

## ***Confidence and Confidentiality: Transparency in the Family Courts***

1. For at least three decades the question of whether there should be more openness in the conduct of Family proceedings has been a live issue. In 2006-2009 the then Secretaries of State for Justice (Lord Falconer and Jack Straw MP) made a concerted effort to address the issues<sup>1</sup>. Despite that initiative, and despite the Family judiciary as a whole, and successive Presidents of the Family Division ['PFD'] in particular, being broadly in favour of greater openness, the pace of change has been glacial. At the heart of the issue is the tension that exists between two principal policy drivers, namely, on the one hand, the need to enhance public *confidence* in the Family Court and, on the other, the need to maintain *confidentiality* by safeguarding the privacy of those who turn to the court for protection or for the resolution of intimate disputes.
2. Following my appointment as PFD and Head of Family Justice three years ago, I took the clear view that the topic of 'Transparency' should not be left to sit in the 'Too Difficult' box. I therefore announced that I would undertake a full review of all of the issues with the aim of formulating my own view and recommendations for any change in practice and approach so that, insofar as it is appropriate for a judge to do so, I might then move forward to achieve their implementation. I appointed a small panel to support the review process and to act as a source of insight and advice<sup>2</sup>. The Panel has received written statements from a number of those interested and held short evidence sessions in which we heard 12 individuals or groups.<sup>3</sup>
3. The panel has individually and collectively proved to be invaluable in the contributions that they have made, and I am extremely grateful to them for their support. This document is, however, a statement of my own conclusions and is not a 'report' from the panel as a whole. Unfortunately the process of the review has been slower than had been intended, with delays caused by the need to focus on the impact of Covid 19 on the Family justice system and, for a time, my own health needs.
4. The volume of evidence that the panel received was substantial and much of it is publicly available.<sup>4</sup> I will not, therefore, attempt to summarise the evidence here, but simply move to my conclusions after some introductory material to establish the overall context.

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<sup>1</sup> *Confidence and confidentiality: Openness in family courts – a new approach* (June 2007) Cm 7131

<sup>2</sup> The membership of the Panel is at Annex 1.

<sup>3</sup> A list of those who submitted and oral evidence is at Annex 2.

<sup>4</sup> <https://www.judiciary.uk/announcements/update-family-divisions-transparency-review/>

### **Transparency: why is the issue important?**

5. Every day the judges and magistrates in the Family Court in England and Wales, sitting in some 45 localities, hear cases which affect the most personal, and often the most important, aspects of an individual's life. The caseload volume is immense, the Family Court Quarterly Statistics record a total caseload of 224,902 in 2020. All of this activity is undertaken within the law and on behalf of society at large, which has a strong legitimate interest in understanding the work of the court and knowing if it is being done well. Many of the decisions made in Family cases involve judges and magistrates exercising a degree of discretion and, in doing so, they are representing the social and other value judgments of society as to what is a fair or proper outcome in a dispute about family finances, or whether the State should remove a child into care, or what is the future course that best meets the welfare needs of a child. Again, it is legitimate for the public to know of these judgments, to provide a basis for trust in the soundness of the court's approach and its decisions, or to establish a ground for concern in that regard. These, and other factors, establish that there is a significant and important public interest in our society having and maintaining confidence in the work of the Family Court. Conversely, a largely closed system, where the public are given no account of how the court operates, leads to accusations that this is 'secret' justice and that the approach of the court is unsound, unfair or downright wrong. Openness and accessibility to the work of the court may also enhance the ability for the system and those who work within it to learn and improve.
  
6. Against the impetus towards greater openness, there is a similarly strong and important force in favour of maintaining a cloak of confidentiality around the identity and personal information of the children and adult parties whose cases come before the court. The voice of children and young people on this issue is strong and clear; they do not wish to have their personal information and the detail of their lives made public. Much of the evidence in cases relating to children is intensely private and sometimes deeply distressing. Such was the strength of this view, coupled with the need to put the interests of children first, that the initial government proposal of 2006 to allow the media in to report on Family cases, was withdrawn.<sup>5</sup> In addition to respecting the natural desire of many parties to Family proceedings not to have details of their private lives made public, the Family Court has a legitimate interest in those who appear before it telling the truth (particularly where it is alleged that a child has suffered significant harm). Knowing that their evidence may be made public is unlikely to increase a witness' willingness to admit to abusive behaviour, despite it being very much in the interests of that person and their child for an admission to be made so that the court can then consider what help may be introduced to avoid a repetition of harmful behaviour.

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<sup>5</sup> *'Confidence and Confidentiality'* (June 2007)

7. Whilst other less prominent factors are, of course, in play, these two opposing dynamics are key. The task of ‘squaring the circle’ between the competing needs for confidence and confidentiality has, rightly, proved to be a most difficult one over the years. Trying to identify ways in which confidence can be significantly enhanced, whilst still maintaining confidentiality, has therefore been my primary aim in this exercise. In approaching this task I have not, however, regarded these as mutually exclusive opposites.

**Transparency: what does it mean?**

8. A trap, and one into which I and, I suspect, many others may have fallen when first approaching this issue, is to see ‘transparency’ as raising a single question, ‘should the Family Court be open to the public and/or press’, to which there would be a single binary answer of either ‘yes’ or ‘no’. Experience over recent years, assisted greatly by the excellent work of the ‘Transparency Project’<sup>6</sup> and others, demonstrates that that formulation is very wide of the mark. There are in fact many ways that the Family Court can be more open, and provide more information about what takes place there, without altering the current restrictions on reporting and attendance. The publication of an annual Family Court report, greater publication of judgments, issuing of summaries of judgments, publishing daily court lists which are clear and more informative, are but a few examples. The Transparency Project itself has amply demonstrated that it is possible, within the current legal framework, to publish a range of information about the court and individual cases.
9. During this review I have, therefore, looked widely and thought laterally to try to identify changes both great and small which may increase openness in the system.

**Transparency: the current legal context**

10. In order to understand any proposals for change, it is necessary to refer to the current statutory scheme, the principal element of which is s 12 of the Administration of Justice Act 1960:

**“12 Publication of information relating to proceedings in private.**

(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—

(a) where the proceedings—

(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;

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<sup>6</sup> <https://www.transparencyproject.org.uk/>

- (ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002; or
  - (iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;
- (b) where the proceedings are brought under the Mental Capacity Act 2005, or under any provision of the Mental Health Act 1983 authorising an application or reference to be made to the First-tier Tribunal, the Mental Health Review Tribunal for Wales or the county court;
- (c)...;
- (d)...;
- (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.
- (2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.
- (3) In this section references to a court include references to a judge and to a tribunal and to any person exercising the functions of a court, a judge or a tribunal; and references to a court sitting in private include references to a court sitting in camera or in chambers.
- (4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the publication is not so punishable by reason of being authorised by rules of court)."

11. It is important to note that AJA 1960, s 12 is only engaged when a court is 'sitting in private'. In recent times, the Court of Protection ['CoP'], which hears proceedings under the Mental Capacity Act 2005 (and therefore covered by s 12(1)(b)) has, for the most part, not been sitting in private and reporting of its proceedings has therefore been without the potential for contempt proceedings under s 12. The Family Procedure Rules 2010 ['FPR'], r 27.10 provides that proceedings to which the FPR apply (that is all Family proceedings) 'will be held in private', except where the rules provide otherwise or where the court directs otherwise.

12. By FPR 2010, r 27.11 various categories of people are permitted to be present during a private hearing and these include 'duly accredited representatives of news gathering and reporting organisations' and any other person with the court's permission. Currently, a pilot scheme under FPR PD36J extends the automatic right to attend to 'duly authorised lawyers attending for journalistic, research or public legal educational purposes', (ie legal bloggers). Practice Direction 27B gives guidance on the court's approach when media representatives attend a hearing.
13. The combined effect of these provisions is that, whilst the default position is that accredited media representatives and legal bloggers may attend a private Family Court hearing as of right (r 27.11), they are still covered by AJA 1960, s 12 which prevents publication of information relating to proceedings if they concern children.
14. In addition, Children Act 1989, s 97(2) makes provision for privacy for children involved in certain proceedings:
- “(2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify—
- (a) any child as being involved in any proceedings before the High Court or the Family court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or
- (b) an address or school as being that of a child involved in any such proceedings.”
15. The Family Procedure Rules 2010, r 12.75(1) and Practice Direction 12G ['FPR' and 'PD'] provide that a party may communicate information relating to the proceedings to certain categories of people who are named in PD12G. Accredited media representatives are currently not included in the list.
16. AJA 1960, s 12 and CA 1989, s 97 apply to children cases, but not to financial remedy proceedings following divorce where there are no children involved. However, the court restricts publication of confidential financial information disclosed in financial remedy proceedings pursuant to the powers and principles established in *Clibbery v Allen (No 2)* [2002] EWCA Civ 45, *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315 and *HRH Louis Xavier Marie Guillaume v HRH Tessy Princess of Luxembourg & Anor* [2017] EWHC 3095 (Fam). Accordingly, the Financial Remedy Courts now ordinarily control the release of information for publication, where this is sought, by an express order.

17. Judicial opinion continues to differ on whether such financial proceedings are covered by the Judicial Proceedings (Regulation of Reports) Act 1926, s 1, which make it unlawful to publish any information relating to matrimonial or civil partnership proceedings other than certain statutory exceptions. Courts have developed a discretion under s 1(4) of the 1926 Act to allow publication of matters otherwise prohibited by the Act. However, the reporting of financial remedy cases is not generally regulated by orders under the 1926 Act, but, rather, pursuant to the powers and principles set out above.
18. Proceedings under Family Law Act 1996, Part IV relating to domestic abuse and/or the occupation of a family home are not subject to a specific statutory provision prohibiting publication of material arising from a private hearing, but, where a child is involved, CA 1989, s 97 and AJA 1960, s 12 are likely to apply.
19. Appeals with respect to most Family proceedings are heard in open court, but are subject to reporting restrictions.

**The broad approach for the future: The need for much greater openness**

20. There are substantial and important principles in play when considering these issues including the rights, encompassed in Article 8 of the European Convention on Human Rights ['ECHR'] to respect for the private and family life of children and their parents, the rights of children under the UN Convention on the Rights of the Child, Article 12 and the rights of the media and others (including the parties) to freedom of expression under ECHR, Article 10.
21. These various, and at times competing, rights must, however, be considered in the context in which they arise. The Family Courts are part of the overall justice system. 'Open justice' is a fundamental constitutional imperative, to which there may be exceptions. Through open justice, the workings of the justice system are held up to public scrutiny by hearings being open to the public and/or by permitting media reporting of the proceedings. The work of the Family Court is of significant importance in the life of our society, yet, as is plain, the current limited degree of openness does not permit effective public scrutiny. It is by openness that judges are held to account for the decisions they make so that the public can have confidence that they are discharging their important role properly.
22. It is no longer possible to rely upon the factors against more openness to prevail so that the Family Court continues to be an exception from the ordinary imperative for open justice. The extent of the jurisdiction of the Family Court, and the volume of its caseload, means that the impact of its work is now felt by many, in a way which will have been beyond the contemplation of legislators over 60 years ago in 1960. The level of legitimate media and public concern about the workings of the Family Court is now such that it is necessary for the court to

regard openness as the new norm. I have, therefore, reached the clear conclusion that there needs to be a major shift in culture and process to increase the transparency of the system in a number of respects. In short, the reasons for this conclusion are as follows.

23. Despite the best intentions of all involved, the current arrangements fall well short of being satisfactory in terms of affording at least an adequate degree of openness about the work of the Family Court.
24. Firstly, and understandably, media representatives, who know that they may be in contempt of court if they seek to publish any information relating to the proceedings, have not attended the court to any significant degree.
25. Secondly, the *Practice Guidance on 'Publication of Judgments'* (issued by Sir James Munby P in January 2014) which required publication of anonymised judgments in certain categories of case and encouraged publication in others, is, unfortunately, not being followed in many cases<sup>7</sup>. This, I accept, is largely due to the increased burden that the task of proof-reading and anonymisation places on already very hard pressed judges.
26. The result of these two circumstances is that, save for some exceptional cases, or those few published judgments which are spotted and taken up in the media, or where a case is heard on appeal, the main body of the work in the Family Court is not open to any form of outside scrutiny or appraisal. In recent times, cases, which have rightly been highlighted as causing concern, have only come to the attention of the media by being heard in public on appeal. Had an appeal not taken place, it is unlikely that the public (and indeed the court system) would have become aware of what the various appeal judges held were significant judicial errors.
27. At the same time, regular press reports appear based upon anonymous accounts of negative experiences in the Family Court by parents, victims of domestic abuse and others. Without knowledge of the identity of the complainant, it is not possible for the system to respond or to assist the media by retrospectively finding and publishing any judgment or account of the court process in such cases. This is a thoroughly unsatisfactory state of affairs, with the drip-drip of concerning stories, that are neither answered nor explained by publication of a judgment, inevitably eroding public confidence in the Family justice system.
28. Justice taking place in private, where the press cannot report what has happened and where public information is very limited, is bound to lead to a loss of public confidence and a perception that there is something to hide. The Family justice

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<sup>7</sup> The number of published judgments fell from 222 in 2015 to 87 in 2019.

system is suffering from serious reputational damage because it is, or is perceived to be, happening behind closed doors. Further a lack of openness undermines accountability and allows occasional poor practice to continue unchecked.

29. I have been struck by the success of the *CoP Open Justice Project*, run by Professor Celia Kitzinger<sup>8</sup>. There are important differences between the CoP and the Family Court, but there are real lessons to be learnt. Transparency in the CoP has led to the public having a much better understanding of the work that is done and to improving standards within the court.
30. There is a genuine and legitimate public interest in the Family justice system. In public law cases, where the State is intervening in the most fundamental way in peoples' lives, the public has the right to understand why that is happening. More generally, improved public knowledge of the work in the Family Courts allows greater and more informed debate around issues such as the role of domestic abuse in Family Court litigation and the approach to parenting after parting.
31. Another real benefit is that, if there is more open information, then judges, magistrates, other professionals and interested parties will become more aware of what is happening in courts elsewhere and there will be a wider dissemination of information and scope for improvement across the system for judges, lawyers and social workers. It is the case that the Family Court is currently not sufficiently transparent even to those, in particular the judges and the social work professionals, who are working within it. Educational opportunities are thereby being missed.
32. Quite apart from the role of the media, and enhancing the right of parents to speak to journalists, there is a very important piece of work to be done in improving data collection which can be used to bring much wider benefits to Family justice. The issue of data collection and use ties in closely with the work being done by HMCTS across the justice system on collecting and using data, particularly in the light of the report and recommendations of Dr Natalie Byrom.<sup>9</sup>

### **The Broad Approach: The importance of confidentiality**

33. On one issue I wish to be both clear and firm. Greater openness must not be at the expense of the interests of children. All the changes I am setting out below must be subject to the proviso that the anonymity of individual children needs to be preserved. The welfare of children is what much of Family justice is about. There is no doubt that the vast majority of children involved in these cases do not want to be identified and want to maintain their complete anonymity. Some of those

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<sup>8</sup> <https://openjusticecourtsofprotection.org/>

<sup>9</sup> HMCTS: Making the most of HMCTS data October 2020



children gave evidence to this effect, and their voices must be heard and respected. The rise of social media has undoubtedly contributed to a fear that they will be identified and then that will spread on the internet. It is, however, of note that there is no evidence of children actually being harmed in this way. In any event, in my view it is possible to maintain the privacy of those children, whilst at the same time operating a much more open justice system.

34. There is a view, which I accept, that, in the long term, holding the system up to greater transparency will benefit children by driving up standards and increasing public confidence. But the children going through litigation are unlikely to see that wider picture. Therefore it is critical that full protection is in place for them, and where possible the scope of transparency is explained to them.

### **Overall conclusion**

35. My overall conclusion is that the time has come for accredited media representatives and legal bloggers to be able, not only to attend and observe Family Court hearings, but also to report publicly on what they see and hear. Reporting must be subject to very clear rules to maintain both the anonymity of the children and family members who are before the court, and confidentiality with respect to intimate details of their private lives. Openness and confidentiality are not irreconcilable and each is achievable. The aim is to enhance public confidence significantly, whilst at the same time firmly protecting continued confidentiality.
36. In common with most of those who submitted evidence to the review, I am not persuaded that allowing total public access to Family Court hearings is currently justified. There are differences between the nature of the evidence and hearings in the CoP (which does regularly sit in public) and cases in the Family Court. For the present, at least, the focus should be on establishing a workable regime that permits and facilitates press and legal blogger reporting of Family cases.

### **Detailed proposals for change**

37. As I will explain at the end of this document, I propose to establish a Transparency Implementation Group [‘TIG’] to support me in leading the changes that I will now describe.

#### **[1] Reporting of proceedings**

38. Many witnesses referred to AJA 1960, s 12 and the ‘chilling effect’ it had on any reporting on Family cases. Section 12 is a somewhat opaque provision, and the fear of breaching it and the costs involved in litigation have acted as a major disincentive to journalists and others reporting on Family cases. The 1960 Act was concerned to protect and support the administration of justice. Now, some sixty years after its enactment, I have concluded that s 12 has the contrary effect of

undermining confidence in the administration of Family justice to a marked degree. Whether s 12 should be repealed and replaced by a provision that is more fit for purpose is a matter for Parliament and not the judiciary. I do however support calls for urgent consideration to be given by government and Parliament to a review of this provision.

39. By AJA 1960, s 12(4), the Family Procedure Rules Committee can put in place rules which mitigate the effect of s 12. I intend to bring forward rules that will allow journalists and legal bloggers to attend Family Court proceedings and report on what happened, subject to the following.

- Firstly, whilst the effect of the change I propose is that the presumption will be reversed to one that allows reporting, it will always be at the judge's discretion whether in a particular case all non-parties should be excluded.
- Secondly, reporting in whatever form of what happened in court must always be subject to ensuring that the anonymity of the children and their family is maintained. I will produce Guidance on how this is to be achieved.
- Thirdly, active consideration will be given to incorporating or adapting the proposed '*Family Court Reporting Pilot*', which has funding from the Rowntree Foundation, into the new scheme.
- Fourthly, any proposed rule changes or practice directions will be subject to the important requirement of government ministerial approval.

40. There is understandable and justified concern amongst Family judges and magistrates that media reporting may result in journalists distorting or misunderstanding the court process in order to produce a 'good story' which is neither accurate nor justified by what took place in court<sup>10</sup>. It will be necessary to monitor the reporting, both locally and nationally, and, where clear misreporting occurs, for it to be taken up with the relevant editors. In this regard both the limited trial run (proposed below) and the establishment of a forum for discussion<sup>11</sup> between the Family judiciary locally and nationally will be important.

41. This new system must start with a trial run (to be called a 'pilot' in the terminology of the Rules) in two local authority areas (one urban and one rural) to ensure that the changes work in an effective way and to deal with any unforeseen issues and problems that may arise before it is rolled out nationally. The progress of the trial run will be monitored by the TIG but also, separately, I will invite the Family

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<sup>10</sup> For example, see the accounts given by 13 judges in '*The Secret Family Court – Fact or Fiction?*' (Clifford Bellamy), Chapter 7.

<sup>11</sup> See para 55

Justice Young People's Board to advise upon and monitor the views of the young people who are in proceedings in these two courts during the trial period.

42. There is a difficult issue about what documents journalists and bloggers should be able to see. In the CoP it is normal practice for those who request them to be shown Skeleton Arguments. In a system where oral submissions are often limited and extensive reference is made to Skeletons this is the only way that an observer can understand what is happening. Equally, when oral evidence is usually largely taken as read, a journalist who does not have the witness statements will not be able to understand the case.
43. The detail of what documents should normally be given to journalists in the different setting of a Family hearing is a matter that will need further consideration. My preliminary view is that those attending should be allowed to read position statements and witness statements but not medical reports or primary documents such as police disclosure. However, in all cases the judge will have a discretion to withhold documentation if that is necessary on the facts of the case.
44. In line with the approach to be taken to identifying information that is to be excluded from published judgments (see below), the default position should be that journalists will not only be prohibited from identifying the child concerned but also from publishing other identifying data (for example school or locality) and from publishing detailed evidence of abuse. Guidance will be issued identifying, in broad terms and subject to judicial discretion, the default position stating what can, and what cannot, ordinarily be published.

## **[2] Communication of information to media representatives and legal bloggers**

45. Accredited media representatives and legal bloggers should be added to the list of those to whom a party may communicate information relating to children proceedings under FPR, r 12.75(1), PD12G and PD14E. The purpose of the communication would be limited to discussion of the case and informing the journalist/blogger of details of the proceeding. The information given would be subject to a prohibition on publication, but the journalist/blogger would be able to attend and report on any hearings.

## **[3] Publication of judgments**

46. The principal way that the judicial system explains what it is doing is through the publication of judgments at the end of cases. The difficulty is that for a Family judgment to be published it must be anonymised. In most cases this is a complicated task because of the risk of 'jigsaw' identification, through details such as the names of schools, professionals or localities. Given the very great pressures

on the Family justice system it is hardly surprising that few judges can prioritise the time needed for anonymisation.

47. In 2018, I issued Guidance on anonymisation and the treatment of sexual abuse allegations in published judgments<sup>12</sup>. The implementation of that Guidance has recently been reviewed by Dr Julia Brophy and Dr Marisol Smith<sup>13</sup>. The publication of this latest round of research has been timely. Once again it sets out the very clear opinion of young people that they are profoundly concerned about the publication of their personal information. The research also establishes two very clear propositions, which I accept. Firstly, that, even where there has been a concerted effort to anonymise a judgment, it is possible to pick up data points which can then, via web searches, lead to identification of the child and family whose private life was before the court. Secondly, published judgments often contain full detail of the evidence of abuse that a judge has heard; not only is the publication of such detail inimical to the interests of the child, it also may be picked up and circulated by those who trawl the web with a perverted interest in such material. The young people and the researchers rightly ask ‘why is it in any way necessary for this detailed material to be published at all’ [my words].
48. It is necessary to draw a distinction between ‘fact-finding’ judgments and other Family Court judgments. In child abuse and domestic abuse cases, a fact-finding judgment must necessarily rehearse some, if not a good part, of the detailed evidence of abuse that has been adduced. This is likely to be particularly sensitive and personal material which requires a different approach to publication. The approach thus far has been to speak of ‘the judgment’ being published, with the result that judges feel required to make public the entire judgment, subject to piece-meal anonymisation but including full detail of any abuse.
49. A judgment in a Family case is written for a range of different readers. The parties in the case, the professionals who may thereafter work with the child and family, and the appeal court all require a full account of the court’s approach to the detailed evidence and its subsequent analysis. For those readers it may well be necessary for the judge to rehearse granular detail of abuse within the judgment. Another class of potential reader is the ‘child’ who may wish to see the judgment in later years, the question of what detail he/she should have and at what age is plainly an anxious one to which the answer may be ‘not the full judgment’. The public are in a very different position. In most cases there will be no legitimate reason for the public to be given access to detailed evidence of child abuse and for this to be made available for all time on the web. The press reporting of a criminal

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<sup>12</sup> <https://www.judiciary.uk/publications/practice-guidance-family-court-anonymisation-guidance/>

<sup>13</sup> *Privacy and Safeguarding: Evaluation of Practice Guidance (2018) – Children Judgments* (Coram/BAAF May 2021).

trial does not recite such detail, and there is every reason for the Family Court to be in a more, not less, conservative position in this regard.

50. I wish to achieve an outcome where detailed accounts of abuse simply do not appear in any published judgment. How this is to be done is a matter on which I wish to consult further. One option is simply for text relating to such matters, which may in some cases take up a substantial part of a fact-finding judgment, to be removed en bloc from any version which is published. The judge would then insert a brief and very basic factual summary sufficient to enable sense to be made of the part of the judgment which is to be published, namely the judge's conclusions (with reasons where these can be given without reference to the detail of evidence of abuse), overall analysis and final decision. Another option is that, in a case with particularly sensitive and intimate allegations, the judge should consider setting out that detail in an annex which would not be published as part of the judgment.
51. Where, despite the process described above, text is to be published which might contain identifying material, the way forward is to find a solution to the practical problem of assisting judges and practitioners to achieve anonymisation. In Australia this task is entirely undertaken by civil servants. It may be that there is a software solution that can assist, and this will be looked at. Experience shows that judges themselves can reduce the burden of the task by not putting any identifying detail into the original judgment, for example by giving the child a fictitious name and using it throughout, or by simply not mentioning the name of any school, hospital or other specifically local venues. Practitioners may assist the court before the start of the case by identifying and agreeing on data that is to be anonymised.
52. The various iterations of *President's Guidance* in this area need to be revisited and consolidated to ensure that the guidance is consistent, and that it properly balances the need for greater transparency with protecting the anonymity of the children and avoiding salacious detail becoming publicly available. The revised guidance should stress that one aim of the publication of judgments is for there to be general access to knowledge of how the court approaches the mainstream of cases, and not just the high profile or most serious issues. The process of revision must also ensure that judges are given straight forward advice on how to approach the task of anonymisation. The approach to the naming of local authorities, treating clinicians, social workers and experts needs further consideration and further consultation responses on this issue will be called for.
53. In order to ensure that a larger number of judgments are published, I will ask all judges to publish anonymised versions of at least 10% of their judgments each year. Whilst a figure of 10% will be seen by some as very low, it will be a very

significant increase in the present output. There are currently very real practical constraints on the ability of judges to produce any judgments for publication. I will press for the establishment of an Anonymisation Unit within HMCTS which, through a combination of human input and/or software, will undertake the task of anonymisation. At present it is not feasible to consider a target of more than 10%. The way in which magistrates decisions may be published requires further consideration.

#### **[4] Financial Remedy Cases**

54. Much of the review process, and of this document, has been concerned with children cases. Similar, but in some respects different, considerations apply to proceedings to resolve financial issues between adult parties following a divorce, breakdown of a civil partnership or other separation. Alongside my review, work has been undertaken by Mr Justice Mostyn and His Honour Judge Hess, as the lead judges of the Financial Remedies Court ['FRC'], to enhance transparency and public confidence in financial remedy proceedings. I am very grateful to Mostyn J and HHJ Hess who have developed a proposal for a 'standard reporting permission order' for use in FRC proceedings. The proposal, which has my support, is being launched today, alongside this review, for consultation. The consultation period is short and will close on 26<sup>th</sup> November 2021.

#### **[5] Communication between the Family Court and Editors**

55. There is a need to work with the media to establish a relationship of trust and confidence in order to ensure that any reporting of Family court proceedings is reliable and well informed. It is now 15 years since one of my predecessors, Sir Nicholas Wall, said:

"There should be an ongoing dialogue with the press and the media generally about Family justice and how it is administered. We, the judiciary and the practitioners, have nothing to fear from public scrutiny: indeed, we should welcome it."<sup>14</sup>

I agreed with those words at the time and they remain just as valid today.

56. Links at a national level need to be established between the PFD and the Society of Editors, and at a local level between DFJ's and their local media. In addition, I will establish a Media Liaison Committee comprised of journalists, media lawyers and judiciary (together with others who may include individuals who are wholly from outside the spheres of Family Justice or the media).
57. One aim of these channels of communication would be to assist journalists to learn more about the general working of the Family Court and the various categories of proceedings which it hears. In addition, it is well known that all MP's receive regular complaints about the operation of the Family Court; I consider that it

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<sup>14</sup> 'Opening up the Family courts: a personal view' [2006] Fam Law 747.

would be a positive move for DFJ's to invite local MP's to the court so that a fuller understanding of the work and approach of the Family Court can, over time, develop.

#### **[6] Data Collection**

58. The lack of judgments being published and the lack of consistent data on the operation of the Family justice system means that it is hard to conduct any evidence based assessments of what we do. This cannot be good for the outcomes for children going through the system. I am therefore going to propose a scheme of compulsory data collection at the end of each case. This can be done as a web-based tool which I hope that the TIG together with HMCTS can devise and trial. I am convinced that better data collection could be transformational in terms of understanding the decisions that are being made, seeing patterns and problems, and ultimately achieving better outcomes. In the slightly longer term there is a need to move towards data collection on what happens to children after the final orders are made.

59. In the last three years Family justice has been extremely well served by the work of the National Family Justice Observatory (a dedicated research body that is generously funded by the Nuffield Foundation)<sup>15</sup>. The work done by the FJO has been a real game-changer which has shed light on the working of the Family Court. It was invaluable during the onset of Covid 19 to have access to research that held a mirror up, in real time, to the impact that our new ways of remote working were having on all involved. The FJO research on babies who are the subject of early care proceedings has had a similar impact. These and other projects, which are just the start of the work that the FJO intends to undertake, have a significant part to play in increasing public understanding of the Family Court and thereby increasing transparency.

#### **[7] Listing of cases**

60. A number of people raised the problem of knowing what cases might be of interest because of the lack of information on the court lists. At present the listing of Family cases is often limited to the case number and a name or initials. In future, lists should be made available in advance to journalists/bloggers which identify the general nature of the proceedings, the category of hearing and the time estimate.

#### **[8] Family Court Online Resource**

61. There is a need for the Family Court to have a comprehensive and interactive online presence. At present the online provision is one web-page which contains short, basic information. Parents, young people and the wider public need a modern online hub to access which will explain the work of the Family Court, how

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<sup>15</sup> <https://www.nuffieldfjo.org.uk/>

cases are dealt with, what other options exist for dispute resolution and how to make an application. The website could signpost visitors to other potential sources of support or information. It should be the go-to first point of reference for anyone who has a need to engage with the Family Court.

### **[9] Annual Review**

62. A further avenue by which the Family Court can be more open about its work is for the public to have access to an annual report of its operation, which would include data setting out case numbers, categories of proceedings and outcomes. The report would also include an annual audit on the progress of the various initiatives that are now to be launched under the overall umbrella of 'transparency'.

### **What happens now? – The way forward**

63. A number of witnesses emphasised that it is for me, as President and Head of Family Justice, to take the lead in achieving greater openness. I agree. It is plain from the number of largely unsuccessful initiatives in the past that a genuine increase in transparency requires a major cultural shift. Such a shift can only come with clear and firm leadership from the President. Publication of the conclusion of this review is not the end of the process, it is just the start. What must now follow is a period of accelerated change. To help me in this task I will establish a Transparency Implementation Group ["TIG"] to take forward the changes that I have proposed, but I will remain closely involved and steer the progress of transparency as it goes forward.
64. The first step on the process of implementation will be to consult and seek comment upon the proposals that I have now made, which are being seen for the first time with the publication of this document. The consultation will be about the detail and not the overall direction of travel which was the subject of the Review, to which wide-ranging evidence was submitted. I anticipate that the consultation process will be short and that, subject to any changes required following consideration of the consultation responses, the TIG will soon begin to establish trials of the various proposed changes prior to them being more widely implemented.

Sir Andrew McFarlane  
President of the Family Division  
28<sup>th</sup> October 2021



## **Annex 1**

### **Transparency Review Panel:**

Sir Andrew McFarlane (President of the Family Division)

Mrs Justice Nathalie Lieven (High Court Judge)

Dr Eia Asen (consultant child and adolescent psychiatrist)

Anthony Douglas CBE (former chief executive of CAFCASS)

Clare Dyer (former Legal Editor of The Guardian)

Nicola Shaw CBE (Executive Director of National Grid).

## Annex 2

### Participants/Representatives in the Oral Evidence Sessions:

#### Session 1- 2<sup>nd</sup> February 2021

Retired Judge and author of The “Secret” Family Court

HH Clifford Bellamy

Director of Child Care Law Reporting Project (Republic of Ireland)

Dr Carol Coulter

Director of Nuffield Family Justice Observatory

Lisa Harker – Director of NFJO

Director of CoP Open Justice Project

Professor Celia Kitzinger

#### Session 2 - 8<sup>th</sup> March 2021

**OPEN JUSTICE FAMILY COURT REPORTING PILOT**

Louise Tickle -

#### **Journalists/legal correspondents**

Sayra Tekin - News Media Association

John Battle - Media Lawyers Association

Sian Harrison - Press Association

#### **The Transparency Project**

Lucy Reed - Combined response for

The Transparency Project

#### **Privacy & Safeguarding**

Dr Julia Brophy & Dr Marisol Smith

### **Session 3 – 17<sup>th</sup> May 2021**

#### **Australian Judiciary**

Chief Justice Alstergren

Deputy Chief McClelland

Judge McGuire

#### **DfE / Cafcass & ADCS**

Isabelle Trowler – Chief Social Worker

Jacky Tiotto- CEO Cafcass

Helen Lincoln - ADCS – Essex & Suffolk

#### **The Family Justice Young People’s Board (FJYPB)**

Representatives of FJYPB

**Sir James Munby - Former President of the Family Division**