The Media Lawyers Association
Defending freedom of expression

THE TRANSPARENCY REVIEW: THE PRESIDENT OF THE FAMILY DIVISION'S CALL FOR EVIDENCE

RESPONSE TO CALL FOR EVIDENCE
ON BEHALF OF
THE MEDIA LAWYERS ASSOCIATION

Caoilfhionn Gallagher QC
Claire Overman

Doughty Street Chambers
Counsel for the Media Lawyers Association

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1. INTRODUCTION

1.1 On 3rd February 2020 the President of the Family Division announced that he is *"undertaking a review of the current arrangements which regulate access by journalists and the public to, and the reporting of, information concerning proceedings in the Family Court,"* known as 'The Transparency Review.' [1] He invited any individuals or agencies who wish to submit evidence, advice or other material for consideration within the Transparency Review to do so by 2nd March 2020. This was later extended to 11th May 2020.

1.2 The Media Lawyers Association ("MLA") welcomes the opportunity to contribute to the President's latest call for evidence, following his previous consultation on related matters in mid-2019. In particular, the MLA is grateful for the opportunity, which it requested in its submission to the previous consultation, to provide further comments on the December 2018 Guidance. The MLA reiterates that it looks forward to working constructively with the President, and the panel appointed to assist him, in shaping guidance in this important area.

[1] https://www.judiciary.uk/announcements/the-transparency-review-the-president-of-the-family-divisions-call-for-evidence/

1.3 At section 3 below, the MLA offers its comments in response to the query raised in the call for evidence, regarding where the line is currently drawn between confidentiality and confidence.

1.4 At section 4 below, the MLA provides its comments on the December 2018 Guidance.

1.5 Finally, at section 5, the MLA offers its comments on the October 2019 Guidance and also suggests steps that should be taken to achieve greater openness.

2. THE MEDIA LAWYERS ASSOCIATION

2.1 The MLA is an association of in-house media lawyers from newspapers, magazines, book publishers, broadcasters and news agencies. It was formed to promote and protect freedom of expression, and the right of the public to receive and impart information, opinions and ideas.

2.2 A list of the MLA's corporate members is set out in the appendix to this consultation response, at section 6 below. As is evident from that list, MLA membership is extensive and wide-ranging. The MLA represents all of the major publishers and broadcasters which reach the vast majority of the viewing and reading public in the UK, at national and local level, but its members also publish Europe-wide and worldwide in a wide variety of formats. For example, its members include all national UK newspaper publishers and broadcasters, but also news agencies (The Press Association and Thomson Reuters PLC), representative organisations for thousands of regional, local and specialist publications, the publishers of a very wide range of national and international magazines (including e.g. The Economist, Which? and Harper's Bazaar) and non-fiction book publishers.

3. THE LINE BETWEEN CONFIDENTIALITY AND PUBLIC CONFIDENCE

3.1 The first question identified in the call for evidence is a general one, as follows:

> *"Is the line currently drawn correctly between, on the one hand, the need for* ***confidentiality*** *for the parties and children whose personal information may be the subject of proceedings in the Family Court, and, on the other hand, the need for the public to have* ***confidence*** *in the work that these courts undertake on behalf of the State and society?"*

3.2 The MLA submits, first, that this is a question of vital importance, and it endorses and supports as a starting point on this issue the words of the former President of the Family Division, Sir James Munby, on the issue of transparency in the family courts:

> "*…there is a need for greater transparency in order to improve public understanding of the court process and confidence in the court system. At present too few judgments are being made available to the public, which has a legitimate interest in being able to read what is being done by the judges in its name."*

Practice Guidance: Transparency in the Family Courts (the "**2014 Guidance**") 16th January 2014, [2]

3.3 This objective of greater transparency, which the 2014 Guidance aimed to implement, has received widespread judicial endorsement. A recent example of such endorsement can be found in the judgment of Lieven J in *Manchester University NHS Foundation Trust v Namiq and others* [2020] EWHC 6 (Fam) at [8].

3.4 The MLA acknowledges and agrees that there is a need for a line to be drawn between this important objective of increasing transparency in the family courts, on the one hand, and the need to afford appropriate respect to the Article 8 rights of those involved in family proceedings on the other. The MLA's view is that, in broad terms, the 2014 Guidance struck an appropriate balance, and since 2014 there has been a developing jurisprudence, with the courts applying that

Guidance in a range of cases and developing the applicable principles further. However, as set out in the MLA's June 2019 consultation response, and developed further below, the MLA has concerns regarding the very different approach adopted in the December 2018 Guidance.

3.5 However, these two factors identified in the question set out in the call for evidence are, of course, not the only factors to be balanced. Confidentiality for individuals need not only be balanced against public confidence in the system overall. Depending on the particular case, there may be other important factors, such as education and incentivisation of good practice. A recent example of a case in which these factors were relevant is *Re G*, No. MB155/18, in which Her Honour Judge Matthews QC said (at [169]-[170]):

> *"I am always concerned about jigsaw identification. The Family Justice and Young People's Board have often drawn attention to the potential for children's whole lives to be exposed to public scrutiny leaving them emotionally naked and in a heightened state of vulnerability by public judgments. I do not, however, accept that the fact that this Authority is in a small geographical area indicates that adverse judgments in relation to its conduct should always be anonymised. That is an argument which supports a blanket ban on their identification which would be wrong. However, in this case I am most concerned about S who is a very vulnerable girl and who can ill-afford any further emotional turmoil. I do not wish to take any step that will put her at further risk thereby compounding the damage already inflicted upon her by the adults in her life, both professional and personal.*
>
> *In addition, the motivation behind publication is not only transparency but education and an incentive to promote good practice. This hearing was never intended to be a witch hunt, rather an enquiry into how the case came to fall into such error and how to ensure that such events do not reoccur. I am well aware that Local Authority employees have been under a huge amount of pressure as a result of the very significant increase in Public Law applications, both nationally and particularly in this area. It is imperative that they do not feel demotivated and attacked by the court. This cautionary tale is intended to positively motivate them to better practice in the future. We should all be proud of the work we do in attempting to make children's lives better and keep them safe."*

3.6 In addition to these general observations on how this balance is struck in the relevant guidance, the MLA also considers there to be some practical obstacles which hamper transparency and require addressing, which are set out below at paragraphs 5.6 to 5.11. More generally, in Section 5 below, the MLA also makes some suggestions for steps that should be taken to achieve greater openness.

4. THE DECEMBER 2018 GUIDANCE

4.1 As set out above, the MLA is pleased to be given the opportunity to provide more detailed comments on the December 2018 Guidance. The President will recall that in section 4 of its previous submission, the MLA highlighted three key concerns in respect of that Guidance:

(i) The absence of a consultation period prior to its implementation (which now largely falls away given its inclusion within the remit of the current call for evidence, for which the MLA is grateful);

(ii) The incompatibility of the December 2018 Guidance with the 2014 Guidance; and

(iii) The prescriptiveness of the December 2018 Guidance encouraging judges to exercise editorial control over the content of reportable judgments.

4.2 At this stage, the MLA takes this opportunity to provide further detail in respect of these concerns and to give some indicative examples of the problems caused by the December 2018 Guidance.

4.3 <u>*Incompatibility with existing legal framework*</u>. As the MLA pointed out in its previous submission, this is a concern that has already been raised judicially. The MLA refers to the comments of Hayden J in *Re J (a Minor)* [2016] EWHC 2595 (Fam) at [37]:

> *"There is no doubt that Dr Brophy's research is, as one would expect, very child focused. I am concerned however that in expressing her aim to be striking 'a better balance between the policy that more judgments should be published' and the concerns of 'young people' about 'deeply distressing' information 'in the public arena', Dr Brophy has lost sight of the legal framework that requires to be applied in any decision concerning publication. We are not concerned merely with a 'policy', to publish more judgments, rather we are applying the obligations imposed by Article 10 and Article 8 ECHR."*

4.4 The MLA agrees with this concern. The Judge's observations are not surprising, given the remit of the work for that particular report, and the involvement of NYAS and the Association of Lawyers for Children. Article 10 concerns regarding journalists' rights and the interests of the wider public were not at the forefront of this research. The balance between Article 8 and Article 10 rights is a complex and nuanced one, which has been explored in detail by the European Court of Human Rights and the courts of England and Wales, and this jurisprudence is not reflected in Dr Brophy's checklists which are expressly endorsed in the December 2018 Guidance.

4.5 In the MLA's view, the December 2018 Guidance contradicts the 2014 Guidance in several important respects.

4.6 A key example of this incompatibility can be found in the treatment of local authorities. The courts have frequently acknowledged the public interest in identifying local authorities.[2] The 2014 Guidance is clear that "*public authorities…should be named in the judgment approved for publication, unless there are compelling reasons why they should not be so named*." In contrast, annex 1 to the December 2018 Guidance provides that identifying a local authority should be confined to two cases: (i) the judge concludes that naming the local authority "*would carry with it no risk of identifying the children*"; or (ii) "*having balanced the remaining risks the judge concludes that the public*

[2] See e.g. Sir James Munby P in *Re B (Children)* [2008] 1 FLR 482 at [18]: "*…the powers exercisable by local authorities under Parts IV and V of the Children Act 1989 are potentially so drastic in their possible consequences that there is a powerful public interest in those who exercise such powers being publicly identified so that they can be held publicly accountable*."

interest in identifying the applicant is so important that it outweighs any risk of identification of the children."

4.7 The December 2018 Guidance significantly waters down the 2014 Guidance. Rather than requiring "*compelling reasons*" for the departure from the general rule, the December 2018 Guidance introduces a balancing exercise, and in effect requires only that the reasons for not identifying the local authority outweigh the reasons for naming it. In effect, this reverses the presumption in the 2014 Guidance.

4.8 MLA members have seen an increase in the courts granting anonymity to doctors in medical cases, including by the Court of Appeal in the case of *Re M (Declaration of Death of Child)* [2020] EWCA Civ 164, which turned on its head the necessity rule established in *Scott v Scott* by asking whether it was necessary for journalists to name doctors in order to report the case, instead of asking whether it was necessary to **prevent** journalists naming the doctors involved. The Court observed at [102] that "*the world has changed*" since the time of Munby P's judgments in *A v Ward* [2010] EWHC 16 (Fam) and *Re J (A Child)* [2013] EWHC 2694 (Fam), and that social media abuse of medical staff in controversial cases is now "*well-established*."

4.9 The MLA's members are already well aware that such cases have the potential to arouse strong public reaction, which can pose risks to individuals involved in them. Accordingly, members give careful consideration to the potential for harm to those individuals when considering whether or not they should be named in reports. Simply by way of example, in the recent case of *Sherwood Forest Hospitals NHS Foundation Trust v C* [2020] EWCOP 10 (27 February 2020), Hayden J named the doctors involved in his judgment, but the Press Association took the decision not to include the names in its case report, mindful of the unwanted attention that might be generated owing to the case's religious dimension. Such sweeping statements as were made in *Re M* about the ubiquity of social media, combined with the changes brought about by the December 2018 Guidance, create concerns among MLA members that they are no longer being trusted to carry out this important task, and that entire classes of

individuals, including doctors, experts and/or social workers, increasingly will be granted these orders in circumstances which do not meet the high threshold for a departure from open justice. There is a risk that, in the future, individuals (and indeed local authorities or NHS Trusts) are routinely granted court-administered secrecy and avoid being held publicly accountable for their actions.[3] This may mean that it would be impossible to report on concerning patterns of behaviour by a single individual or a single NHS Foundation Trust, [4] for example, that the same consultant/doctor/Trust had been responsible for a number of withdrawal of treatment cases to go to the High Court.

4.10 *Infringement of editorial autonomy*. Finally, the MLA is concerned that, owing to the prescriptiveness of the December 2018 Guidance, it gives judges the ability to exercise editorial control over the content of reportable judgments. It is well-established that it is not the role of the judge to seek to exercise editorial control over the manner in which the media reports information.[5] The MLA's members are professional and regulated media organisations. They are well-acquainted with the risk of jigsaw identification and have considerable experience of making editorial decisions that avoid or minimise that risk whilst ensuring that newsworthy information is able to be published.

4.11 The detailed annexes to the December 2018 Guidance effectively entrust these editorial decisions to the judge. As a result, the media may find itself unable to publish what it considers is the newsworthy information, owing to a risk of jigsaw identification arising from information already contained in a judgment. The MLA is concerned to prevent a repetition of events in *A Council v M and Others*,[6] in which the court's unilateral decision to publish the birth country of

[3] In that regard, the MLA's members note with particular concern that the Court in *Re M* felt it unnecessary to "*descend into detail*" on the issue of anonymity, which was dealt with in six paragraphs: see [99]-[105].

[4] In this regard, we note that NHS Foundation Trusts are publicly owned and accountable to the local population, patients, carers and staff through a Council of Governors (appointed from stakeholder organisations such as Local Councils or elected by the members of the Trust). They were created in order to devolve decision-making from central government to local organisations and communities, enabling them to be responsive to the needs of local communities.

[5] See e.g. *Re Roddy (a Child) (Identification: Restriction on Publication)* [2004] EMLR 8 at [89].

[6] Four judgments have been published: [2012] EWHC 4241 (Fam) (judgment 1: fact-finding); [2012] EWHC 4242 (Fam) (judgment 2: welfare); [2012] EWHC 2038 (Fam) (judgment 3: reporting restrictions); and [2013] EWHC 1501 (Fam) (judgment 4: foreign adoption – refusal of recognition).

one of the children involved resulted in the media's abandonment of an application to vary a RRO to allow identification of the local authority involved. Although the media had identified that the local authority's identity was newsworthy and important to the public debate, the risk of jigsaw identification alongside the child's country of birth (which was non-newsworthy) was unacceptably high.

5. THE OCTOBER 2019 GUIDANCE

5.1 Finally, the MLA also takes this opportunity to offer some comments on the October 2019 Guidance.

5.2 The MLA reiterates from its previous submission its support for guidance on the procedure and practice to be adopted where a media organisation seeks to vary or lift reporting restrictions. The existence of such guidance empowers reporters attending hearings, which ensures that they can more readily fulfil their public watchdog role.

5.3 In particular, the MLA is pleased to note that the final version of the October 2019 Guidance implements three key suggestions put forward in its consultation response:

(i) Paragraph 5 of the October 2019 Guidance now notes expressly that s.12 of the Administration of Justice Act 1960 and s.97(2) of the Children Act 1989 are exceptions to the general principle in favour of open justice;

(ii) Paragraph 13 now makes clear the application, in *all* cases, of the requirement for the court to consider whether an application to lift or vary a RRO should be adjourned to allow the applicant and/ or other media organisations the opportunity to effectively participate; and

(iii) Paragraph 16 now confirms that a media organisation will not be deemed to have acted unreasonably (and accordingly be at risk of a

costs order) by making submissions through its in-house solicitor, or by instructing a solicitor and/ or counsel.

5.4 The MLA is grateful for these additions, which it of course supports.

5.5 In addition, the MLA strongly supports the inclusion of paragraph 8(f), which now provides that a judge should: (i) proactively enquire of a reporter in attendance, at the start of a hearing, whether an application to lift or vary a RRO is to be made; and (ii) if it is not, invite the reporter to alert the court if the situation changes. If followed, this approach will ensure that these issues can be considered in a timely manner with minimal disruption to an ongoing hearing. The MLA endorses such an approach: as noted at paragraph 3.7 of its previous submission, its members are well-used to instructing legal representatives to attend on very short notice and with minimal disruption to hearings.

5.6 Nonetheless, the MLA is conscious that a number of the concerns raised in its previous submission have not been made the subject of specific provision in the final version of the October 2019 Guidance. In particular:

(i) At paragraph 3.2 of its previous submission, the MLA noted the difficulties its members' journalists face in determining which hearings are likely to be of significant public interest, as they are listed in a coded format. This continues to be a problem for MLA members. In recent financial remedy proceedings in *Kliers v_Kliers* [2020] EWHC 1026 (Fam), the matter was listed to be heard in private, with the listing information in coded format. The reporter attending court was only able to identify that the case was of interest, such that he should make an application for the parties' identities to be reportable, because he had happened to speak with one of the parties outside the courtroom.[7] This is plainly unsatisfactory, and it would be helpful if advance listing information could disclose to the media a summary of the relevant issues, the parties and the identity of any local authority/ trust in a case to give journalists a basis upon

[7] As a result of the reporter's representations, the parties were in fact identified in the judgment.

which to decide whether to attend and the opportunity to make relevant arrangements for reporting a specific hearing;[8] and

(ii) At paragraphs 3.8 and 3.9, the MLA noted the further difficulties its members' journalists face in obtaining access to case papers, and recommended that provision be made in the October 2019 Guidance for the parties to cooperate in providing journalists in attendance with these documents at the earliest opportunity.

5.7 The two issues highlighted above are examples of practical obstacles hampering the ability of the MLA's members' journalists to effectively report on family court proceedings.

5.8 In addition to the suggestions made in paragraph 5.6 above, MLA members have suggested that public judgments given in family court proceedings are handed down at listed public hearings to improve openness. They have expressed concerns that, in some cases, judgments are listed for handing down, only for reporters attending on the day to be told by the judge's clerk or associate that the judgment has not been anonymised and is therefore not yet ready for handing down. In these situations, judgments are then not handed down at all on the day, or are handed down to the parties only. MLA members report that it is common for such judgments to appear, without notice, some weeks later on Bailii. It is the MLA's position that judgments should only be listed once ready for publication, and that they should be handed down at a public hearing for which they are listed.

5.9 As for Court of Protection proceedings, the MLA's members are encouraged by the positive developments arising out of the Transparency Pilot and the resulting CoP Rules 2017 and Practice Directions 4A-C, as result of which most hearings are now held in public. However, these changes have also led to difficulties for MLA members covering such proceedings as they are unable to obtain meaningful information about them prior to attending. Previously, in

[8] The MLA also raised this concern in its response to Sir James Munby P's 2014 consultation on transparency.

cases concerning serious medical treatment (which formed a minority of all CoP proceedings and, contrary to the usual position, were heard in public), applications for reporting restrictions were notified to the media through the PA Injunctions Alert Service. Such notifications included the name of the patient and a short explanatory note providing brief details of the case. Under r.43 CoP Rules 2017 and paragraph 2.1 of PD 4C, the CoP now makes a transparency order, setting out the reporting restrictions applicable to the public hearing, without any application being required. These orders are now routinely made at the first hearing, which reporters rarely attend. As a result, the media is no longer notified of reporting restrictions via the PA Injunctions Alert Service, and is not provided (as it was previously in those few cases that were heard in public) with details of the patient's identity or summary of the case. Accordingly, MLA members attending later hearings at the High Court have no prior information about the patient's identity or the nature of the case.

5.10 Simply by way of example, on 28th April 2020 a telephone hearing was held before Knowles J in a CoP case. The reporter attending had no information about the matter, and raised this with the Judge at the end of the hearing. The Judge requested that the parties provide a copy of the transparency order and a case summary (which, regrettably, did not reach the reporter until some hours later).

5.11 The MLA therefore suggests that: (i) parties and their representatives should be encouraged to provide reporters attending CoP hearings with a copy of the transparency order and (if not covered in the order) details of the patient's identity and a short summary of the case; and (ii) judges should be encouraged to inquire of parties whether they have provided reporters in attendance with such information.

5.12 Finally, MLA members have also suggested the introduction of training for family judges and lawyers in order to assist the application of the existing guidance in relation to reporting restriction orders and to ensure a better understanding and observance of the relevant principles and requirements, particularly in the lower courts.

5.13 The MLA hopes that these submissions are of assistance. It would be happy to assist further if required, including by way of discussions with the President of the Family Division and the Review Panel prior to the preparation of the final report. There are specific cases that the MLA considers may be useful to discuss together.

CAOILFHIONN GALLAGHER QC
CLAIRE OVERMAN
Doughty Street Chambers

FOR THE MEDIA LAWYERS ASSOCIATION
11 May 2020

6. APPENDIX

List of MLA Corporate Members

1. **Associated Newspapers Limited,** publisher of the Daily Mail, the Mail on Sunday, Metro and related websites.

2. **Bloomberg LP**, an international news agency.

3. **The British Broadcasting Corporation,** a public service publisher of 8 UK-wide television channels, interactive services, 9 UK-wide radio/audio stations, national and local radio/audio services, bbc.co.uk and the BBC World Service.

3. **British Sky Broadcasting Limited,** a programme maker and broadcaster, responsible for numerous television channels, including Sky News and Sky One.

4. **Buzzfeed**, an internet media, news and entertainment company with a focus on digital media.

5. **Channel 5 Broadcasting Limited,** a public service broadcaster of the Channel 5 service and 2 digital channels, interactive services and related websites.

5. **Channel Four Television Corporation,** public service broadcaster of Channel 4 and three other digital channels, plus new media/interactive services, including websites, video on demand and podcasts.

6. **The Economist Newspaper Limited,** publisher of the Economist magazine and related services.

7. **The Financial Times Limited,** publisher of the Financial Times newspaper, FT.com and a number of business magazines and websites, including Investors Chronicle, Investment Adviser, The Banker and Money Management.

8. **Guardian News & Media Limited,** publisher of the Guardian, the Observer and Guardian Unlimited website.

9. **Independent Digital News and Media Limited,** publisher of the Independent, the Independent on Sunday, the Evening Standard, i and related websites.

10. **Independent Television News Limited (ITN),** producer of ITV News, Channel 4 News, Channel 5 News, internet sites and mobile phones.

11. **ITV PLC,** a programme maker and a public service broadcaster of the channels ITV1 (in England and Wales), ITV2, ITV3, ITV4 and CITV, interactive services and related websites.

12. **The National Magazine Company Limited,** publisher of consumer magazines including Cosmopolitan, Good Housekeeping, Harper's Bazaar and Reveal.

13. **News UK,** publisher of The Times, Sunday Times and The Sun and related magazines and websites, and part of NI Group Limited.

14. **News Media Association**, is the voice of the news media industry whose members publish around 1000 national, regional and local titles, read by 48 million adults each month, in print and online.

16. **Reach PLC** (including MGN Limited) publishers of over 170 local and regional newspapers, 9 national newspapers, including the Daily Mirror, Daily Express, Daily Star, Sunday Mirror, Sunday People, Sunday Express and Daily Stay on Sunday and over 60 websites.

17. **The Press Association,** the national news agency for the UK and the Republic of Ireland.

18. **Telegraph Media Group Limited,** publisher of the Daily Telegraph, Sunday Telegraph and related websites.

19. **Thomson Reuters PLC,** international news agency and information provider.

20. **Which?**, the largest independent consumer body in the UK and publisher of the Which? series of magazines and related websites.