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BRIEFING PAPER

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Confidentiality and openness in the family courts: current rules and history of their reform

By Tim Jarrett

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Summary

This briefing paper considers the issue of confidentiality and openness in the family courts, including:

- an explanation of the new Family Court, introduced in April 2014;
- the current rules on transparency, including communication of information, media attendance and the publication of judgments, as well as the rules on contempt of court;
- a history of recent changes to the transparency of the family courts, including the recent direction on the publication of judgments, and consultation on further measures to improve transparency by the President of the Family Division, Sir James Munby.

Disclosure of information relating to proceedings of the family courts outside of the rules is a serious matter and can result in a fine and/or imprisonment. It is strongly advisable to seek appropriate legal advice before disclosing information.

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This note replaces SN6102 .

1. Background: the Family Court

On 22 April 2014, a single Family Court was introduced (under the *Crime and Courts Act 2013*) alongside the Family Division of the High Court, following a recommendation of the independent *Family Justice Review*.[1]

The Family Court is able to deal with all family proceedings, except for a limited number of matters which are exclusively reserved to the High Court.[2] The then Justice Minister, Simon Hughes, told the House that the "new structure is expected to be more efficient and flexible, simpler for court users to understand and to promote increased judicial continuity in managing cases".[3]

In terms of whether a magistrate or a judge (and if so, which level of judge) would usually hear a case, this is set out in Schedule 1 to the *Family Court (Composition and Distribution of Business) Rules 2014* (SI 2014/840) and the associated *President's Guidance on Allocation and Gatekeeping for Care, Supervision and other Proceedings under Part IV of the Children Act 1989 (Public Law)* and its Schedule. It is possible to request the court to reconsider the allocation of the level of the judge in certain circumstances.[4]

For people applying for a matter to be heard, the Family Court means that "you won't have to work out whether to make your application to the county court or magistrates' court, you just have to make your application to the Family Court".[5]

On its website, the Law Society notes that the Family Court can sit anywhere in England and Wales, although in practice hearings will tend to be in county or magistrates court buildings, and that lay magistrates and all levels of judges will be able to sit on the Family Court.[6]

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1 Norgrove, D. and others, *Family Justice Review – Final Report*, November 2011, p10, para 36

2 The reserved matters are inherent jurisdiction, international work, and specified other cases: applications for declaratory relief; applications which require the jurisdiction of the administrative court to be invoked; issues as to publicity (identification of a child or restriction on publication or injunctions seeking to restrict the freedom of the media); and applications in medical treatment cases e.g. for novel medical treatment or life saving procedures. (Hershman and McFarlane, *Children Law and Practice*, para B40, taken from the *Schedule to the President's Guidance on Allocation and Gatekeeping for Care, Supervision and other Proceedings under Part IV of the Children Act 1989 (Public Law)*, 22 April 2014

3 HC Deb 28 April 2014 c40WS

4 Family Law, *The single Family Court – essential update*, 15 April 2014

5 Family Law, *The single Family Court – essential update*, 15 April 2014

6 Law Society, *Family law changes: information from the Ministry of Justice*, webpage [taken on 16 September 2015]

2. The current rules on transparency

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2.1 Communication of information

The *Family Procedure Rules 2010* (SI 2010/2955) permit the communication of information concerning private proceedings between specified individuals in limited circumstances.[7] In these circumstances, the communication will not amount to a contempt of court (see section 2.4).[8]

Information may be communicated to parties to the proceedings, legal advisers and other professionals concerned with the proceedings or child protection. In addition, the court can also give permission for information to be communicated to other parties. If, however, the court specifically prohibits any additional disclosure, then it remains an offence to communicate information about the proceedings.

Rule 12.73 of the *Family Procedure Rules 2010* provides:

> **Communication of information: general**
>
> (1) For the purposes of the law relating to contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court) may be communicated –
>
> (a) where the communication is to–
>
> (i) a party;
>
> (ii) the legal representative of a party;
>
> (iii) a professional legal adviser;
>
> (iv) an officer of the service or a Welsh family proceedings officer;
>
> (v) the welfare officer;
>
> (vi) the Director of Legal Aid Casework (within the meaning of section 4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012);
>
> (vii) an expert whose instruction by a party has been authorised by the court for the purposes of the proceedings;

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7 Ministry of Justice, *Family Procedure Rules 2010*, Part 12, rule 12.73

8 These rules replace rules previously included in the *Family Proceedings (Amendment No 4) Rules 2005* (SI SI 2005/1976) and the *Family Proceedings Courts (Miscellaneous Amendments) Rules 2005* (SI 2005/1977).

(viii) a professional acting in furtherance of the protection of children;

(ix) an independent reviewing officer appointed in respect of a child who is, or has been, subject to proceedings to which this rule applies;

(b) where the court gives permission; or

(c) subject to any direction of the court, in accordance with rule 12.75 and Practice Direction 12G.

(2) Nothing in this Chapter permits the communication to the public at large, or any section of the public, of any information relating to the proceedings.

(3) Nothing in rule 12.75 and Practice Direction 12G permits the disclosure of an unapproved draft judgment handed down by any court.

Unless prohibited by the court, rule 12.75 permits communication of information between a party to the proceedings (or their legal representative) and other specified parties, in specified circumstances. Rule 12.75 provides:

Communication of information for purposes connected with the proceedings

(1) A party or the legal representative of a party, on behalf of and upon the instructions of that party, may communicate information relating to the proceedings to any person where necessary to enable that party –

(a) by confidential discussion, to obtain support, advice or assistance in the conduct of the proceedings;

(b) to attend a mediation information and assessment meeting, or to engage in mediation or other forms of non-court dispute resolution;

(c) to make and pursue a complaint against a person or body concerned in the proceedings; or

(d) to make and pursue a complaint regarding the law, policy or procedure relating to a category of proceedings to which this Part applies.

(2) Where information is communicated to any person in accordance with paragraph (1)(a) of this rule, no further communication by that person is permitted.

(3) When information relating to the proceedings is communicated to any person in accordance with paragraphs (1)(b),(c) or (d) of this rule –

(a) the recipient may communicate that information to a further recipient, provided that –

(i) the party who initially communicated the information consents to that further communication; and

(ii) the further communication is made only for the purpose or purposes for which the party made the initial communication; and

(b) the information may be successively communicated to and by further recipients on as many occasions as may be necessary to fulfil the purpose for which the information was initially communicated, provided that on each such occasion the conditions in sub-paragraph (a) are met.

Further information is set out in Practice Direction 12G of the *Family Procedure Rules 2010*, including tables setting out to whom parties to a case can provide information, what information can be provided and for what purpose(s).

2.2 Media attendance

On 27 April 2009, legislation introduced new rules on media attendance in cases before a family court.[9] The rules are now set out in the *Family Procedure Rules 2010* and associated legislation.[10]

Previously, the media had been able to attend family court cases only in family proceedings courts; the provisions in force since 2009 now allow for media attendance in the county courts and High Court. The rules now apply to the Family Court and to the Family Division of the High Court.

Part 27, specifically rule 27.11, of *Family Procedure Rules 2010* now allow for the attendance, during specified family proceedings, of accredited media representatives (and any other person whom the court permits to be present, but not the general public).

"Duly accredited representatives of news gathering and reporting organisations" can attend proceedings held in private, subject to a power for the court to direct their exclusion for all or a part of the proceedings for one of the specified reasons. Anyone entitled to be present at the hearing may request that media representatives be excluded.

The media is not allowed to attend:

- any placement or adoption proceedings,
- proceedings relating to a parental order under section 54 of the Human Fertilisation and Embryology Act 2008;
- any conciliation or financial dispute resolution appointments – this is where a judge is helping the parties to reach an agreement in their dispute.[11]

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9 The legislation was the *Family Proceedings Courts (Miscellaneous Amendments) Rules 2009* (SI 2009/858) – dealing with proceedings in Magistrates' Courts – and the *Family Proceedings (Amendment) (No. 2) Rules 2009* (SI 2009/857) – dealing with proceedings in the county courts and the High Court.

10 *Family Procedure Rules 2010* (SI 2010/2955)

11 Ministry of Justice, *Family Procedure Rules 2010*, Part 27, rule 27.11(1)

The media are not allowed to identify children who may be involved in family proceedings and such proceedings must remain private. Practice Direction 27B states that:

> The prohibition in section 97(2) of the Children Act 1989, on publishing material intended to or likely to identify a child as being involved in proceedings or the address or school of any such child, is limited to the duration of the proceedings. However, the limitations imposed by section 12 of the Administration of Justice Act 1960 on publication of information relating to certain proceedings in private apply during and after the proceedings. In addition, in proceedings to which s.97(2) of the Children Act 1989 applies the court should continue to consider at the conclusion of the proceedings whether there are any outstanding welfare issues which require a continuation of the protection afforded during the course of the proceedings by that provision.[12]

Further information on contempt of court can be found in section 2.4 of this note.

Practice Direction 27B also provides guidance to the courts on:

- the identification of accredited media representatives;
- the handling of applications to exclude media representatives from the whole or part of a hearing and
- the exercise of the court's discretion to exclude media representatives whether upon the court's own motion or any such application.

2.3 Publication of judgments

Under Practice Guidance issued by the President of the Family Division, Sir James Munby, new rules have applied since 3 February 2014 (shortly before the Family Court was established) in regard to the publication of judgments (also see section 3.4 below).

The guidance applies:

> (i) in the family courts (and in due course in the Family Court), to judgments delivered by Circuit Judges, High Court Judges and persons sitting as judges of the High Court; and
>
> (ii) to all judgments delivered by High Court Judges (and persons sitting as judges of the High Court) exercising the inherent jurisdiction to make orders in respect of children and incapacitated or vulnerable adults.

It therefore does not apply to judgments by lay magistrates in the Family Court.

In regard to judgments that the judge must ordinarily allow to be published:

> Where a judgment relates to matters set out in Schedule 1 or 2 below and a written judgment already exists in a publishable form or the judge has already ordered that the judgment be transcribed, the starting point is that permission should be given

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12 Ministry of Justice, *Family Procedure Rules 2010*, Practice Direction 27B, paragraph 2.5

> for the judgment to be published unless there are compelling reasons why the judgment should not be published.
>
> SCHEDULE 1
>
> In the family courts (and in due course in the Family Court), including in proceedings under the inherent jurisdiction of the High Court relating to children, judgments arising from:
>
> (i) a substantial contested fact-finding hearing at which serious allegations, for example allegations of significant physical, emotional or sexual harm, have been determined;
>
> (ii) the making or refusal of a final care order or supervision order under Part 4 of the Children Act 1989, or any order for the discharge of any such order, except where the order is made with the consent of all participating parties;
>
> (iii) the making or refusal of a placement order or adoption order under the Adoption and Children Act 2002, or any order for the discharge of any such order, except where the order is made with the consent of all participating parties;
>
> (iv) the making or refusal of any declaration or order authorising a deprivation of liberty, including an order for a secure accommodation order under section 25 of the Children Act 1989;
>
> (v) any application for an order involving the giving or withholding of serious medical treatment;
>
> (vi) any application for an order involving a restraint on publication of information relating to the proceedings.
>
> SCHEDULE 2
>
> In proceedings under the inherent jurisdiction of the High Court relating to incapacitated or vulnerable adults, judgments arising from:
>
> (i) any application for a declaration or order involving a deprivation or possible deprivation of liberty;
>
> (ii) any application for an order involving the giving or withholding of serious medical treatment;
>
> (iii) any application for an order that an incapacitated or vulnerable adult be moved into or out of a residential establishment or other institution;
>
> (iv) any application for a declaration as to capacity to marry or to consent to sexual relations;
>
> (v) any application for an order involving a restraint on publication of information relating to the proceedings.[13]

The second class of judgment is those that *may* be published. The Practice Guidance states:

> In all other cases, the starting point is that permission may be given for the judgment to be published whenever a party or an accredited member of the media applies for an order permitting publication, and the judge concludes that permission for the judgment to be published should be given.[14]

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13 Sir James Munby, *Transparency in the Family Courts – Publication of Judgments: Practice Guidance*, 16 January 2014, pp3–4, para 17

14 As above, p4, para 18

The Practice Guidance adds that "in deciding whether and if so when to publish a judgment, the judge shall have regard to all the circumstances, the rights arising under any relevant provision of the European Convention on Human Rights, including Articles 6 (right to a fair hearing), 8 (respect for private and family life) and 10 (freedom of expression), and the effect of publication upon any current or potential criminal proceedings".[15] It also sets out which personal information should be anonymised.[16]

2.4 Contempt of court

Section 97(2) of the *Children Act 1989* makes it a criminal offence to publish, to the public at large or to any section of the public, any material which would identify, or which would be likely to identify, a child as being involved in family courts proceedings (unless a specific order has been made dispensing with this provision).

In addition, under section 12 of the *Administration of Justice Act 1960,* it may be a contempt of court to publish information of a court sitting in private where the proceedings:

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

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.

A person found guilty of contempt of court will be liable to a term of imprisonment and/or a fine.[17] Under section 14 of the *Contempt of Court Act 1981*:

- a superior court may impose a prison sentence of up to 2 years, or an unlimited fine, or both;
- an inferior court may impose a prison sentence of up to 1 month, or a fine not exceeding £2,500, or both.

2.5 Further information

Further information about privacy and the family courts is set out on the website of the Judiciary of England and Wales. This includes links to two HM Courts and Tribunals Service leaflets:

- EX710: Can I talk about my case outside court?
- EX711: Can the media attend my court case?

15 As above, p4, para 19
16 As above, pp4–5, para 20
17 *Contempt of Court Act 1981,* s 14

3. History of recent reforms

3.1 Summary of recent changes and the Government's position

In response to a parliamentary question which asked "whether they will introduce measures to open the proceedings of the family courts … to the press and public; and, if not, why not", the answer given in June 2015 by the Justice Minister, Lord Faulks, provided a summary of recent changes and the current Government's position on the issue of transparency:

> The Government supports steps to increase openness whilst remaining mindful of the rights to privacy of those involved in such personal proceedings.
>
> Since May 2009, amendments to the rules of court governing the practice and procedure to be followed in family proceedings have allowed accredited members of the media access to the majority of court hearings.
>
> In January 2014 the President of the Family Division issued guidance requiring more judgments of both the Family Court and Court of Protection to be published online.
>
> In August 2014 the President of the Family Division issued a consultation seeking views on the impact of these earlier steps to increase transparency in the family court and on ways to further increase transparency including, the possibility of public access.[18]

3.2 Building pressure for reform

Campaign by *The Times* newspaper

In 2008, the *Times* newspaper ran a family justice campaign to open up the family courts. In a leading article, *The Times* said that it was "impossible to know the extent to which miscarriages of justice may be occurring, because the whole system is shrouded in secrecy".[19]

In response, Sir Mark Potter, who was then the President of the Family Division and Head of Family Justice, said that the present system was "far from perfect" but spoke of the distinction between privacy and secrecy.[20]

Constitutional Affairs Select Committee reports

The issue of transparency in the family courts was examined in 2005 and revisited in 2006 by the Constitutional Affairs Select Committee as part of its *Family Justice* inquiry.[21] Many of the witnesses who gave evidence to the Committee called for more open access to the family courts. The Committee called for a greater degree of transparency, and said that an "obvious move" would be to allow the press and public

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18 PQ HL306 22 June 2015
19 "A Conspiracy of Silence", *The Times,* 7 July 2008
20 "Family justice is private - not secretive", *The Times,* 11 July 2008
21 Constitutional Affairs Committee, *Family Justice: the operation of the family courts,* 2 March 2005, 2004–05 HC 116-I; Constitutional Affairs Committee, *Family Justice: the operation of the family courts revisited*, 2005–2006, HC 1086; 11 June 2006

into the family courts under appropriate reporting restrictions, subject to the judge's discretion to exclude the public.

3.3 Measures taken during the period of the Labour Government

Consultations

Against a background of increasing pressure to improve transparency in the family courts, the previous Government engaged in two public consultation exercises on the issue: in 2006, *Confidence and confidentiality: Improving transparency and privacy in family courts*, and in June 2007, *Confidence & confidentiality: Openness in family courts – a new approach*.

In the 2007 consultation document, the Government announced that the media would not be given automatic rights to attend family proceedings, although it was intended that the court would still have discretion to allow media attendance on application. Instead, the focus would be on providing better information about family proceedings to the public.[22]

New rules allowing media attendance

In December 2008, a further Government announcement stated that the rules of court would be changed to allow the media (but not members of the general public) to attend family proceedings, thereby reversing the decision made in the June 2007 consultation. The then Secretary of State for Justice and Lord Chancellor, Jack Straw, told the House that he was "announcing today that the rules of court will be changed to allow the media to attend family proceedings in all tiers of court".[23] Previously, the media had only been able to attend family court cases in the family proceedings courts.

The Ministry of Justice also published *Family Justice in View* to accompany Mr Straw's statement, which included a summary of responses to the 2007 consultation. On the issue of media access, the report highlighted the dichotomy in responses between different interest groups to the question, "Should the media be allowed to attend family proceedings as of right, with judicial discretion to exclude where appropriate?":

> Unsurprisingly, 100% of media representatives who responded agreed with the proposition; 72% of members of the public and 54% of voluntary sector (charities for children, adults or others) organisations that replied also agreed.
>
> Equally emphatic were the groups who generally did not agree with the proposal to allow the media into courts: – 73% of judicial responses (58% if the 61 identical responses from a single FPC were taken as one response); 77% of responses from local and devolved government and Non-Departmental Public Bodies

22 Ministry of Justice, *Confidence & confidentiality: Openness in family courts – a new approach*, Cm 7131, 20 June 2007, p3

23 HC Deb 16 December 2008 c980

> (NDPBs); and 78% of responses from legal practitioners or bodies representing them.[24]

The Government argued that "allowing confidence in the family courts to fall in the eyes of the public is not in the interests of the children who we are working so hard to protect", and "therefore [the Government has] come to the conclusion that we must increase the volume of information available about the family courts and open up the courts" subject to the proviso that "a right of access to proceedings cannot mean an untrammelled right to report anything and in any manner regardless of its impact on the children involved".[25]

The change took effect in April 2009.

In January 2010, the Ministry of Justice published *A study of the impact of changes to court rules governing media attendance in family proceedings*.[26] The study noted that, prior to the changes announced by Mr Straw, "the media already had the right to attend hearings in the Family Proceedings Court", meaning that "the main change introduced in April 2009 was to allow the media to attend County and High Court hearings". The report stated that "the study does provide evidence to suggest that the impact of the media attendance rules in the family courts in England and Wales has been minimal", and also that it had "identified a range of challenges experienced by courts associated with the practicalities of implementing the media attendance rules".[27]

Some commentators expressed disappointment that the new rules allowing media attendance did not go as far as had been hoped. The new court rule changes did not alter the statutory reporting restrictions framework for family proceedings; this required primary legislation. This meant that the media were able to report only limited information about the proceedings they were now able to attend.

Detailed information about the current rules on media attendance can be found in section 2.2 of this paper.

Piloting of the publication of written judgments

In his December 2008 statement, the then Secretary of State for Justice and Lord Chancellor also said that the provision of written judgments would be piloted and that the rules on the disclosure of information in family proceedings would be relaxed.[28]

Mr Straw told the House:

> At present, anonymised judgments of the Court of Appeal, and in some instances of the High Court, are made public, but that is not the situation for the county courts or the family proceedings courts, which deal with the bulk of family law cases.
>
> We have therefore decided to pilot the provision of written judgments when a final order is made in certain family cases. The courts in the pilot areas—Leeds, Wolverhampton and Cardiff—

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24 Ministry of Justice, *Family Justice in View*, Cm 7502, December 2008, p29
25 As above, p31
26 DEP2010-0187
27 Ministry of Justice, *A study of the impact of changes to court rules governing media attendance in family proceedings*, DEP2010-0187, January 2010, p17
28 HC Deb 16 December 2008 c980

> will, for the first time, routinely produce a written record of the decision for the parties involved. In selected cases, where the court is making life-changing decisions for a child, it will publish an anonymised judgment online, so that it can be read by the wider public.[29]

The Children, Schools and Families Act 2010 (CSFA 2010)

Provisions intended to amend reporting restrictions were enacted in Part 2 of the *Children, Schools and Families Act 2010*; the Act received Royal Assent immediately before Parliament dissolved ahead of the 2010 General Election, which the Labour Government lost. The provisions were not brought into force by the subsequent Coalition Government, and Part 2 was subsequently repealed by the *Crime and Courts Act 2013* (see section 3.4 below).

The *Explanatory Notes* published with the Act summarise how it was intended that Part 2 would operate:

> The new arrangements provide for a general restriction on publication by any person of information relating to the proceedings covered, subject to three major exceptions for types of authorised publication: authorised publication of a court order or judgment, "authorised news publication" and authorisation by way of provision made in rules of court. Of the three exceptions, publication of court orders and judgments will be possible in much the same way as at present, and it is anticipated that the rules of court will continue to permit similar sorts of disclosure of information as at present; but the "authorised news publication" exception is new and will allow for wider reporting of family proceedings than at present. In addition to these three exceptions, the court will also retain a general discretion to permit the publication of information relating to family proceedings.
>
> The exception for authorised news publication of proceedings is for reporting of information acquired by an accredited media representative who has attended the proceedings in question. The news reporting scheme turns on automatic prohibition on reporting of certain sorts of information which is particularly sensitive, with other information being reportable unless the court specifically imposes restrictions. Thus—
>
> a) publication of any information likely to lead to the identification of children, parties or witnesses (save professional witnesses) in the proceedings ("identification information") or of other sorts of particularly sensitive information ("sensitive personal information", "restricted adoption information" and "restricted parental order information") is prohibited, but with the court having power to relax the prohibition and allow publication;
>
> b) publication of all other information is permitted, but with the court having power to prohibit or restrict publication.[30]

Five conditions would have to be met before a publication would be classified as an authorised news publication. These were complicated

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29 HC Deb 16 December 2008 c981

30 *Children, Schools and Families Act 2010–EN*, pp2–3, paras 17–18

and had a number of elements; two of the conditions had many exceptions.[31]

The *Explanatory Notes* also contain a detailed explanation of each of the provisions in Part 2.

3.4 Measures taken during the period of the Coalition Government

Decision not to implement Part 2 of the CSFA 2010

The provisions in Part 2 of the *Children, Schools and Families Act 2010* (CSFA 2010), which were to be implemented in two stages, were not been brought into force by the Coalition Government.

Initially, in October 2010, the then Parliamentary Under-Secretary of State for Justice, Jonathan Djanogly, said that a decision on whether to introduce the changes on media reporting would not be made until after the publication of the final report of the independent Family Justice Review, established by the previous Government.[32]

This followed criticism by some media organisations and other critics who argued that the reforms in the Act would actually have the effect of making reporting of family cases more difficult than it is at present.[33]

In particular, in July 2010 the Lord Justice James Munby (who was later to become President of the Family Division) referred to the provisions in Part 2 of the CSFA 2010 as a "lost opportunity":

> The new 'scheme', if that is what one can call it, is far from comprehensive. Divorce and ancillary relief are scarcely affected; the adult inherent jurisdiction not all. A greater degree of consistency has been achieved – the different treatment of the County Court and the Family Proceedings Court will now be a thing of the past – but at the heavy price of an increase in the areas covered, for the first time, by reporting restrictions. And at the same time it is far from obvious that the supposed relaxation of the reporting restrictions in children cases – surely the crux of the problem – will actually have the desired effects, if, indeed, any effect at all.
>
> What the overall impact will be of the Act, assuming that it is ever brought into force, and more generally of the recent reforms, is difficult to predict, not least given the complexity and technicality of the new statutory provisions. One view voiced by various commentators, and a view I am inclined to share, is that if anything the Act is likely to reduce, rather than increase, the amount of information about children and other family proceedings which finds its way into the public domain.
>
> Truly, it may be thought, a lost opportunity.[34]

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31 As above, pp10–11, paras 54–60

32 HC Deb 11 October 2010 c7WS

33 See, for example, Newspaper Society, *Family Courts: New Act Won't Enhance Openness and Public Confidence,* September 16, 2010; Frances Gibb, "Family courts: 'the changes were a misguided, politically motivated fudge'", *Times Online,* 6 May 2010

34 Munby, J., *The Hershman-Levy Memorial Lecture For 2010: 'Lost Opportunities: Law Reform And Transparency In The Family Courts'*, 1 July 2010, pp27–28

In July 2011, the Justice Select Committee published its report entitled *Operation of the Family Courts* which considered Part 2 of the CSFA 2010 as part of its inquiry.

While acknowledging the need for transparency in the administration of family justice, and the equally important need to protect the interest of children and their privacy, the Committee recommended, in the light of the opposition expressed by witnesses, that Part 2 of CSFA 2010 should not be implemented:

> ...our witnesses were united in opposing implementation of the scheme to increase media access to the family courts contained in Part 2 of the Children, Schools and Families Act 2010. While their reasons for doing so differed, and were sometimes contradictory, such universal condemnation compels us to recommend that the measures should not be implemented, and the Ministry of Justice begin afresh. We welcome the Government's acknowledgement that the way the legislation was passed was flawed, and urge Ministers to learn lessons from this outcome for the future.[35]

The Government published its response to the report in October 2011, and accepted the recommendation that Part 2 of the *Children, Schools and Families Act 2010* should not be commenced at that time:

> Ministers advised Parliament in October 2010 that no decision would be taken on commencement of these provisions before the outcome of the Family Justice Review. However, in light of the committee's findings, we have decided to bring forward that decision.[36]

It should be noted that the Family Justice Review's final report published a month later welcomed the Justice Committee's recommendation that Part 2 should not be brought into force.[37]

The Government's response to the Justice Committee's report also stated that "this complicated and sensitive area of law" needed to be "reviewed carefully", including gathering the views of children who have experience of the family courts. Further legislative change would not be brought forward in the near future but:

> We will instead look at measures that can increase the amount of publicly available information about the work of the family courts, including encouraging judges to publish more family court judgments. In particular, Ministers will examine the results of the family court information pilot, which trialled the online publication of family court judgments in an anonymised form.[38]

Mr Djanogly acknowledged the need for greater transparency, and said the Government would consider the findings of the "Family Courts Information Pilot".[39] He told a Westminster Hall debate in March 2012

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35 Justice Committee, *Operation of the Family Courts*, 2010–12 HC 518-I 14 July 2011, p87, para 281

36 Ministry of Justice, *Government Response to Justice Committee's Sixth Report of Session 2010–12:Operation of the Family Courts*, Cm 8189, October 2011, p31, para 73

37 Norgrove, D. and others, *Family Justice Review – Final Report*, 3 November 2011, p13, para 54

38 As above, p32, para 75

39 The Family Courts Information Pilot ran from November 2009 to December 2010. It was designed to test the feasibility of providing written judgments to parties in

that that the Government "accept[ed] that the current position in the family courts is unsatisfactory and we are considering ways in which more information can be released".[40]

The *Crime and Courts Act 2013* subsequently repealed Part 2 of the *Children, Families and Schools Act 2010* without it ever having been brought into force.

New guidance from the President of the Family Division on the publication of judgments

In January 2014, the President of the Family Division, Sir James Munby, issued practice guidance entitled *Transparency in the Family Courts*. Noting the July 2011 paper jointly issued by his predecessor, Sir Nicholas Wall, which set out a statement of the current law (excluding the provisions of Part 2 of the *Children, Schools and Families Act 2010*), the President said that he:

> propose[d] to adopt an incremental approach. Initially I am issuing this Guidance. This will be followed by further Guidance and in due course more formal Practice Directions and changes to the Rules (the Court of Protection Rules 2007 and the Family Procedure Rules 2010). Changes to primary legislation are unlikely in the near future.[41]

The first step, set out in the practice guidance, was that from 3 February 2014 new rules would apply in regard to the publication of judgments. Details of the current rules can be found in section 2.3 of this note, and a helpful summary was published in *Halsbury's Law Exchange*:

> Probably for practical reasons, the Guidance applies at this stage only to the judgments of Circuit Judges and High Court Judges.
>
> […]
>
> For those judgments to which it does apply there will now be mandatory publication of anonymised judgments where, in the view of the judge, there is a public interest in doing so.
>
> Secondly, in any cases falling into particular categories (which broadly correlate with those which may be controversial, or in which there is likely to be a public interest in publication) and where a judgment already exists in written form (or a transcript has been ordered), the starting point is that permission should be given for the judgment to be published, unless there are compelling reasons not to do so.
>
> Thirdly, the starting point for other judgments is permission to publish on application by a party or the media.

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certain types of family cases, and posting anonymised versions on a public website, the British and Irish Legal Information Institute (BAILII). The pilot also looked at options for retaining written judgments for later life access by children. The subsequent report found that there was support for greater transparency and better public understanding of the family justice system, but that there were concerns about the protection of the privacy of the families involved. It questioned whether there would be "any real benefit in a national roll-out which would include each and every case falling within the criteria, as tested in the pilot, or whether the cases to be published might be sampled in some way". See: Ministry of Justice, *Review of the Family Courts Information Pilot*, August 2011

40 HC Deb 21 March 2012 c253WH

41 Sir James Munby, *Transparency in the Family Courts – Publication of Judgments: Practice Guidance*, 16 January 2014, p2, para 7

> Where a judgment is published, "public authorities and expert witnesses should be named in the judgment approved for publication, unless there are compelling reasons why they should not be so named". It appears that this is intended to include social workers because, "anonymity in the judgment as published should not normally extend beyond protecting the privacy of the children and adults who are the subject of the proceedings and other members of their families, unless there are compelling reasons to do so". This is of course consistent with Re J.
>
> Children should not normally be named unless specific permission is given. It seems likely that a parent who wishes to identify themselves will be given permission to do so providing that can be done without risk of identifying the child (for example, where a parent has been exonerated).
>
> The Guidance makes provision for the legal representative of the Applicant in the proceedings, or in the application (as appropriate) to carry out the anonymisation, and for the costs to be at public expense, joint expense or the Applicant's expense depending on the circumstances.[42]

Consultation from the President on further transparency measures

In August 2014, the President of the Family Division issued a consultation paper entitled *Transparency – The Next Steps*. The consultation dealt with four topics:

- comments were invited "on the impact and the working to date of the Practice Guidance and canvassing views as to any ways in which the [January 2014] Practice Guidance can be improved and, perhaps, extended". Sir James noted the "significant increase" in the number of judgments in family cases being published online following the publication of the January 2014 Practice Guidance: "from February to July 2013, 109 judgments of High Court or section 9 judges were published and 6 judgments of Circuit Judges. The figures for the corresponding period in 2014 were 146 and 109 respectively".
- "views and suggestions" were sought "as to whether any steps can be taken to enhance the listing of cases in the Family Division and the Family Court" to perhaps provide "a catch-phrase or a few catch-words … to indicate in slightly more detail what the case is about", rather than the current system of only providing a case number;
- "views on further guidance … dealing with the disclosure to the media of certain categories of document, subject, of course, to appropriate restrictions and safeguards"; the documents proposed were (1) those "prepared by the advocates, including case summaries, position statements, skeleton arguments, threshold and fact-finding documents" and (2) "some experts' reports, or extracts of such reports". A pilot where documents were made available to members of the accredited media was

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42 Halsbury's Law Exchange, *Pulling back the curtain of privacy in family and Court of Protection proceedings*, 23 January 2014

proposed. It would be confined to confined to cases heard by High Court judges sitting in London (and possibly a limited number of DFJs [Designated Family Judge] elsewhere).

- "seeking *preliminary*, *pre-consultation* views about the possible hearing in public of certain types of family case", which the President acknowledged was "obviously a very large question". He added that "before any specific proposals are implemented I will consult further on the detail of whatever is proposed. My purpose now is to canvass preliminary views in order the better to be in a position to decide whether and if so how it might be appropriate to proceed. I am likely to propose that if the matter proceeds at all, it will initially be by way of a pilot".[43]

The document did not state when the consultation period closed, and a further paper by the President yet to be published.

3.5 Measures taken during the current Government

The Conservative Government has yet to make any policy changes in respect of transparency in the family courts; it is perhaps waiting for the outcome of the President's consultation.

However, as noted above, it has stated its position on this matter: "The Government supports steps to increase openness whilst remaining mindful of the rights to privacy of those involved in such personal proceedings".[44]

43 Sir James Munby, *Transparency – The Next Steps: A Consultation Paper issued by the President of the Family Division on 15 August 2014*, 15 August 2014

44 HL306 22 June 2015

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