS act as signatories. Although the Protocol’s scope applies to ‘cases involving criminal investigations into alleged child abuse and/or Family Court proceedings concerning a child, it is submitted that the principles and procedures contained within the document can be adopted to other alleged offences and, indeed, all Children’s Act proceedings (i.e. care proceedings and private children act applications as above). In practice, the Protocol is used in many different contexts.

3.2 It should be noted that there have been recent judicial suggestions that the protocol requires updating and revision<sup>2</sup>.

3.3 The aims and objectives of this document contains the following:

“ ...

*3.5 Subject to the Family Procedure Rules 2010 (and relevant Practice Directions) the Criminal Procedure Rules 2013 and the common law duty of confidentiality, to facilitate timely and consistent disclosure of information and documents from the Family Justice System to the police and/or the CPS.*

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<sup>1</sup> <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/protocol-good-practice-model-2013.pdf>

<sup>2</sup> *A Local Authority v US and A Local Government v A*

*3.6 To provide a timely expeditious process for the Local Authority to respond to a request from the police for material held by the Local Authority which would assist a criminal investigation.*

*3.7 To provide for timely consultation between the CPS and the Local Authority where Local Authority material satisfies the test in Criminal Procedure and investigations Act 1996 for disclosure to the defence.*

*3.8 To provide a streamlined and standard process for applications by the police and/or the CPS for the permission of the Family Court for disclosure of material relating to Family Court Proceedings.*

...

*3.9 To specify a procedure for linked directions hearings in concurrent criminal and care proceedings.”*

3.4 Part B of the Protocol looks at ‘Disclosure from the Local Authority/Family Justice System into the Criminal Justice System’. There is provision for the Local Authority to, ‘as soon as reasonably practicable and in any event on issue of care proceedings’, provide notice to the police of the contemplation or existence of Family Proceedings using a form contained in the annex of the protocol. This form is also to be passed on to the CPS where criminal proceedings ‘have been commenced (or are contemplated), and the CPS ‘will give due priority to making charging decisions in cases involving Family Court Proceedings’. Although the guidance is clear, in practice conformity from Local Authorities is sporadic.

3.5 The protocol also provides a document by which the police can request disclosure from the Local Authority. The protocol states that ‘requests for material **must** be as prescriptive and detailed as possible and necessary for the pursuit of reasonable lines of enquiry’. The relevant document is at Annex C.

3.6 Upon receipt of Annex C, the Local Authority will identify and collate relevant material from the Children’s Services or other files as appropriate.

- 3.7 As above, there is a broad rule that documents relating to family court proceedings should not be disclosed to the police or other parties for the purposes of criminal investigation<sup>3</sup>. However, there are a number of key exceptions.
- 3.8 The Local Authority can disclose to the police documents which are lodged at court, or used in the proceedings, which already existed (e.g. pre-existing medical reports, as opposed to, e.g., psychological assessment for the proceedings). Therefore, it is documents that derive directly from the litigation that are covered by this rule.
- 3.9 However, there will be ‘exceptional circumstances’ where the Local Authority are not able to provide existing material (e.g. on grounds of confidentiality), and they will notify the police of the existence of such material and the reason why the material is not being made available to the police<sup>4</sup>. At this stage, the material will be regarded as sensitive by the police and the CPS and therefore there is limited consideration of a right to privacy for example, or the notification of information held about an individual to the same. This is because the information would not be disclosed to the defence without further consultation with the Local Authority (who will have their own duties of confidentiality to consider) or order of the court (via the CPS). If these documents are not disclosed, the Police/CPS will need to make an application to the family court (the practicalities of which are set out below) to seek its disclosure.
- 3.10 Further, the Local Authority are able to provide documents or information relating to Family Court proceedings where:
- a) The police officer to whom disclosure is made is carrying out duties under s. 46 Children Act 1989 (police protection with 72 hour limit); and
  - b) And the disclosure is for the purposes of child protection and not criminal investigation<sup>5</sup>.

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<sup>3</sup> 12(1) Administration of Justice Act 1960

<sup>4</sup> R v Chief Constable of North Wales Police ex parte Thorpe [1996] QB 396

<sup>5</sup> Rule 12.73(1)(a)(viii) Family Procedural Rules 2010)

- 3.11 Any document or information disclosed for this purpose cannot be used for criminal investigation or prosecution without permission of the Family Court<sup>6</sup>.
- 3.12 Where further material comes to light as a criminal investigation/proceedings develop, the Local Authority will contact the police and/or the CPS to arrange an examination of the new material by the police. If new issues arise in the criminal case (e.g. following the receipt of the defence case statement), the police will submit a further Annex C document, as above requesting access to other material that may now be relevant.
- 3.13 Judgments at the conclusion of family proceedings may be of particular interest to criminal proceedings. This is covered by Practice Direction 12J which states that a party can provide ‘the text or summary of the whole or part of a judgment given in the proceedings’ to a police officer for the purpose of a criminal investigation.
- 3.14 Disclosures of documents from the CPS to criminal defence (of documents from family proceedings obtained by any aforementioned means) is also covered in the protocol at paragraph 13. All material obtained from the Local Authority will be listed by the police on the sensitive disclosure schedule (MG6D). Any material not disclosed to the police, for reasons set out above (i.e. those relating to Family Proceedings or confidentiality), will also be included on MG6D.
- 3.15 Disclosure for the purposes of child protection (rule 12.73) will be revealed on the MG6D, but there will not be a description. As above, the police/CPS can make a further application to the Family Court as required.
- 3.16 Where the Local Authority has failed to make available documents not relating to family proceedings, the CPS will consider whether it is appropriate to seek access to such material by means of a witness summons in the criminal court pursuant to s.2 Criminal Procedure (Attendance of Witnesses) Act 1965. Where any Local Authority material falls within statutory disclosure test under the Criminal Procedure and Investigations Act 1996, the CPS will write to the Local Authority setting out the reasons why the material falls to be disclosed and informing them of that decision. The

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<sup>6</sup>A District Council (Applicant) v M (Respondent) & West Yorkshire Police (Interveners) [2007] EWHC 3471 (Fam); [2008] 2 FLR 390

relevant forms are set out in the Protocol. The Local Authority can raise objections in writing.

3.17 Therefore, in reality, criminal defence lawyers would usually use the standard routes within the criminal courts to make requests of further disclosure, or question CPS decisions under the disclosure test. There are applications in the family courts from the CPS, seemingly at the behest of a presiding Crown Court Judge, for disclosure of further information in order for the CPS to fulfil its disclosure obligation. However, there is no clear procedural barrier for a party (to the family proceedings) to make an application to the family court for the disclosure of documents in family proceedings for use in criminal proceedings separately.

#### **4. Applications for permission**

4.1 The application is made using Form C2<sup>7</sup>. Usually, the costs of the application would be split between the Local Authority and the legal aid certificates of the publicly funded parties (with an order for costs in the case). Where proceedings have finished and the parties no longer have public funding certificates for the purposes of family proceedings, then it is likely that the costs will be borne by the party making the application. This would be another reason for criminal defence practitioners to use the usual criminal procedures to seek disclosure of material related to the family proceedings through the CPS.

4.2 Prior to the service of prosecution papers pursuant to s.51 of the Crime and Disorder Act 1998, applications will be generally made by the police, and after they will generally be made by the CPS.

4.3 The applications should set out the extent of the disclosure they seek: leave to disclose the material to the CPS, to disclose the material to the criminal defence solicitors<sup>8</sup> and subject to s.98(2) Children Act 1989 (considered below) to use the material in evidence at the criminal proceedings.

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<sup>7</sup> <https://www.gov.uk/government/publications/form-c2-application-for-permission-to-start-proceedings-for-an-order-or-directions-in-existing-proceedings-to-be-joined-as-or-cease-to-be-a-part>

<sup>8</sup> Where required under s3 or s. 7A Criminal Procedure and Investigations Act 1996



4.4 The application must be served on all parties. If agreed by all parties, a consent order can be sent for approval to the relevant family court. Whenever possible, the application should seek for the Local Authority lawyer to request for the family court to consider the issue at the next case management hearing, if this would not overly delay the substantive proceedings.

## 5. Section 98 Children's Act

5.1 To this point, we have considered the disclosure of documents to the police/CPS for the investigation of crime or fulfilling their statutory function. There is another key consideration for criminal practitioners when considering the use of material in a criminal trial.

5.2 Criminal lawyers must tread with care when considering the admissibility of some evidence from family proceedings in a criminal trial. The very different nature of criminal and family proceedings leads to a tension in the rules regarding the admissibility of evidence more broadly. In family proceedings, parties are often advised to be open and honest within family proceedings to demonstrate their insight and ability to address any concerns with their parenting. This may mean accepting past criminal activity. This may, clearly, be contrary to their best interests in a criminal setting.

5.3 Accordingly, s. 98 Children's Act 1989 states:

*“Self-incrimination.*

*(1) In any proceedings in which a court is hearing an application for an order under Part IV or V, no person shall be excused from—*

*(a) giving evidence on any matter; or*

*(b) answering any question put to him in the course of his giving evidence,*

*on the ground that doing so might incriminate him or his spouse of an offence.*

*(2) A statement or admission made in such proceedings shall not be admissible in evidence against the person making it or his spouse in proceedings for an offence other than perjury.”*

5.4 This essentially provides that no person shall be excused within care proceedings from giving evidence on any matter, or answering any question put to them in the course of giving their evidence on the ground that doing so might incriminate them, or their spouse or civil partner, as to an offence. This can encompass written statements, oral evidence and statements made to a guardian, social worker or expert<sup>9</sup>.

5.5 However, even the disclosure of admissions within family proceedings is subject to the discretion of the family court, as per Rule 73(1)(b), as above. Therefore, parties must seek permission to use a statement or admission made in family proceedings if the statement or admission is being used against the person making it in criminal proceedings.

5.6 An application would be made via the C2 procedure, set out above.

5.7 The principles the court would consider are set out in Re C (a minor) (care proceedings) (disclosure) [1997] Fam 76:

(1) The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor.

(2) The welfare and interests of other children generally.

(3) The maintenance of confidentiality in children cases.

(4) The importance of encouraging frankness in children’s cases. This is a very important factor and is likely to be of particular importance in a case to which section 98(2) applies. The underlying purpose of section 98 is to encourage people to tell the truth in cases concerning children, and the incentive is that

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<sup>9</sup> A Chief Constable v A County Council and Others [2002] EWHC 2198 (Fam)

any admission will not be admissible in evidence in a criminal trial. However, the added incentive of guaranteed confidentiality is not given by the words of the section and cannot be given.

- (5) The public interest in the administration of justice. Barriers should not be erected between one branch of the judiciary and another because this may be inimical to the overall interests of justice.
- (6) The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor.
- (7) The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order.
- (8) The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the police service, medical practitioners, health visitors, schools etc. This is particularly important in cases concerning children.
- (9) In a case to which section 98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations.
- (10) Any other material disclosure which has already taken place.

5.8 Consideration regarding the use of this document at the criminal trial will still be given by the Crown Court Judge. Whilst some protection is provided to Defendants via

section 78 PACE<sup>10</sup>, the role of section 119 of the Criminal Justice Act 2004 relating to the admissibility of previous inconsistent statements as evidence will be a factor. Accordingly, questions asked of a suspect in an interview regarding any admissions from family proceedings may well be admissible.

5.9 In reality, this appears to be the most common use of evidence in family proceedings. Documents are disclosed to the police, through one of the routes explained above, and then put to the Defendant as part of the investigation in interview.

5.10 Due to the Family Procedural Rules and Criminal Justice Act 2004, academics have argued that s.98(2) has been subrogated by the later Family Procedural Rules and rule 12.73 which provides for a court giving permission for admissions or statements to be disclosed to the police/CPS that can then be used in a criminal court with the Crown Court Judge's permission<sup>11</sup>.

## **6. Concluding principles/Rules**

6.1 Key principles and considerations on this issue then are:

- The starting point is that s.12 of the Administration of Justice Act 1960 taken with the Family Procedural Rules renders the publication of information relating to private family proceedings to the public at large a contempt of court. This means they cannot be used in open court unless the family court has given permission.
- Unless the court specifically prevents it, the police and CPS are entitled to a copy of a judgment arising from family proceedings pursuant to rule 12.73.

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<sup>10</sup> In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

<sup>11</sup> 'The Self-incrimination Privilege in Care Proceedings and the Criminal Trial and "shall not be admissible in evidence"?' JCL 73 (48) 1 February 2009 (S Edwards))

However, the information within that judgment must only be used for the purposes of child protection and/or investigation of crime.

- The police are able to receive information from family proceedings without court permission but only if the purpose and use of that information is the furtherance of child protection.
- The family court must give permission for the police and CPS to receive further documents or to use that information for other purposes (criminal investigations or prosecution).
- For criminal defence practitioners, the interplay with the family courts will more often than not play out through the disclosure test and the CPS.

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