



Response of the Family Justice Council to the Consultation paper

“Confidence and Confidentiality – Openness in family courts – a new approach”

The Council welcomes the opportunity to comment on the new proposals put forward in the consultation paper. It remains of the opinion that it is important to make the family justice system more widely understood and to provide better information on the working of the family courts. It reaffirms its commitment to the stimulation of greater confidence in the family justice system and better education about the way the system works and it, therefore, welcomes the proposals in the current consultation paper to provide anonymised judgments and to provide information on the family justice system.

In responding to the consultation, in addition to answering the specific questions, the Council has the following comments to make:

Provision of information.

The Council welcomes the list of cases that the consultation document has identified as those warranting further information as a matter of routine. However, it makes the following recommendations regarding the list:-

1. The list should not be exhaustive and it should be open to the parties to apply to the Court for a judgment or summary to be published or for it not be published. It is imperative that whether to publish, or not, remains a judicial decision which is subject to the usual checks and balances.
2. In any event, cases where a party seeks a Prohibited Steps Order to regulate re-location should be added to the list.
3. The list should be put on a statutory footing to ensure transparency and consistency of application to echo the statutory guidance of judicial discretion regarding admittance into Court.

The Council notes that the information in the judgment or summary is to have three purposes:

- To provide a written record of the judgment for the families involved which they could retain
- To retain for the child involved so they could request access to it when they were older
- Where the case is of public interest, published anonymously online so that it can be seen by the wider public (including the media)

It is not clear how information in the form of a summary, which can be no substitute for a full judgment, will meet the three stated purposes. In particular, it is unlikely that the proposed one page document will meet those needs. There will need to be clear and transparent guidance about the contents of any summary. It is suggested that thought be given to ways in which the set format of the justices' reasons could be adapted for the formulation of summaries. It is unclear who is proposed to be the preparer of such summary, which could be open to complaints of inaccuracy and bias.

The criteria of "public interest" for the publication of such judgments or summaries online must be clearly defined and we reiterate that there should always be an element of judicial

discretion whether to publish a judgment and a possibility for the parties to apply for publication, or to resist the judgment being published.

The Council assumes, although there appears to be a contradiction in the consultation document, that only those cases “in the public interest” will be put online. The Council takes the view that *public information* should be the criterion, rather than public interest. If a significant number of suitably anonymised cases were reported this would provide a better quality of information about the system and its workings. These would have to be a random sample. In its response to the earlier consultation, the Council proposed a statutory checklist for the exercise of judicial discretion in determining whether or not to admit the media in to hearings and suggests that such a checklist should be used to provide a set of standards for those cases which fit the definition of “public interest”.

The Council welcomes the suggestion for a pilot of the provision of information, but is of the opinion that this should be on the basis not of **whether** the system will be implemented but on the practicalities of **how** it is to be achieved. The question of cost for the system in finance and judicial time must be considered but, as stated in our response to the earlier consultation, we believe that adequate funding will be essential.

The process of anonymisation of judgments will be crucial and the extent to which they can be anonymised will need to be carefully considered. Details will need to be looked at carefully to ensure that there is no way that the child, or the family, can be identified.

The Council is concerned that the proposals would make it possible for individual items of evidence, by way of statements or reports, to be disclosed in isolation rather than being

explained or contextualised in the proposed anonymised judgments or summaries. Statements in family cases often contain wild and hurtful allegations for example of adultery, sexual practices, drug and/or alcohol abuse, religious non-conformity, domestic violence, witchcraft and sexual abuse of children. At trial these allegations may, or may not, be proved. If evidence by way of statements is disclosed containing the allegations without the explanations, or subsequent findings of fact, made by a tribunal this will create a false and misleading impression. Further, wider disclosure where allegations are made is likely to cause a disproportionate effect on women and children from the BME community; for example, in the South Asian community with its difficult and complex notions of “izzat” or honour. Allegations of witchcraft or “kindoki” in certain African communities result in exorcisms and isolation of those alleged to practice the art. Children are particularly vulnerable to such allegations. The likely negative consequences of wider disclosure on such vulnerable members of society can never be in the interests of the family justice system.

On the specific questions raised in the consultation, the Council responds as follows:

Do you agree that the current court rules on disclosure should be altered to allow for wider disclosure of information in cases involving children and heard in private?

The Council supports the suggestion that those involved in family proceedings should be able to obtain the advice and support that they need. However, it has reservations about the wider disclosure of documents. The general principle that those involved in proceedings should be able to discuss and share information about their case more widely is a dangerous one. It must be borne in mind that parties embroiled in family litigation are often bitter and seek to use information against another party to their own advantage either within the litigation or within

the community. It is this usage that must be guarded against. The disclosure rules must prevent the inappropriate use of information and encourage the parties to be open with the Court.

In public law children cases there is often a lot of very personal medical information made available to the courts about the physical and mental health of parties. These medical reports should never be allowed to be widely disclosed. Further very personal information is often made available to courts in children cases to enable complex and difficult decisions to be made. Disclosure of sensitive information could have catastrophic effects for children and parties in many BME communities where there remains terrible stigma attached to mental ill health, alcohol abuse, drug abuse and any question of children having been conceived out of wedlock. The disclosure of information will have a disproportionately negative effect on the vulnerable such as victims of domestic violence and children. The dissemination of the information alone may cause women and some children to be shunned by their communities resulting in further suffering and isolation.

The Council would prefer to see more detailed proposals as to how this rule amendment is intended to be framed before commenting further.

Do you agree that the court rules should be amended so that they concentrate on the purpose for which the information is disclosed rather than on who the information is disclosed to:

We are unsure. The Council agrees that confidential disclosure for a defined purpose should be made easier and simpler. It agrees that there should be restrictions on who can receive the

information and what they can do with it but, again, it would want to see more detailed proposals. It makes the following points:

There must be a balance to be struck between the disclosure of evidence and the purposes for which it is disclosed. The two must go hand in hand. Disclosure for legal and medical purposes is to be encouraged. The disclosure of information to make points, gossip and/or to influence communities should be discouraged. The consultation document refers to the disclosure of information in cases to MPs prior to it being adjudicated upon. Given the untested nature and the form of such information (e.g. a party's witness statement), and its likely partisan contents with no guarantee of its accuracy, the Council would urge MPs to be very cautious about doing anything beyond discussing in general terms any ongoing litigation with their constituents. This is especially to ensure the separation of powers between the executive and the judiciary and for members of the public to continue to have faith in the judiciary and the justice system. It is not possible to comment in more detailed terms without sight of any proposed draft amendment to the rules.

In any event, we recommend that, given the nature of information in family cases, particularly those involving children, there should be no disclosure of information until after the issues have been determined so as to put the information in context and subject to findings made by the Court.

Do you agree with allowing unlimited onward disclosure of information for the same purpose as the original?

We disagree. The Council would be in favour of limited onward disclosure but feels that unlimited disclosure is too wide a definition and presents too great a risk of identification.

Such unlimited onward disclosure would be impossible to regulate and to determine where the information will end up. The risk of the identification of the parties, and in particular, the children involved in such cases where there is unlimited onward disclosure is too great. It is our considered opinion that adequate information will be available by way of the published summaries or judgments and these can be used by Ministers and MPs for constituency work and policy discussion as the judgments will contain sufficient information for those purposes.

Unless there are welfare grounds to the contrary, the identity of the child should be protected beyond the conclusion of a case.

We agree strongly. The Council fully supports this proposal. Guidance and thought would need to be given on how to achieve this continued protection if an un-edited judgment were to be given to the parents for them to keep, as suggested in the consultation document. Further, if an un-edited version is made available to the parents there may be a conflict between the need to protect the child and the proposed amendment of the disclosure rules to allow parties to disclose information (by way of evidence filed in the proceedings and the un-edited judgment) to friends and family for support. The potential conflict is that these persons may be a support for the parent but not the child e.g. where the child has made allegations of cruelty or sexual abuse that the parent denies and is unable to accept the findings of the court. The child may then be shunned and/or isolated by his or her community.

Attendance at Court

The Council endorses the establishment of a statutory checklist to guide the judicial discretion in determining admittance to proceedings.

The Council would not, however, support the publication of unedited court lists. BME names are readily identifiable. Publication could cause undue concern for vulnerable parties and witnesses if the members of the press, or their community, were to be aware of a court hearing as a result of the publication of their names. Witnesses and parties can be followed home from Court and pictures taken of them entering the court building on a particular day to be published alongside that day's cause list. This could then be linked with any summary or judgment. This "jigsaw" approach has been adopted by the media in the past and its use is not to be encouraged. The Council believes that the publication of the parties' names does not sit well with the concept of protecting the identity of a child during, or after, the conclusion of a case. The best way to protect a child's identity is to ensure that no-one knows the child's name.

Adoption and reporting restrictions

The unification of who may attend adoption proceedings is a welcome amendment to the law as is the proposed unification of powers between the various tiers of court to impose reporting restrictions.