**FROM HIS HONOUR CLIFFORD BELLAMY**

***The Transparency Review* – response to the President's call for evidence**

## Introduction

From 2004 until my retirement in February 2019 I was a family Circuit Judge. From 2006 to 2019, I was a Designated Family Judge (Warwickshire and Coventry 2006-12, Leicester 2012-16, Derby 2016-19). From 2006 until my retirement I also sat as a Deputy High Court Judge.

Practice Guidance *Transparency in the Family Courts – Publication of Judgments* issued by the then President of the Family Division, Sir James Munby, came into force in February 2014. In the five years from the commencement of that Guidance to the date of my retirement, I published on Bailii more Family Court judgments than any other family Circuit Judge in England and Wales. Several of those judgments were also published in the law reports (mainly in the Family Law Reports). Several were covered by the media. I have a longstanding interest in, and considerable experience of, the issue of transparency in the Family Court.

At the time of my retirement I accepted an invitation to become Patron of the Transparency Project. I have read and agree with the Transparency Project's response to the President's call for evidence.

In my first year of retirement, encouraged by the President, I wrote a book concerning the issue of transparency - *The 'Secret' Family Court – Fact or Fiction?* The book was published in March 2020. I attach a digital copy of the book. Though not written in response to the President's call for evidence, my book does address the issues raised by the President in his review.

In my response to the President's call for evidence, I propose to address briefly the specific issues to which the call for evidence relates. The detailed arguments underpinning my response are to be found in my book. This submission is not intended to be a substitute for reading the book!

## The call for evidence

**1. Whether, currently, the line between confidentiality (privacy) and transparency (openness) is correctly drawn.**

In March 2005 the report of the House of Commons Constitutional Affairs Committee, *Family Justice: the operation of the family courts*, concluded that:

> "Lack of transparency has been a major factor in creating dissatisfaction with the current Family Justice system on the part of those involved in cases…Some of the evidence we received was that the lack of openness prevented proper scrutiny of the work done by family judges or court officials, and made it impossible to prove or disprove perceived unfairness. While there is disagreement as to whether all the criticism of the system of Family Justice is justified, it is widely agreed that reform is needed."

Had that committee been asked the question now asked by the President – whether, currently, the line between confidentiality (privacy) and transparency (openness) is correctly drawn – it is plain that the answer would have been 'no'. The committee was clearly of the view that greater transparency was necessary. Since the publication of that report little progress has been made:

(a) A rule change in 2005 has permitted the disclosure of information relating to proceedings, in certain circumstances, without the need to obtain the prior leave of the court. The rule change did not permit parents to discuss the detail of their case with a journalist without obtaining the prior leave of the court. Fifteen years later, that remains the position. Some, most notably Camilla Cavendish (now Baroness Cavendish of Little Venice) writing for The Times, likened this to parents being gagged. In my opinion, that is an apt description.

(b) Between 2006 and 2009 a number of government consultations considered how the Family Court might be made more transparent. The report of the Constitutional Affairs Select Committee in March 2005 stated clearly that:

> "A greater degree of transparency is required in the family courts. An obvious move would be to allow the press and public into the family courts under appropriate reporting restrictions and subject to the judge's discretion to exclude the public."

As a result of a rule change in April 2009, duly accredited media representatives (but not the public) were given the right to attend some hearings in the Family Court, subject

to the power of the judge to exclude them in any particular case. This rule change has had relatively little effect. In Chapter 4 of my book (pages 44-47) I set out five reasons why this rule change has not led to any significant improvement in transparency. Chief among those reasons is the chilling effect of section 12 of the Administration of Justice Act 1960.

(c) The Family Court Information Pilot ran from November 2009 to December 2010. One of its key objectives was to improve transparency by the publication of anonymised judgments in family cases heard (by District Judges and by lay magistrates) in five pilot courts. This was followed by an evaluation. Had the pilot been successful consideration would have been given to rolling out this scheme nationally. The pilot was not a success. Nothing came of it. I deal with this in Chapter 5 of my book.

(d) The Children, Schools and Families Act 2010 was passed by Parliament in haste in the so-called 'wash-up' prior to the dissolution of Parliament and the holding of a General Election that year. Part 2 of this Act, had it been implemented, would have made substantial changes to the rights of the media to publish information relating to cases heard in the Family Court. The Act was condemned by both supporters and opponents of greater transparency. The Coalition Government decided not to bring Part 2 into force. In 2013 it was repealed.

(e) In 2011 the then President of the Family Division, Sir Nicholas Wall, ordered that the report of a consultant paediatrician, which had been severely criticised by a Circuit Judge, should be published, suitably redacted.[1] That order was never complied with. In his judgment, Sir Nicholas said that:

> "94. I would…like to see a practice develop, in which expert reports would be routinely disclosed, and the media able to comment both on the report and on the use to which they were put in the proceedings. This would mean that the views of the judge on the expert evidence would also be disclosed."

Those words fell on deaf ears. They have never been acted upon.

(f) In January 2014 the then President of the Family Division, Sir James Munby, published *Practice Guidance* on Transparency in the Family Court. The Guidance encouraged family judges to publish their judgments, appropriately anonymised, in certain categories of case. The Guidance led to an immediate increase in the number of

[1] See *X, Y and Z & Anor v A Local Authority* [2011] EWHC 1157 (Fam)

judgments being published. That increase was not sustained. I discuss this issue in Chapters 6 and 7 of my book.

As is clear from that brief history, the need for greater transparency has been clearly identified on several occasions over the last 15 years. There has been a recognition (admittedly not supported by some children's interest groups) that the line between transparency and confidentiality is not currently drawn. None of the changes which have taken place during that period, either alone or collectively, have made any real improvement to the level of transparency in the Family Court. There remains concern that there is inadequate scrutiny of what happens in the Family Court. The need for greater transparency remains.

In so far as it may be argued by some children's interest groups that the line needs to be redrawn closer to confidentiality, it needs to be recognised that that would almost certainly mean turning the clock back 15 years. In my opinion that is unthinkable. Such a step would be likely to lead to considerable media outrage. That, in my respectful opinion, would be fully justified.

In my submission, the line between transparency and confidentiality is not correctly drawn. More – much more – transparency is required.

**2. If the line between confidentiality and transparency is not correctly drawn, what steps should be taken to achieve either greater openness or increased confidentiality?**

Steps need to be taken to achieve greater transparency. I end my book by making a number of specific recommendations. Whilst all of those recommendations are important, the most important is the first:

**Recommendation 1**: that immediate steps be taken to seek to persuade the Government of the urgent need to repeal section 12 of the Administration of Justice Act 1960.

In Chapter 4, I explore the history of section 12 and the reasons why it is now in urgent need of repeal. Section 12 seriously inhibits the media from carrying out their primary role of speaking truth to power effectively. The repeal of section 12 is an absolute necessity.

In my book I do not set out a view on what, if anything, needs to be put in the place of section 12. This issue is considered in depth in the response of the Transparency Project. I would add some brief comments of my own.

The three main options appear to me to be either (i) to amend section 12 in order to address the concerns that have been expressed about the interpretation and scope of that section, (ii) to

repeal that section and replace it with a completely new section, or (iii) to abandon the notion that this issue can only be dealt with by statute and in its place make more creative use of reporting restriction orders.

My concern about amending or replacing this statutory provision is very simple. Over the years, in several judgments handed down by the senior judiciary, attempts have been made to explain the meaning of section 12. The weight of judicial interpretation of that section makes it difficult, if not impossible, for journalists and parents to understand what they can and cannot say without breaching section 12 and thereby giving rise to a possible application for committal for prison. In terms of the interpretation of that section I have well in mind the comment made by Mr Justice Munby, as he then was, that "There is no substitute for a careful study of the reported cases".[2] Journalists and parents have neither the training nor the aptitude to undertake that task with any degree of confidence. My fear is that if section 12 were amended or replaced, skilful counsel will still take points of interpretation and an entirely new body of case law will, over time, be built up. I consider it highly likely that this would happen within, say, five years. The new statutory provision together with then new body of interpretive jurisprudence would become as impenetrable as the present. That is not good for open justice.

The alternative, and my preferred option, is that section 12 be repealed and its place be taken by a more creative use of reporting restriction orders. There is no reason why a reporting restrictions order, in a standard form, should not be made routinely at the time of issue of any application for an order under the Children Act – whether in public law proceedings or private law proceedings. That would be the default position in every case. The standard reporting restrictions order could be amended either on application by a party or by the media or, indeed, by the judge of his or her own motion. Amending a standard form order could mean either increasing or reducing the scope of the standard form order. The court could have the power to disapply the standard reporting restriction order if satisfied that the justice of a case required such a step. To proceed in this way would lead to a level of protection at least as strong as that currently provided by section 12 but would be open to refinement by amendment of the reporting restrictions order to ensure that in every case the order made is proportionate and relevant to the specific circumstances of that case.

[2] *Re B (A Child)* [2004} EWHC 411 (Fam)

The next recommendation which I regard as being of particular importance is my fifth recommendation:

> **Recommendation 5**: that a national Media Liaison Committee be formed, the constitution of which should include representatives of the print and broadcast media and senior members of the judiciary. It may also be appropriate for such a committee to include representatives from public interest journalism and/or public legal education bodies and perhaps from the press regulators.

A move in this direction was taken in 2011 by the then President, Sir Nicholas Wall. A small committee was set up whose members included Sir Nicholas and the then Executive Director of the Society of Editors, Bob Satchwell. This group commissioned two media lawyers, Adam Wolanski and Kate Wilson, to prepare a statement setting out the current state of the law. That comprehensive and well-written document was published by the President as an annex to a Practice Direction. It appears that the committee set up to commission and oversee this work fell by the wayside.

In Chapter 13 (pages 199 to 203), I explain the steps taken in Nova Scotia, Canada, to set up a Media Liaison Committee. This committee has been in place for many years. It is a balanced committee containing representatives of the judiciary and the media. In England it is not unusual to find journalists criticising either individual family judges or the system of administering justice in the Family Court. It is also not unusual to find judges expressing criticism of individual journalists for the way they have reported a family case. A Media Liaison Committee would provide a forum where open discussion can take place which should improve the working relationship between the judiciary and the media, including facilitating the opportunity for discussion concerning, and recommendations for, change. In the context of improving transparency in the Family Court I consider the setting up of such a committee as an important and appropriate means of improving understanding between, and appreciation of the role and work of, judges and journalists. I see this as a key step in improving the relationship between Bench and Media, thereby improving the prospects of the media being able not only to hold truth to power but also of being able to educate the public. Educating the public is one of the roles of the media in a democratic society.

**3. Any observations on the *Practice Guidance: Anonymisation Guidance* and the *President's Guidance as to reporting in the Family courts*.**

(i) Practice Guidance: Anonymisation Guidance

This is an issue in respect of which there appears to be a measure of agreement between those who are opposed to and those who support an increase in transparency.

I noted in Chapter 12 of my book (pages 187-192) that in her report published in October 2015, *A review of anonymised judgments on Bailii: Children, privacy and 'jigsaw identification'* Dr Julia Brophy stated that the young people involved in her study highlighted errors which, in her opinion "are arguably errors in the anonymisation process". She went on say that "the 'direction of travel' for a larger sample is worrying."

Shortly after Brophy completed her research another piece of research was undertaken by a team led by Dr Julie Doughty.[3] The aim of this research was to evaluate the effects of and responses to the President's Practice Guidance on transparency. The research was carried out in 2016/17. Like the Brophy research, these researchers identified problems with the adequacy of the anonymisation of some of the judgments posted on Bailii.

It is clear from the Transparency Project's response to the President's call for evidence that they, too, have encountered the same problem. Their report begins its discussion of this topic by saying, "We are clear that substantial and urgent steps are required on this front."

Brophy undertook a study on anonymisation in 2016 and then published a paper on the front page of which appeared the words 'Judicial Guidance'. The guidance has been criticised by Hayden J[4]. Some of the 'guidance' given by Brophy is not compatible with existing case-law. Although Brophy's guidance has now largely been accepted in the 2018 Practice Guidance issued by the current President, in my opinion the criticisms of that guidance remain valid.

However, I do agree that the concerns about the quality of anonymisation are real and need to be addressed as a matter of urgency. I recognise this in my book which includes two recommendations on this issue. The first relates to the concerns about the present quality of anonymisation.

> **Recommendation 2**: that there should be an urgent review of all Family Court and Family Division judgments posted on Bailii in the last 12 months to assess whether there

[3] The other two members were Alice Twaite and Paul Magrath

[4] *Re J (A Minor)* [2016] EWHC 2595 (Fam)

has been any improvement in the overall quality of anonymisation since the publication of the report by Doughty, Twaite and Magrath.

In my opinion, the reality is that no family Circuit Judge has the time to anonymise a judgment with the level of care that is required by Brophy's guidance. Indeed, it could be said that the guidance is likely to act as a deterrence to the publication of judgments by Circuit Judges. In Australia anonymisation of judgments is carried out by a specialist unit. I describe this in Chapter 12 of my book (pages 189-192). In my opinion, the Australian model has much to commend it. In my book I include the following recommendation:

> **Recommendation 3**: that the anonymisation of judgments be recognised as a specialist task, that an Anonymisation Unit be created following the Australian model and that the staff allocated to work in these units be adequately trained and resourced.

If such a unit were set up in England and Wales it should form part of the Judicial Office.

**(ii) Practice Guidance as to reporting in the Family Court**

This guidance relates to a narrow, though very important, issue, namely to a situation where a reporter may wish to apply to vary reporting restrictions in a case before the Family Court or the Family Division of the High Court. This is an important point because, as I have already noted, section 12 of the Administration of Justice Act 1960 and section 97(2) of the Children Act 1989 severely restrict what a journalist may publish after attending a hearing in the Family Court and will often leave a journalist perplexed when trying to decide what he or she is permitted to report. Most journalists are likely to adopt a very cautious approach. This guidance sets out the steps a journalist should take if he or she wishes to apply for reporting restrictions to be varied or lifted. The guidance is easy to follow and ought to be of assistance to any reporter who needs to seek, or considers that it would be prudent to seek, variation or lifting of reporting restrictions.

Although I support this guidance, it needs to be recognised that many journalists will lack the confidence to follow it and make the appropriate application to the court. Exceptions, such as freelance journalist, Louise Tickle, are comparatively rare. To believe that this will make a huge difference to the media is, I fear, naive. The reasons why I come to that conclusion are set out in Chapter 9 of my book – *The Media – the Facts of Life*

His Honour Clifford Bellamy

27 April 2020