**A TRANSPARENCY TOOLKIT**



## About this toolkit

This toolkit won’t tell you everything you need to know about transparency, but it’s an attempt to gather together some basic information and signposts to more detailed information in a handy format. It’s meant to be useful for both professionals and families, so we’ve tried not to be too technical.

We’ve outlined the current position and some of the things that are likely to change.

This is only an outline of a complicated area to get you started, and is not legal advice. We’ve provided links to more detailed information at the end so you can find out more.

**What do we mean by Transparency?**

Transparency is about seeing and understanding how things work.

When we talk about family courts and child protection we think about :

* Whether hearings (and court documents) should be public or private (or somewhere in between)
* Whether court cases should be reported in the media or on social media (and whether some information should be kept private, like childrens’ names)
* How the law and the court procedure is made clear for the people using it or whose lives might be affected by it (where do people find the law and how do they work out what it means)
* How families are helped to understanding how a decision has been made in their own case
* What information is available about how the system works overall? (things like statistics, complaints data, audits and inspection reports)

**What might change?**

Transparency has been a hot topic for some years. The Family Courts have been criticized for being “secret”, because it is difficult for people to understand what happens if they cannot see for themselves. This doesn’t necessarily mean the courts aren’t working as they should but it does mean that people can’t reassure themselves about it, and it does mean that we might be missing opportunities for a wider pool of people to help us spot things we could do better, to campaign for change or to suggest new ideas we haven’t thought of.

Journalists have been allowed to come into court hearings since 2009. They don’t often come because there are still a lot of restrictions on what they can publish, so what’s the point? It’s too expensive for them to sit through a hearing if they are not sure whether it will be newsworthy or whether they will be allowed to write about it at all. So we tend only to read about cases which are “juicy” (this usually means cases where something has gone wrong with the process or where the facts are very sad), which doesn’t give a balanced picture of how the system typically works.

An attempt to reform this area by the Government through the Children Schools & Families Act 2010 failed and that legislation was repealed. Since then the Government has not been keen on dealing with this difficult area.

The head Family Judge, the President of the Family Division (Sir James Munby), has introduced some changes (around the publication of judgments) and is planning to introduce some more. We expect to hear about those in the autumn.

Some people think that this is such an important issue that there should be a formal public consultation and that Parliament should make the decision.

## Public hearings and reporting?

Most hearings involving children are heard in private. The public are not allowed in to court, but journalists are allowed to sit in court unless the Court decides it would not be appropriate in that particular case. Hearings can be in public if the judge agrees that is appropriate, but everyone would be asked for their view first. Committal hearings must be held in public, even if they involve things connected to a case about a child. This is because a committal hearing is about whether someone should go to prison for disobeying a court order, so in some ways it is like a criminal trial.

Although journalists are allowed to be in court during a hearing they are not allowed to see the court papers and they are not allowed to freely report the case unless the court has decided that this is ok.

**“Reporting” or “publication”?**

There are lots of different pieces of law which set out what can and cannot be published and they apply to journalists AND everyone else and to publishing material online in blogs or social media, email or any other form of “publication” – the law covers much more than just newspaper reports, and could even cover spreading local gossip about a case.

Nothing prevents you from talking about your case *confidentially* to your lawyer, MP or other person for advice or support, but you must make sure that any person you share information with understands that the information must not be passed on. If you are worried about this look at Practice Direction 12G to the Family Procedure Rules 2010 (see www.justice.gov.uk) which tells you all the things you CAN do with information about your court case (things like making complaints or using documents to get therapy). If the thing you want to do is not on the list in PD12G you need to ask the court for permission BEFORE you share the information with anyone.

The two main pieces of law say (in summary) :

Section 97 of the Children Act 1989 makes it a criminal offence to publish the name, school, address or photo of a child who is the subject of Children Act proceedings. Section 97 does not apply after the case has ended but it can be extended by the judge making an injunction.

It is a contempt of court to publish information relating to proceedings about a child. This applies even after the case has finished (A Family Court judge can send someone to prison for contempt of court even though it is not a criminal offence).

“Information relating to proceedings” includes things said or done in any court hearing by the judge or a witness and the contents of documents produced for the court case (even extracts or summaries). It does not apply to any information that the court has included in a published judgment or to anything that happens in open court (a public hearing), and it does not prevent anyone from publishing things like an outline of the nature of the dispute, the names of witnesses, dates of hearings.

It’s often quite difficult to work out whether publishing a specific piece of information is allowed or not so it’s important to check. It can be a lot more complicated than the two bullet points above suggest – particularly because in any case the court can tighten or relax the rules about publication of information about a court case. It will only do so after hearing what everyone involved has to say, but unless you are involved in a case it is often difficult to know what orders may be in place about what can be published.

**Don’t forget**

* “publication” includes the republishing of something that someone else has published by sharing it through social media.
* where the judge authorizes publication of an anonymised judgment the people anonymised in it must not be identified unless the court has said this is ok. This includes saying “this is the judgment in my case”. Also be careful about “jigsaw identification” where adding together bits of information can lead to identification.

Some examples of cases where the court has allowed publication of names or images are :

* The “Italian C-section case”, where the mother Alessandra Pacchieri was permitted to identify herself as the mother of “P” the child, whose identity and placement details were to remain confidential. The President of the Family Division said :

*The public has an interest in knowing and discussing what has been done in this case, both in the Court of Protection and in the Chelmsford County Court. Given the circumstances of the case and the extreme gravity of the issues which here confronted the courts – whether to order an involuntary caesarean section and whether to place a child for adoption despite the protests of the mother – it is hard to imagine a case which more obviously and compellingly requires that public debate be free and unrestricted.*

*The mother has an equally obvious and compelling claim to be allowed to tell her story to the world. I repeat what I have on previous occasions (see most recently Re J, para 36) about the importance in a free society of parents who feel aggrieved at their experiences of the family justice system being able to express their views publicly about what they conceive to be failings on the part of individual judges or failings in the judicial system and likewise being able to criticise local authorities and others. I repeat what I said last week (Re P [2013] EWHC 4037 (Fam), para 4):*

*"The mother wishes to complain publicly about the way in which the courts in this country have handled her and her daughter. The court should be very slow indeed before preventing a parent doing what the mother wishes to do in the present case." If ever there was a case in which that right should not be curtailed it is surely this case. To deny this mother in the circumstances of this case the right to speak out – and, I emphasise, to speak out, if this is her wish, using her own name and displaying her own image – would be affront not merely to the law but also, surely, to any remotely acceptable concept of human dignity and, indeed, humanity itself.*

*P also, it should go without saying, has an equally compelling claim to privacy and anonymity.*

(See www.BaILII.org : P (A Child) [2013] EWHC 4048 (Fam) (17 December 2013))

* Re J, where the Father had covertly filmed the execution of an Emergency Protection order on a newborn baby following a home delivery, and had published the video online. The court permitted the publication of the video (saying the child was too young to be identifiable), but prohibited the naming of the child, extending this beyond the end of the case. See www.BaILII.org : Re J (A Child) [2013] EWHC 2694 (Fam)
* Re P and Q (the case involving fabricated allegations of a satanic abuse cult), where Pauffley J anonymised the children even though there had been 4m hits on videos of them posted online, saying “I see no good reason for adding to the damage already done.” (see www.BaILII.org : P and Q (Children: Care Proceedings: Fact Finding) [2015] EWFC 26 (19 March 2015)). The parents were identified in the judgment, which enabled the Father to be subsequently interviewed by the BBC about his experience in the case, as abuse of him continued online after delivery of the judgment.

You can find all these judgments on the www.BaILII.org website.

**Will this change?**

In the Italian C-section case The President of the Family Division said “*This case must surely stand as final, stark and irrefutable demonstration of the pressing need for radical changes in the way in which both the family courts and the Court of Protection approach what for shorthand I will refer to as transparency. We simply cannot go on as hitherto. Many more judgments must be published.”* Shortly after this case arose the President issued his Guidance on Transparency, which dealt mainly with judgments.

However the primary legislation (s97 Children Act, s12 Administration of Justice Act 1960 etc) is unlikely to change in the near future, as this is not a parliamentary priority - but guidance and rules around how those pieces of law should be dealt with in practice may change and develop under the President’s leadership.

In August 2014 the President of the Family Division consulted on whether journalists should sometimes be allowed to see some types of documents to help them report more accurately, and whether some types of hearings could be held in public. We don’t yet know what changes will be made to this area because the President is still considering consultation responses.

## Publication of judgments

In January 2014 the President of the Family Division published guidance for judges about when they should publish their judgments and about anonymising them.

The guidance means that all judges (apart from District Judges or Magistrates) should routinely consider whether their judgment should be published, and think about whether there is a public interest in doing that. There are certain types of judgment that the guidance tells us should usually be published, for example at the end of care proceedings, or after a fact finding hearing where a parent has been exonerated or found guilty of serious violence or abuse (see attached table). Generally, it is less likely that a judgment about a dispute between family members (private law) will be published than a judgment involving the state (care proceedings). This is because it is particularly important for the public to know how the state (through social services and the court) is behaving when it exercising the power to remove children from their family.

Where a judgment is published usually children and their families will be anonymised but judges, lawyers and other professionals (e.g. Guardians, social workers and experts) will usually not be anonymised. In practice some judges / courts seem to be keener than others on publication, and some judges will anonymise social workers names where they have been critical of the Local Authority employing them but want to make sure the individual social worker does not get the blame for systemic failings.

The process of anonymising judgments is time consuming and needs to be done carefully so that people are not identified by accident. Sometimes “jigsaw identification” can happen by piecing together different bits of information (e.g. initials + date of birth + ethnicity + town + number of siblings) so this needs careful thought by all involved before publication.

**Will this change?**

Some judges at Circuit Judge level are very keen on publishing their judgments whilst others seem not to do so (take a look at the list of judgments published on www.BaILII.org to see this). This might be because the publication of judgments is very time consuming, or because judges have different approaches to the balancing of privacy and public interest when making decisions under the guidance (or a bit of both). This inconsistency of implementation might be the subject of further guidance from the President when he announces his “next steps” on transparency later this year.

In Australia there is a semi-standardized approach to anonymisation, and a specific unit is responsible for carrying it out before publication. It is unlikely that resources will be found for a dedicated unit here, but a standardized approach might help reduce the risk of mistakes and identification. It is likely that there will be some more guidance about getting anonymisation right in the future. In the meantime, the Australian guidelines are attached.

Some individual High Court judges (e.g. Holman J) are very keen on sitting in open court in cases (usually involving financial remedy) which means their judgments may be automatically reported along with anything said in court. It is very unlikely this will become the norm in children cases, but more judges might start to think about it in some cases. In one care case Holman J did sit in open court and permitted the identification of the LA And of the family by surname, but this was a very unusual case that had attracted a vast amount of international attention (see www.BaILII.org : LB Haringey v Musa [2014] EWHC 1200 (Fam)).

In Wigan BC v Fisher & Ors [2015] (Rev 1) EWFC 34 (21 April 2015) Peter Jackson J noted that in 2014 over 300 judgments at High Court level and 160 other judgments had been published on BaILII - a substantial increase but still not enormous numbers. He said that Legal aid should cover arguments about the publication of judgments because these issues are an integral part of proceedings.

## Access to law and information

The law and procedure rules are generally available for free online. But this doesn’t mean that they are accessible. The law is difficult to find, difficult to navigate and difficult to understand and interpret:

* **Legislation** is available on [www.legislation.gov.uk](http://www.legislation.gov.uk) but it might not be up to date.
* **Cases** are available on www.Bailii.org but it is difficult to search for unless you know what you are looking for and non-lawyers find it really hard to work out which cases are relevant to their own. Historically, it was usually only judgments that were “binding precedents” were published through the Law Reports. These are judgments of higher courts, that give guidance to lower courts on how to interpret the law, and which must be followed. Today, now that judgments are published in the interests of transparency it is difficult for non-lawyers (and even lawyers!) to work out which judgments are precedents and which are just records of how one judge has dealt with one unique set of facts (This is a good example of how sometimes more information makes it harder to see what is happening. More information does not always make things more transparent).
* **Procedure rules and practice directions** are available on [www.justice.gov.uk](http://www.justice.gov.uk) but they are poorly formatted – and vast.
* **President’s guidance** notes are (largely) available on [www.judiciary.gov.uk](http://www.judiciary.gov.uk) but are difficult to find.
* Most **government websites** have very poor search functionality and confusing site architecture.
* **Local practice directions** made by Designated Family Judges for any given area are circulated on an ad hoc basis, usually only to lawyers. Even lawyers who do not regularly work in a particular court may be unaware of a local practice direction until they find they have done something wrong!
* A **Research bulletin** summarizing recent research relevant to family lawis published from time to time by the Ministry of Justice Knowledge Hub, but its existence is poorly publicized (email knowledgehub@justice.gsi.gov.uk).
* There are many websites which offer explanations of the law and guidance about it, but some of them are wrong or based on out of date law (the best example is that many websites still refer to contact and residence orders which no longer exist but there are more serious errors still out there). Some of these websites are publicly funded but appear to be infrequently maintained and without lawyer oversight.

**QUESTION** : These websites are meant to help people without a lawyer, but how do people know which is wrong without a lawyer?

One example of a site which is aiming to help point people to genuinely useful and generally reliable information is [www.familycourtinfo.org.uk](http://www.familycourtinfo.org.uk) - currently a website focusing on information relevant to Bristol and surrounding areas but which may be rolled out further.

**Will this change?**

A number of bodies have recommended the provision of a single government funded point of information on the internet for families involved in family court cases or family breakdown, most recently in Litigants in Person in Private Family Law Cases, a piece of research commissioned by the Ministry of Justice and published in Nov 14. It seems unlikely that this will happen any time soon.

## Understanding my own case

Everyone who is involved in a case in the Family Court is entitled to be told the reasons for a decision made by the court. This is done through a judgment for judges, or by “facts and reasons” for Magistrates.

* In cases involving the state (care proceedings), the parties will have a lawyer to explain the judgment to them.
* Children should be given an age appropriate explanation of the decision of the court by their Guardian, social worker or carer.
* Where people are not represented : they are entitled to a copy of the Magistrates’ facts and reasons, or to the judge’s judgment if it is in writing. If the judgment has been spoken they may ask for a transcript of the judgment to be provided - but this costs money. They could talk about the judgment / facts and reasons privately with a friend or supporter, or take it to a lawyer for help understanding it.
* A young adult who was involved in care proceedings as a child and who wishes to see the judgment in their case and their files should ask social services. A young adult who was involved in a case which did not involve social services (for example a dispute between their parents about where they should live) should ask CAFCASS, or the court or their lawyer (if they were a party to the case). Although it was proposed some years ago that CAFCASS would keep judgments in all children cases on file we don’t think this proposal was adopted so this information might be less easy to get hold of via CAFCASS.

**Will this change?**

Unlikely.

## The bigger picture

How can we see how an individual case fits in (or does not fit in) to a pattern? Lots of bodies publish statistics on a regular basis. Interpreting and comparing the statistics available can be confusing, but these can help us to see trends and changes over time.

* The Ministry of Justice publishes data every quarter on the type and volume of cases in the family courts, legal aid and on appeals.
* CAFCASS also publish statistics on a monthly basis. This covers private law demand and public law demand (how busy CAFCASS are by number of public and private law cases started each month).
* In public law cases codes are entered onto every court order for statistical purposes, covering things like placement type, and the reason for adjournment or delay. However, these statistics have never been published.
* The Department for Education publishes data on child protection and children in need around characteristics of children in need; referrals, assessments and children who were the subject of a child protection plan; and Monitoring and evaluation of family intervention projects. However, some useful statistics are not published e.g. around use of section 20 Children Act before and during proceedings (Family Rights Group is asking for this information using the Freedom of Information Act).
* UWE are conducting research into child protection strategy and are gathering and analyzing large datasets to help identify trends and evaluate the current system. They will be publishing research findings in 2016. See link at end of document.

There is limited good quality data about complaints.

* CAFCASS do not publish their complaints data and do not record complaints outcomes. Some people have made Freedom of Information Act requests but these have not been very successful. CAFCASS say :

*“There are no complaint outcomes recorded from February 2012 onwards due to the change in our complaints procedure: the number of stages involved was reduced from three to one and the classification of complaints as ‘upheld’ was ended. Figures for the number of upheld complaints during this period do not, therefore, exist. The focus of the complaints system is now on putting things right for service users while their case is ongoing so that any necessary remedial action can be taken.”* [Response to my FOI request, Oct 14, see www.whatdotheyknow.com ]

* Complaints about CAFCASS can also be made to the Parliamentary and Health Service Ombudsman, who do publish some summaries of cases dealt with, but their statistics do not separate out CAFCASS. CAFCASS are also subject to OFSTED inspection.
* Complaints about judges are dealt with by an independent body, the OIJC. Disciplinary action and statistics are published.
* Lawyers must have internal complaints procedures and their disciplinary bodies publish disciplinary findings, as does the Legal Services Ombudsman.
* Local Authorities are also subject to internal complaints processes and the Local Government Ombudsman, serious case reviews and OFSTED inspection.
* The Health Care Professions Council regulates social workers and some experts. It publishes its disciplinary decisions online.

**Will this change?**

Probably not.

## USEFUL LINKS AND DOCUMENTS

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| USEFUL LINKS / DOCUMENTS | Date | Link |
| President’s Transparency Consultation – the next steps | Aug 14 | [www.judiciary.gov.uk/publications/consultation-family-transparency-the-next-steps/](http://www.judiciary.gov.uk/publications/consultation-family-transparency-the-next-steps/) |
| President’s Guidance – Transparency in the Family Courts (judgments) | Jan 14 | [www.judiciary.gov.uk/publications/transparency-in-the-family-courts/](http://www.judiciary.gov.uk/publications/transparency-in-the-family-courts/) |
| The Family Courts – media access and reporting | 2011 | [www.judiciary.gov.uk/publications/the-family-courts-media-access-and-reporting/](http://www.judiciary.gov.uk/publications/the-family-courts-media-access-and-reporting/) |
| The Transparency Project |  | [www.transparencyproject.org.uk](http://www.transparencyproject.org.uk) |
| Research Bulletin | Jan 15 | www.gov.uk/government/uploads/system/uploads/attachment\_data/  file/398781/family-justice-research-bulletin-jan-2015.pdf |
| What can I talk about? Who can I talk to? (Sarah Phillimore, Child Protection Resource Blog) |  | www.childprotectionresource.org.uk/transparency/ |
| Publishing information about family proceedings (Lucy Reed, Pink Tape blog) |  | www.pinktape.co.uk/rants/publishing-information-about-family-proceedings/ |
| Rethinking Child Protection Strategy research |  | www1.uwe.ac.uk/bl/research/childprotectionstrategy.aspx |
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