



HOME MYTH BUSTING THE LAW STORIES FROM FAMILIES ADVICE FROM TAKING PHOTOGRAPHS OF CHILDREN

I want to take a photograph of my child but I am told I cannot

This is a post by **Sarah Phillimore** arising out of her own recent experiences.

I want to focus on the single issue of when a parent can be prevented from taking a photograph of their own child, for their own private use or for publishing on a social networking site.

It is an issue that causes significant difficulties as the law that supports such prohibition does not seem to be either clearly set out or understood. It has the potential to cause trouble for parents in a variety of environments such as school events, sporting events or during supported/supervised contact with their children. These are all occasions when parents may wish to take a photograph or film their children but may be told they cannot.

It seems that the difficulties have largely arisen because a variety of different worries converge to make people worried about parents taking photographs and some would appear to have stronger foundation than others.

What is a growing issue of concern for me is the lack of understanding about what laws and legal principles actually underpin any prohibition of a parent taking a photograph of his or her own child. This must inevitably have a detrimental impact on how child protection policies are devised and implemented. This issue crystalized for me after my daughter attended a drama festival recently and a general announcement was made at the beginning that no photography in the building would be permitted due to the 'Child Protection Act'.

This caused me immediate consternation, as this wasn't an Act I had ever heard of. Further investigation of what informed the festival's child protection policy showed that they relied upon:

- The Children Act 1989;
- The Police Act 1997;
- The Data Protection Act 1998;
- The Human Rights Act 1998,
- The Protection of Children Act 1999;
- The Criminal Justice and Court Services Act 2000.

There are immediate problems with this list as a basis for a 'no photos' rule

The **Data Protection Act does not apply to photographs taken for purely personal reasons**, for example by parents or grandparents at sports days or school plays (a photo album is fine but there might be a question mark over whether or not a photo published on a Facebook timeline with no privacy settings could be 'purely personal') See the guidance from the [Information Commission](#).

The **Criminal Justice and Court Services Act 2000 does mention photographs but only to increase the penalties for possession of indecent photographs at section 41.**

The **Police Act 1997 appears utterly irrelevant** from looking at its [table of contents](#). I confess I have not sat down and read the whole Act but I note what [Archbold said about it](#) at the time *The Act has five parts: Part I puts the existing National Criminal Intelligence Service on a statutory footing; Part II creates a new national squad, the National Crime Squad; Part III gives wide-ranging*

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powers of intrusive surveillance to the police and customs; Part IV creates the Police Information Technology Organisation ... and Part V develops a wholly new system to provide access to criminal records for employment purposes.

The Protection of Children Act 1999 appears to be equally irrelevant, [being an Act: to require a list to be kept of persons considered unsuitable to work with children](#); to extend the power to make regulations under section 218(6) of the Education Reform Act 1988; to make further provision with respect to that list and the list kept for the purposes of such regulations; to enable the protection afforded to children to be afforded to persons suffering from mental impairment; and for connected purposes.

The Child Protection Act 1999? This was referred to by the organisers in their announcement but did not feature in the written list of primary legislation. I originally dismissed it as made up legislation but a bit more digging revealed the [Child Protection Act of 1978](#) which is an Act:

[to prevent the exploitation of children by making indecent photographs of them](#); and to penalize the distribution, showing and advertisement of such indecent photographs.

I am unable to understand how this Act could ever apply to a parent who wished to take a photograph of his or her own fully clothed child to record an event in that child's life.

The Human Rights Act 1998 and the Children Act 1989, I don't know what article of the ECHR I would be breaching by taking a photograph of my fully clothed child. If anything, refusing to allow me to indulge such a parental desire to celebrate and commemorate my child's experiences is arguably a breach of my right to respect to my family and private life pursuant to [Article 8](#). Any such breach of my right to respect to my family life must be necessary and in accordance with the law: it must be [proportionate](#).

This seems to lead to the only statutory foundation for the organisation's prohibition on photography, that under [section 97\(2\) of the Children Act 1989](#). This makes it an offence to publish any material which is intended or likely to identify any child involved in any proceedings in which any power may be exercised regarding that child under the Children Act 1989 or the [Adoption and Children Act 2002](#).

You do have a defence if you can prove that you did not know and had no reason to suspect that the published material was intended, or likely to identify the child. So it would seem very unlikely that a parent would fall foul of this section if they wished to take a photograph of their child, another child wanders unnoticed into shot, turns out to be involved in care proceedings and is subsequently identified from the photograph if the parent publishes it on social networking sites.

So what's going on?

Why are people so nervous about photographs? The concerns appear to fall within the following domains.

- Fear that a vulnerable child might be identified
- A wish to protect commercial profit making if a school/organization wishes to sell its own photographs of an event.
- A wish to prevent an event being disrupted by intrusive efforts to take photographs/film videos.
- An expectation of privacy
- Fear of paedophilia

Identification of vulnerable children

Given the ubiquity of social media and the tendency now for parents to wish to publish on line photographs or videos of their children, I accept this is a real fear, particularly as use of social networking sites increases and facial recognition grows ever more sophisticated. I have discussed the inexorable rise of Facebook and the implications this has for adopted children in [another post](#).

I agree that [schools and other organizations need a clear policy setting out what is and is not acceptable with regard to photography at events so that vulnerable children can be protected from being identified by people from whom they need to be kept safe.](#)

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But reliance on the Child Protection Act 1978 will not assist with this sensible aim and may well hinder it; if the law is constantly framed in terms that photographs are risky because they are indecent, many parents are likely to 'switch off' and become irritated by such constraints on their innocent wish to photograph their child.

Intrusive photography and protection of commercial interests

I can also understand and accept that efforts by parents to record the achievements of their children has the potential to be disruptive to the event and the children's enjoyment of it. There need to be rules about what is or is not acceptable. If a school or other organization goes to the trouble of organizing an event they may wish to make some money on the sale of photographs or use photographs to publicise the event.

Provided the organisers make it clear to parents before hand so they can decide whether or not they wish to attend in the light of such restrictions, this would appear to be a reasonable policy. Hopefully individual schools/organisations would have a policy sufficiently flexible to give some opportunities to individual parents who wanted to take a photograph at some point in the proceedings of their child and their child alone. But again, a focus on the potential indecency of photographs does not assist anyone's understanding or compliance with such policies.

Paul Weller: An expectation of privacy under Article 8 ECHR

The case law around this, unsurprisingly, usually involves celebrities or others in the public eye who find themselves being photographed when they go about their day to day business. The case of *Weller v Associated Newspapers* [2015] concerned the musician Paul Weller's objections to photographs taken of his children on a street on their way to a cafe in the USA; these photographs were later published by the Mail Online without any attempts to obscure the children's faces and despite Mr Weller's objections at the time. Mr Weller succeeded at his first court hearing where the Judge found that his children did have a reasonable expectation of privacy and that the Mail On line could not argue that it was justified in breaching their privacy by claiming freedom of speech or expression. The Mail Online appealed. The Court of Appeal considered the concept of 'a reasonable expectation of privacy' and the various strands of case law. At para 29 the Master of the Rolls commented:

First, a child does not have a separate right to privacy merely by virtue of being a child. Secondly, however, although the broad approach that must be adopted to answering the question whether there is a reasonable expectation of privacy is the same for children and adults, there are several considerations which are relevant to children (but not to adults) which may mean that in a particular case a child has a reasonable expectation of privacy where an adult does not.

And further at para 61 he explained why he agreed with the first court:

*61. The starting point is the place where the activity happened and the nature of the activity. As the judge said, this was a private family outing. It could have been a family visit to a local park or to a public swimming pool. It happened to be an outing to the shops and to a café which was visible from the street. The essential point is that it was a family activity which belongs to that part of life which is protected by the broader right of personal autonomy recognised in the case law of the Strasbourg court: see *R (Catt) v Association of Chief Police Officers* [2015] UKSC 9, [2015] AC 1065 per Lord Sumption at para 4. The family element of the activity distinguishes it from *Naomi Campbell's* popping out to the shops for a bottle of milk and *Sir Elton John* standing with his driver in a London street, outside the gate to his home wearing a baseball cap and tracksuit (see *John v Associated Newspapers Ltd* [2006] EMLR 27).*

62. It is also relevant that the claimants' parents did not consent to the taking or publishing of the Photographs.

*63. But the critical factor which militates in favour of the claimants having a reasonable expectation of privacy in relation to the Photographs is that they are children and that they were identified by their surname. The twins were less than one year old at the time of publication. They did not "knowingly or accidentally lay [themselves] open to the possibility of having [their] photograph taken in the context of an activity that was likely to be recorded or reported in a public manner" (see *Reklos* para 37). Nor did their parents court publicity for them.*

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However, these kinds of circumstances are highly unlikely to arise when you inadvertently include another child in the background of a photograph of your own child. So long as that other child is not identified by name and you are not intruding upon a private family event, it seems improbable that anyone could argue that any publication of the photograph would be an actionable breach of Article 8 in respect of that child. The issue in the Weller case was clearly that the pictures were identified as members of his family as he was a celebrity and the pictures would provoke interest for that reason alone.

Fear of paedophilia

This to me seems the objection without any sensible foundation in fact or law but the one that looms largest over many child protection policies and is probably mainly responsible for infecting such policies around photographs with a sense of unreality and hysteria.

I am alarmed that the recent objections raised against me photographing my child appeared to be based on legislation relating to the possession of indecent photographs. I struggle to see in what possible context photographs of my child taken by me at a school event or other kind of educational /sporting /musical gathering could ever meet the legal requirements for indecency.

The **Obscene Publication Act 1959** sets out the test for indecency as – does the material have a tendency to ‘deprave and corrupt’?

I am both angered and saddened that I am being encouraged to consider how a photograph of my fully clothed daughter at a drama festival could possibly have a tendency to deprave or corrupt anyone, let alone the limited number of people who have access to my photographs on Facebook. It seems that this belief that pictures of children are likely to invoke some dangerous sexual response from adults is widespread; note this article which suggests that parents taking pictures of their children in the bath could find themselves as a ‘test case’ for prosecution due to taking indecent images!

I am not alone in my criticism of how the spectre of paedophilia has been permitted to corrupt many innocent interactions between adults and children. See for example this article from the Guardian in 2012 *The Child Protection in Sport Unit recommends that you “avoid full-face and body shots” and that children in swimming costumes should only be shown “from waist or shoulder up”*. These rules create a stilted genre of child photography, where children are pictured on their own or at designated “photo moments” at the end of the play or match, rather than in the thick of events.

Schools often invoke the Data Protection Act 1998, or the Children Act 2004 as the reason for photography bans. “But there is nothing in the Children Act that says ‘Thou shalt not photograph children,’” says Eleanor Coner, information officer at the Scottish Parent Teacher Council. The Information Commissioner’s Office has taken to putting out bi-annual statements refuting the myth that the Data Protection Act prohibits photography. “We call it the ‘data protection duckout,’” says David Smith, director of data protection at the Information Commissioner’s Office. “If there is something people don’t want to do, but they can’t explain it easily, they say it’s because of the Data Protection Act.” In fact, photography bans cannot be traced to any single event or law. Rather, it seems that there was a shift from the early 2000s, when similar regulations diffused throughout schools and sports organisations. As an example of how attitudes have changed, a manufacturer of children’s play equipment asked a photographer, John Robertson, to photograph its apparatus at a variety of English sites: he was shouted at and parents snatched away their children in parks in Nottingham, Cambridge and the Isle of Wight. The spread of photo bans is not really a response to child abusers stalking school sports days. Instead, it reflects the contamination of everyday adult-child relations – and the new assumption, as the children’s author Philip Pullman put it, that “the default position of one human being to another is predatory rather than kindness”. Any adult looking through the viewfinder at a child is viewed as potentially sinister and in need of regulation.

I don’t doubt that parents do need to be more aware than many are, that photographs published on social media may end up being published elsewhere. This was demonstrated quite horribly recently when parents in the UK discovered that pictures of their children had ended up on a Russian site where they were used for sexual gratification of those viewing.

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But the focus here is probably better put on teaching people more about protecting their on line privacy (these pictures were taken from the 'open' profile of one of the children's grandparents) than encouraging hysteria over what happens to pictures on Facebook and using this as justification to curtail the actions of all parents who wish to take photographs of their own children outside their own home.

So why does this matter?

Why am I getting annoyed by this issue? Does it really matter? I took a photograph of my daughter outside the venue, put it on Facebook, lots of my friends 'liked' it: I was able to share her special moment and show that I was proud of her and could keep a record for her to remember in future. Neither she nor I suffered in any way because of the restriction placed on photography within the building at the time.

But to dismiss this as a concern simply because at this particular time and at this particular event it had no or only trivial consequences is to miss a very important point.

That point is that a justification was given to interfere in my innocent interactions with my own child on what appears to be spurious or very poorly understood legal grounds.

And this matters. To rely upon an Act which prohibits taking indecent photographs during an event where the possibility that any indecent photographs would be taken was close to zero, suggests very strongly to me that the child protection policies devised by these organisers were not based on any clear understanding of the relevant law or what is involved in assessing risk.

If you do not understand the law which underpins your policies, how can we have any faith in these policies? How can we respect these policies? And ultimately, how will you enforce them? If you don't understand what a risk is and how to assess it, how can we have any confidence that you have identified the relevant risks and set up proper safeguarding procedures?

This is not the only time I have been referred to 'the Child Protection Act'. A laminated sign at Cardiff ice rink also relies upon it – or at least it did in 2013 when I was last there. Interestingly and alarmingly, it also appears in an article in the *Telegraph* from 2008 which suggests it has made its way very firmly into consideration of child protection policies.

Policies about something as important as child protection should not be made by reeling off a list of primary legislation which appears to have very little relevance to the issue in hand or relying on an Act which can't possibly apply to parents who want to record their children at school or sporting events. Setting us all up as potential paedophiles does not make children any safer. Taking a photograph of a child should not be considered by default either an indecent or dangerous act.