RESPONSE TO THE PRESIDENT'S DRAFT GUIDANCE AS TO REPORTING IN THE FAMILY COURTS

PREPARED BY THE TRANSPARENCY PROJECT

WHO WE ARE

The Transparency Project is an educational charity in England & Wales whose objects are to promote public understanding of family law and courts, to facilitate public debate about them and to enhance public trust and confidence in the administration of justice. We were founded in 2014 and achieved charitable status in 2015.

We operate primarily via a website at www.transparencyproject.org.uk where we focus on explaining and correcting news reports about family law and published judgments, and encouraging and facilitating better reporting of family law. We have published plain English myth busting guidance notes on contentious or tricky topics, and we host public debates and events which get professionals and the public talking about family courts. We have been involved in the development of the legal blogging pilot operating via PD36J in the Family Court.

Our team is primarily volunteer based and comprises practising and academic lawyers, journalists, and parents. Our guest posts also incorporate a wide range of viewpoints. Our patron is His Honour Clifford Bellamy.

PRELIMINARY REMARKS

We welcome the introduction of this guidance.

In this document we use the term ‘reporters’ to refer collectively to journalists and legal bloggers.

In due course, we will provide feedback to the President’s Office in respect of the legal blogging pilot, in order to assist an evaluation of that scheme, but we mention the pilot in this document because of the substantial crossover of issues with the subject matter of the guidance.

THE LEGAL BLOGGING PILOT

Our response has been prepared in the hope that the legal blogging pilot would continue in some shape or form, at least for a period of evaluation following the 30 June and therefore on the basis that a court might be dealing with applications from reporters of both types.

We have drawn on the experiences gained through the attendances of various of our members at hearings under PD36J and upon the experiences of our journalist member when attending court to inform our responses, and on our experience in trying to arrange for our lawyer volunteers to attend. We have attempted to make constructive use of the pilot period to tentatively test out what works and what doesn’t seem helpful, and to think through ways in which reporters can be facilitated to attend and report cases without undue disruption or anxiety, and without creating undue additional burdens on judges, court staff or professionals in an already overstretched system. However, we think it is necessary to explicitly state that it would be quite wrong to permit transparency only where it is resource neutral. Being seen to do justice is part of the core work of the justice system and whilst some of the suggestions we make below may have a marginal resource implication, this is merely a corollary of that core function in a context where the court is operating privately.

At the time of writing, we have not yet attended any hearing at which there has been no lawyer acting in the case. We recognise that attendance at such hearings, and requests to relax restrictions concerning such hearings, might raise particular issues, but we do not think these are insurmountable.

Confirmation that the pilot scheme will indeed continue for a further year was received just prior to completion of this response, which we think is a sensible approach to testing out new ways of achieving transparency, since a comprehensive understanding of the potential benefits and risks can only be gained through over time as experience accrues.

OUR SUGGESTIONS

Although the guidance refers, in a number of places, to legal bloggers and appears to be intended to be equally applicable to both category of reporters, we would invite the President to make this explicit in the opening paragraph of the guidance, which presently refers only to journalists. We suggest that the document expressly adopts the collective term 'reporters', as we have in this document (and if the Pilot continues or in due course is incorporated into the FPR, that terminology might be imported in the definitions section of the FPR too).

The draft currently states that :

> "Where the court is asked to lift/extend reporting restrictions, a balancing exercise is required between ECHR Articles 6, 8 and 10."

We would like the guidance to specifically reference Lord Steyn's balancing exercise between Articles 8 and 10, as enunciated in Re S (a child) [2004] UKHL 47; [2005] 1 AC 593 – either by referring in parentheses to the citation for the case, or by setting out a summary of the test itself. We also suggest the addition of the

words ‘or other relevant ECHR rights if applicable’ in acknowledgment that other articles might be engaged.

The draft guidance refers to the 2005 Cafcass Practice Note. That document was updated by CAFCASS in 2015 but is not available in its updated format at the citation given. We suggest the guidance therefore says “(as updated in 2015)” and includes the link to the guidance on the CAFCASS Website : https://www.cafcass.gov.uk/about-cafcass/policies/ (as it is otherwise impossible to find).

We note that two previous sets of practice guidance are referred to, but the relationship between those and the current draft is not explained. We think it would be helpful if it were.

In particular, we invite some consideration of the wording of paragraph 11, which appears to suggest that there should be consideration of publication of any judgment regardless of the tier of judge, category of case or readiness of a judgment or transcript for publication. We don’t object to that if intended but respectfully suggest this could be clearer.

As regards the anonymisation guidance, we have seen the comments that journalist Louise Tickle has incorporated into her own response on that topic, and adopt those submissions. We are concerned to ensure that anonymisation is deployed where properly justified (necessary and proportionate) rather than as a matter of course and would wish to avoid the risk of professionals and judges being led into error by departure from a case specific balancing exercise.

If thought appropriate, we would welcome the guidance referring to the Transparency Project’s own guidance note on the publication of judgments (a copy of which has been provided to the President’s Office and which can be found on

www.transparencyproject.org.uk/resources) as a useful neutral tool to assist practitioners and litigants think through these issues.

We suggest that the guidance should be expanded to include some basic points and prompts regarding the provision of certain core documents to attending reporters, in order to ensure that they are able to identify which cases they wish to attend, and to follow proceedings and thus accurately report (where permitted) the proceedings. We would suggest that the following documents ought ordinarily to be uncontroversial in the first instance:

- Case outline for the relevant hearing
- Skeleton argument for the relevant hearing
- Any current reporting restrictions order (over and above statutory restrictions)
- Any judgment that is the subject of an application for publication

Whilst of course matters would need to be considered on a case by case basis, we suggest that ordinarily where a reporter has indicated a wish to attend a hearing, permission could be given for a copy of that document to be provided to the reporter on the basis that s12 Administration of Justice Act 1960 (s12 AJA) / s97 Children Act 1989 (s97 CA) will prohibit in any event the dissemination of the contents of that document (subject to any permissive order later made). A legal blogger will have signed an undertaking to that effect in form FP301, but the court might ask a journalist to confirm their appreciation of the restrictions prior to release.

If appropriate, the court could require the return of any copies of such documents at the end of the hearing.

We are mindful of the need to ensure that the attendance of reporters at family court hearings causes as little disruption as possible and that it does not generate additional workload unnecessarily. With that in mind we wonder if FP301 might be adapted to include a tick box whereby the legal blogger attending might indicate at the outset that they request sight of case summary or skeletons, in order that the court and parties can apply their minds to this and can agree and provide these documents before the outset of the hearing without any need for an application. If in the individual case there is any objection to such documents being provided, we would suggest a short oral application could deal with this issue. In reality, we suspect that where objections are raised regarding documents, those are likely to be coupled with a broader objection to attendance at all – so we doubt that this will create additional burden or disruption.

Now that the continuation of the legal blogging pilot has been confirmed, we intend to make plans to support and develop the legal blogging format as a vehicle for public legal education and general information as an adjunct to mainstream media reporting by journalists.

We would invite some consideration of whether this guidance might sensibly be consolidated at some stage with FPR Practice Direction 27B, which has not been revised for some years.

Litigants in person / private law

It is sometimes suggested that there is less public interest justification for reporting private law proceedings. We disagree. There has been huge public interest recently in the handling of allegations of domestic abuse by family courts, particularly in the context of private law proceedings, leading to the MoJ setting up its 'spotlight review' on the issue, and we would argue that it is important that transparency provisions apply equally to public and private law proceedings.

However, we recognise that there are some practical differences in private law proceedings – not least that the parents may not be represented, and the child may not be a party.

Whilst it would obviously be ideal if legal advice were available to every litigant in whose case there is a question raised about reporting, we do not think that the involvement of a litigant in person in a case should prevent the reporting of it (subject to the individual circumstances of that case). Automatic legal advice is clearly not the case in criminal or civil jurisdictions generally, where there are very few restrictions on what can be reported and where there is very limited privacy protection. Whilst it is important to ensure that the unrepresented understand what is being requested, it should not be forgotten that primary legislation clearly protects the identities of all subject children except where (exceptionally) a permissive order pursuant to s97(4) CA 1989 is made (usually only in cases of missing children).

The experience of our team members (as lawyers and journalists attending court) is that, more often than not, where a clear explanation of what is proposed and what protections will remain (anonymity etc.) is given, a parent will often be sufficiently reassured not to object to publication of a judgment or report.

We suggest that it would be very helpful for Plain English information materials on these issues to be made available so that litigants in person (and indeed also represented litigants) can understand what is and is not being suggested and give informed consent to a relaxation or can understand that they can object if they wish. These could also be posted on walls around the court: via an expanded version of the HMCTS information leaflets and wall posters displayed at many Court Centres about the media's rights of attendance in private hearings. We have

already produced a guidance note intended to support litigants to reach an informed view about whether the judgment in their case should be published or not, and the ethos of that document is not to persuade parents that their judgment should be published but to help them explore what is right for them in their particular case (see Guidance Note Publication of Family Court Judgments) http://www.transparencyproject.org.uk/publication-of-family-court-judgments-guidance-note/.

HMCTS information leaflets (EX710 and EX711) are neither up to date nor widely available (and since court forms have been moved to gov.uk are almost impossible to locate online without knowing the leaflet name or number). They refer to the now defunct Press Complaints Commission and make no mention of legal bloggers. We would be happy to work with the President's office or HMCTS on developing these materials, and are in any event considering developing our own materials to provide to parties in cases where we attend as legal bloggers in order to introduce ourselves, our work, and to reassure those involved. We are hampered in applying for grant funding for such work unless and until we know that PD36J is going to continue in some form.

OTHER MATTERS

We intend to publish this response on our website at www.transparencyproject.org.uk, and would like to publish other responses with permission in the same place.

The Transparency Project Team

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