TRANSPARENCY – THE NEXT STEPS

A Consultation Paper issued by the President of the Family Division on 15 August 2014

A key element of the family justice reforms is the transparency agenda – finding ways of opening up the workings of the Family Court to public scrutiny so as to increase understanding of what we do and how we do it, whilst at the same time preserving confidentiality and respecting the private and family lives of those whom the system serves.

The underlying principles are two-fold. First, there is a need for greater transparency in order to improve public understanding of the court process and confidence in the court system. Secondly, the public has a legitimate interest in being able to read what is being done by the judges in its name.

I have been clear throughout that the process of reform must be incremental and informed at every stage by the views obtained from consultation with everyone who may be affected.

On 16 January 2014 I issued *Practice Guidance: Transparency in the Family Courts – Publication of Judgments* [2014] 1 FLR 733. This took effect from 3 February 2014. In my twelfth View from the President's Chambers, *The process of reform: next steps*, [2014] Fam Law 978, 982, I announced that I would be issuing, for discussion and comment, a consultation paper dealing with four topics. This I now do.

First, I am inviting comments on the impact and the working to date of the *Practice Guidance* and canvassing views as to any ways in which the *Practice Guidance* can be improved and, perhaps, extended.

There is no doubt that one consequence of the *Practice Guidance* has been a very significant increase in the number of judgments in family cases being published on BAILII. In the six months 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.

Like all reforms, this one will take time to settle down.

Plainly, increasing the number of judgments being published will have consequences, some of which are foreseeable, others not. I am keen to have as wide a debate as possible about the impact of these changes, and accordingly I invite views on any aspect of this change, especially views based on particular cases or specific experiences. Without in any way seeking to confine the debate, amongst the issues on which I shall especially welcome views are:

(1) The impact on children and families, both immediate, short term and long term. I have in mind, for example, the risk of a child in later life coming across an

anonymised judgment about his background and learning details of it for the first time.

(2) The impact on local authorities and other professionals.

(3) Any change in the level and quality of news and reporting about the family justice system.

On this, as in relation to all aspects of the transparency agenda, I am anxious to hear the views and experiences of children and young people who have been through, or know of others who have been through, the family justice system. I have read and carefully considered the latest research undertaken by Dr Julia Brophy and her colleagues for NYAS and ALC. I shall be interested to hear the views of the Family Justice Young Peoples Board. No doubt the Family Justice Board will also wish to respond.

Secondly, I am seeking views and suggestions as to whether any steps can be taken to enhance the listing of cases in the Family Division and the Family Court so that court lists can, as the media have suggested, be made somewhat more informative than at present as to the subject matter of the cases (but not, I emphasise, by naming the parties).

The practice at present is that cases are listed by case number. The numbering system, which has been in place for many years, though adjusted recently following the introduction of the Family Court, is well understood by practitioners though not, I fear, by others.

Case numbers take the form BM14C01234. The first two letters identify the place at which the proceedings were issued, in the example given Birmingham. Each place has its own identifying code. I will shortly be publishing a definitive list. Most of these codes reflect the place name (eg, CV for Coventry, GU for Guildford, SN for Swindon). Some do not (eg, HB for Brighton). FD refers to proceedings issued in the Family Division in London. ZC refers to the Central Family Court, ZE to the East London Family Court and ZW to the West London Family Court. The next two figures represent the last two digits of the year the proceedings were issued, in the example given 2014. The next letter identifies the type of case, in the example given a care case:

C	Public law
D	Divorce
F	Family Law Act
J	Judicial separation
N	Nullity
P	Private law (Children Act cases)
Z	Placement and adoption

The final five digits identify the specific case, in a continuous numbered sequence throughout the year starting at 00001, in the example given the 1,234th case.

Obvious considerations of costs and practicable feasibility suggest that there is probably only limited scope for expanding the amount of information that appears in court lists. One suggestion is that a catch-phrase or a few catch-words might be added after each case number to indicate in slightly more detail what the case is about. I shall welcome all suggestions. If there is thought to be merit in the idea of adding a catch-phrase or a few catch-words, it will be of great help to have some suggested examples of what would be thought useful.

Thirdly, I am seeking views on further guidance which I propose to issue, dealing with the disclosure to the media of certain categories of document, subject, of course, to appropriate restrictions and safeguards.

After discussion with a number of judges, my current thinking is that the next step might be a pilot project, confined to cases heard by High Court judges sitting in London (and possibly a limited number of DFJs elsewhere), under which the disclosable documents would fall into two categories:

(1) Documents prepared by the advocates, including case summaries, position statements, skeleton arguments, threshold and fact-finding documents.

(2) Some experts' reports, or extracts of such reports.

I view category (1) as the logical next step. I envisage that advocates will prepare the documents in a form that can be released to members of the accredited media. The purpose will be to facilitate their understanding of the case and to assist them in performing their watchdog role. If a case summary is available for members of the media to read, they will be able to decide quickly whether the case is one they would wish to attend, as they are entitled to do.

I envisage that at least initially, and until it has been possible to evaluate the outcome of the pilot, documents disclosed in this way will remain confidential, unless the judge orders otherwise, so that any copying or onwards transmission or disclosure by members of the media of the documents or their contents would be a contempt.

I do not anticipate that this will be unduly burdensome on advocates, nor lead to any significant change in practice. Advocates will quickly become used to drafting documents in a way that means they can be disclosed to the media. Plainly, particular care will have to be taken when litigants in person are involved.

Category (2) is more complicated and more controversial, which is one reason why it is proposed to be piloted in the way I have described. It will not be every expert's report that will be released but only those identified by the judge, having heard submissions. In some cases consideration may have to be given as to whether the report should be redacted or anonymised and if so who should carry this out.

I propose that in the first instance disclosure be confined to reports in the 'hard sciences'.

Again, the purpose will be to facilitate the media's understanding of the case and to assist them in performing their watchdog role. Again, I would envisage that at least

initially, and until it has been possible to evaluate the outcome of the pilot, documents disclosed in this way will remain confidential, unless the judge orders otherwise, so that any copying or onwards transmission or disclosure by members of the media of the documents or their contents would be a contempt.

I propose that where such disclosure is being considered, the expert should be informed prior to disclosure. It will be important to see whether the prospect of disclosure of their reports impinges on the willingness of doctors and others to offer their services as experts, and also on the content and quality of their reports.

In addition to the obvious points, I shall value responses on the following questions:

(1) Which types of documents should be included in category (1) and which types of expert in category (2)?

(2) Should access to such documents be confined to those members of the accredited media who actually attend the hearing or extend to any member of the accredited media entitled to attend the hearing, whether or not they do attend?

(3) What further restrictions and safeguards are desirable?

I am very conscious that this is a topic which causes nervousness amongst many professionals in the family justice system. I am aware of these concerns and propose to proceed carefully. Assuming that a pilot along these lines proceeds, I will want to receive feedback from all interested parties, including the experts themselves, the media, the legal professions and other interested parties, not least those who speak for children and young people who have been through the system.

Fourthly, I am seeking *preliminary, pre-consultation* views about the possible hearing in public of certain types of family case. I emphasise 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.

This is obviously a very large question. Without in any way limiting responses I shall particularly value views on three questions:

(1) What types of family case might initially be appropriate for hearing in public?

(2) What restrictions and safeguards would be appropriate?

(3) What form might a pilot take?

When a family court sits in public, there are various legal consequences. There are two in particular which will need the most careful consideration.

First, section 12 of the Administration of Justice Act 1960 does not apply to a hearing where the court sits in public. What are the implications of this? Will other restrictions and safeguards need to be put in place, and if so which?

Secondly, the confidentiality which attached to documents and information produced under compulsion ends when the material is read out in open court. This has particular ramifications in the context of financial remedy cases. Again, what are the implications of this? Will other restrictions and safeguards need to be put in place, and if so which?

It will be especially helpful to have the observations and comments of anyone who has had experience of a family case of whatever type which has for any reason been heard in open court. Has this caused problems?

I look forward to receiving views, comments and suggestions. They should be sent by email to Andrew Shaw at Andrew.shaw@judiciary.gsi.gov.uk.

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