'Transparency through publication of family court judgments'

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This is a submission to the President's Transparency Review by the research team who undertook the **evaluation of the responses to, and effects of, judicial guidance on publishing family court judgments involving children and young people.**

This research was undertaken by Julie Doughty, Cardiff School of Law and Politics, Alice Twaite and Paul Magrath. It was funded by the Nuffield Foundation and was carried out in 2016-2017. It related to the guidance issued to judges by the former President, Sir James Munby, in January 2014.

Our report, '**Transparency through publication of family court judgments'** is available at: http://orca.cf.ac/99141/

We attach a copy of a four-page summary that was published alongside our report in March 2017.

The authors are also members of The Transparency Project and have contributed to The Transparency Project evidence to the Review Panel. We agree with the call in that document for greater openness while maintaining appropriate privacy. This submission relates only to the research project we completed in 2017 to highlight what might contribute to the current review.

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Context

In our report, we noted that the 2014 guidance was *'intended to bring about an immediate and significant change in practice'* by requiring Family Court judgments to be sent to BAILII. The purpose was stated by the former President to be a first step in ensuring that the new Family Court would not be *'saddled with the charge … that we are a secret system of unaccountable justice'*. The President anticipated *'in due course more formal Practice Directions and changes to the Rules'* although change in legislation was thought unlikely in the near future. However, this vision was not fulfilled; there was no subsequent formalisation or development of the guidance for the Family Court. The President issued a consultation, as a next step, but we do not know whether the responses were considered by anyone.

In contrast, there has been significant change in the Court of Protection (in respect of which similar contemporaneous guidance on publication was issued). Hearings in the Court of Protection have been held in public since

a pilot began in 2016, now incorporated in a Practice Direction (temporarily suspended because of remote hearings). We are not aware of any adverse consequences arising from a Court of Protection hearing being held in public, but we maintain our view that the pilot could not be simply transferred to the Family Court without extra safeguards.

The 2014 guidance required Family Court circuit judges and High Court judges to send their judgments to BAILII in the following circumstances:

- where the judge considered publication would be in the public interest (para 16)
- where there is a written judgment or transcript and the case came within one of six categories (para 17)
- additionally, the judgment can be published at the request of a party (para 18)

In *Re C (A Child) (Publication of Judgment)* [2015] EWCA Civ 500, McFarlane LJ (as he then was) described the guidance as an expectation that judgments under Paras 16 and 17 would be published, with judicial discretion regarding para 18.

In *Wigan BC v Fisher* [2015] EWFC 34 Peter Jackson J (as he then was) described the purpose of the guidance as promoting understanding and confidence in the Family Court but also part of a process that should always be undertaken to ensure that the rights of individuals and the public are properly balanced in deciding whether any judgment should be published. He said that this balance cannot be achieved if '*confidentiality in the proceedings of the Family Court, a public body, is allowed to trump all other considerations'.*

MacDonald J said in *H v A (No. 2)* [2015] EWHC 2630 (Fam) that '*ordinarily the exercise of discretion concerning the publication of a judgment will be a simple case management decision to be taken at the conclusion of the judgment'*.

Hayden J in *Re J (A Minor)* [2016] EWHC 2595 (Fam) rejected submissions that only a brief summary should be published of his judgment. He considered more detail needed to be in the public domain than such a summary could provide. Specific restrictions to prevent the child being identified were put in place. He warned against '*constructing a paternalistic presumption of privacy for every child in every case'*.

Findings

We compiled a database of all judgments that had been published under the guidance in its first two years (February 2014-February 2016). Despite the expectations and encouragement by the senior judiciary (above), the total was only 837 judgments, 296 of which were Family

Division cases, which had tended to get published before 2014 in any event.

Put simply, the guidance was not followed by many circuit judges. Only 17 of them sent more than ten cases to BAILII in the two-year period. Twelve local family courts sent in ten or more judgments. The numbers varied widely across the country, the highest being 65 from Newcastle, 38 in Leeds and 30 in Manchester. Many courts sent no cases to BAILII at all. Therefore, only a partial picture of the family justice system was available on BAILII.

Anonymisation

The task of effective anonymisation emerged as one of the greatest challenges in complying with the 2014 guidance. We found several instances of anonymisation errors amongst the cases on BAILII and notified the Ministry of Justice accordingly in May 2016. Sometimes a name had been left in by accident and sometimes an un-redacted version had been sent to BAILII. (BAILII has no editorial control but will take down a judgment which has errors in it, if notified by the judge.)

This led the President to mention the issue in a judgment, *Re X (A Child) (No. 2)* [2016] EWHC 1668 (Fam) in which he said that HMCTS was reviewing its internal guidance to judicial clerks on the protocols for releasing judgments to BAILII. We were in correspondence with HMCTS and wrote to the Judicial Press Office in September 2016 with a list of all the errors we had found. We were surprised that HMCTS did not think it was necessary to notify a party or family member that had been accidentally named in a published judgment, as this might be viewed as data breach. We have not been informed of any changes in processes so do not know what, if anything, has been put in place to reduce risks since 2016.

We noted that research by Julia Brophy had raised concerns that publication on BAILII might lead to jigsaw identification of children. In our overview of 837 cases, we identified many cases where there appeared to be excessive detail and others where a child's date of birth and/or other identifying details were unnecessarily included. Our research, and that of Julia Brophy, was drawn on to write The Transparency Project guide to safe anonymisation in July 2017.

With regard to the Anonymisation Guidance issued by the current President, in December 2018, we think that it would have been helpful to formulate guidance that referred to the 2014 guidance, our research, The Transparency Project guide, and relevant cases, as well as Julia Brophy's recommendations from August 2016. We have the impression that these have contributed to a more considered approach by judges in recent years, although we have no data on this.

Naming local authorities, social workers and experts

The 2014 guidance states that public authorities and expert witnesses should be named in BAILII judgments unless there are compelling reasons not to do so (para 20). However, we found that - although it was standard practice to name independent expert witnesses - local authority and Cafcass witnesses were not routinely named. Local authorities were occasionally not named but this appeared to be to help prevent jigsaw identification. Even where there might be 'compelling reasons' not to identify an individual or an agency, these were rarely explained. One example of reasons given is *Re A (A Child)* [2015] EWFC 11 where it would have been '*unjust to name and shame*' the frontline social workers. On the other hand, in *Re A, B, C, D & E (Final Hearing)* [2015] EWFC B186, a Family Court judge (who had not published in any other cases) published three judgments in a case explicitly to publicise social workers who he had found to have been dishonest in their case recording.

We gave more examples of varying practice in naming professionals in the report (pages 49-54) which may help inform revision of the December 2018 guidance.

Media coverage

Our report contained an analysis of national media coverage of family court cases between 2012 and 2016. This indicated that access to judgments on BAILII had improved the quality and accuracy of some media coverage. Most press attention was given to high profile cases that were associated with criminal proceedings, not to routine family proceedings. Online media coverage rarely linked to BAILII to allow the reader to access the primary source. Linking has subsequently become a little more common but not very.

We interviewed four journalists who regularly wrote or broadcast on family courts. They had found the initiative helpful in allowing them to learn about more cases although they still found the law (Section 12 Administration of Justice Act 1960) complex and the limitations of BAILII frustrating. We tried to engage with other journalists (those who wrote often about 'secret courts') but they did not respond. We hope that the Review Panel will be able to engage with those parts of the media that still tend to the 'secret' view and that the 2011 Media Guide can be updated.

Judges' views

Despite extensive efforts by the researchers and the support of the President, only 17 judges responded to our survey on their views; of these, 13 were circuit judges. However this small sample provided a wide

range of views on the impact of the guidance on them and on public understanding (pages 67-78.)

The greatest barrier to following the guidance was the perceived risk of ineffective anonymisation. One circuit judge openly declined to publish any judgments because he thought anonymising children was impossible in the locality he covered. More commonly, the concern was a lack of time to do the task effectively. Some judges did not have time to even think about publishing. A key factor here was that the High Court judges had clerks who could administer the process. A more surprising reason (considering Article 10 European Convention on Human Rights) for not complying with the guidance was that some judges thought their own judgments were not important or interesting enough to publish.

Other views

We sought views on the impact of the guidance from a range of stakeholders, such as lawyers; social work organisations; local authority children's services; charities; and young people's groups. We can't draw firm conclusions from the small number who responded and we hope that the Review Panel will be more successful in gathering views. However, it did become apparent that young people were not being routinely advised that a judgment about them might be published online. Furthermore, the concept of publication as a record for the child in later life, as promoted in the government papers in the 2000s seems to have completely disappeared.

Developments

As we predicted, the number of Family Court judgments on BAILII has dropped since its high point in 2015. It appears to have halved in the last five years (see more detail in Clifford Bellamy: *The Secret Family Court – Fact or Fiction?* (Bath Publishing, 2020). It may be that a realisation that so few judges complied with the guidance, and the lack of progress with the consultation, were a disincentive to further efforts. Our research was received positively by members of the judiciary (see, for example, Peter Jackson, 'An Open Question' [2017] Fam Law 701) and featured in national media (BBC at https://www.bbc.co.uk/news/education-39371173). We did not receive any criticisms. However, we received no formal acknowledgement of our findings.

Conclusion

We would like to see the 2014 guidance and the 2018 guidance revised to bring it up to date and reissued as one coherent set of principles. As noted above, we have contributed to The Transparency Project submission of evidence and support that in full. We would also like the Review Panel to consider our recommendations (pages 92-94), in

particular those numbered 11-13 on a new practice direction. Those numbered 1; 3-10; 14-20 are not radical and remain relevant.

The President's 2019 guidance to judges is about undertaking a balancing exercise with regard to Articles 8 and 10 on deciding whether to adjust section 12 restrictions on application by a journalist. This does not relate directly to our research. However, this is an opportunity to remind the judiciary and professionals in the system that the same principles apply to transparency throughout a case, that is, from a decision on objections to a journalist or legal blogger attending, through to sending the judgment to BAILII.

With regard to BAILII publication itself, we think the best option is a pilot of selecting more representative judgments for publication, and storing audio files, as set out in our report (pages 91-92).