

TRANSPARENCY REVIEW – FLBA RESPONSE

May 2020

INTRODUCTION

1. FLBA members' input was sought into a response to the President's call for evidence to inform his Transparency Review. No doubt partly as a function of the large number of recent consultations, responses have been sparse and what follows should be read in this context. Undoubtedly, however, the views summarised below are likely to be shared by others who have not responded.

CONSULTATION QUESTIONS AND RESPONSES

2. The President has sought responses, indicating that submissions on three issues would be of particular value. What follows addresses each question in turn.
 - A. **Is the line currently drawn correctly between, on the one hand, the need for confidentiality for the parties and children whose personal information may be the subject of proceedings in the Family Court, and, on the other hand, the need for the public to have confidence in the work that these courts undertake on behalf of the State and society?**
3. On reviewing the focus of the questions posed, it did appear that the core question of transparency was being seen through the limited lenses of press attendance and reporting of the cases (whether through the press or published judgments) and hence there was a focus on the responses received towards the questions of media attendance and the resultant issues rather than other aspects of transparency. The first part of this note focuses on that issue.
4. However, the association, being involved in a variety of other consultation across the country and with other associations wishes to highlight other aspects of

transparency and confidentiality within the family court system and these are addressed at the end of this note.

5. Two opposing views have been expressed by FLBA members:

(a) On the one hand, some consider that greater transparency is a positive step and the current balance does not provide for sufficient reporting of decisions, in terms of the number of judgments that are actually reported on in the press. The press are very rarely if ever in attendance in local family courts. FLBA members in this camp believe that everyone needs to get more used to having members of the press attending and that this should be encouraged.

(b) The converse view has also been expressed, namely that the press essentially cannot be trusted to report in a balanced and impartial way and the damage to children and families done by simplistic and sensationalist reporting is too great to take the risk. One contributor said the following about an example of this in their blog:

“The article was the usual tabloid fodder. No discussion of the wider issues examined by the judgment, no recognition of the work done by parents, the social workers, or the court. It read to me simply as an exercise in slut shaming. Given the level of detail about the services the parents had been offered it was apparently easy for people in their locality to know who they are. The parents, I am told and understandably – are distraught.”

6. There seems to be consensus on the point that the aim of the media is not to inspire confidence in the courts, particularly in the current climate where courts and judicial intervention is not viewed by many as a positive interference and the courts are portrayed to the public as a tool to be curtailed and controlled by politicians. If the aim is to increase public confidence in the Family Court, the consensus seems to be that placing trust in the hands of the media is not the answer.

7. It also seems to be agreed that the role of the Judge in protecting confidentiality and controlling what can be published should be safeguarded, whilst there are differing views as to the success with which judges perform this task.

B. If not, what steps should be taken to achieve either greater openness or increased confidentiality?

8. The current level of confidentiality is one that is felt to be appropriate and to provide the correct balance. As mentioned above, there are those who would welcome more openness in the court, but with an emphasis on the need for accurate reporting and links to the actual published judgments, which has been seen in some press reports. The main concern is not with the press attending but how they can be encouraged to report accurately. Examples provided of unhelpful reporting include reporting as to Hayden J's comments about "a man's right to sex with wife" in April 2019 and reports of a "Christian child forced into Muslim foster care" in August 2017.

It has been suggested that consideration should be given to how the press can be made aware that they are able to attend for judgments in the family court, and to report in accordance with the court's directions. One difficulty with this end approach is that a report may focus solely on the contents of the judgment rather than provide a holistic approach to the case e.g. where a family have been given the opportunity to show that they are able to provide good enough care across time throughout the course of the proceedings but have been unable to do so. A judgment rightly reflects the courts consideration of all of the evidence both written and oral but it may not necessarily display all of the nuances of the case and important steps along the way. It is this lacuna that may lead to the wrong/inaccurate type of reporting.

C. Any observations on the *Practice Guidance: Family Court- Anonymisation Guidance* issued by the President on 7 December 2018.

9. The feeling among those who have responded is that the guidance is in the main very thorough and useful and supported by practitioners. The one area that causes concern is the naming of individual local authority staff where criticisms are being made. The point has been made that social workers and legal officers are currently under an enormous amount of pressure and are over stretched. They should rightly be criticised by the court if they make mistakes or do not meet their obligations, but the consequences for sometimes very young staff of being publicly named and shamed are life changing and career ending. We would suggest that a more cautious approach should be taken before publicly naming any individual, unless it is the most serious of circumstances. It should be sufficient to refer to the local authority as the corporate body with responsibility. Individuals are very rarely acting out of malice or deliberate dereliction of duty, the reasons for mistakes are usually lack of time, lack of proper management, lack of experience, stress and illness. Compounding those difficulties by a public humiliation is unhelpful. Needless to say, whether or not to name a local authority needs to be carefully considered in every case, weighing up the risk of jigsaw identification of the child and family against the public interest in holding to account local authorities whose conduct has fallen short of what is expected.

D. Any observations on the *President's Guidance as to reporting in the Family Courts*, issued on 29 October 2019.

11. The guidance itself was considered appropriate by those who responded. However, the suggestion was made that it would be helpful to have a statement expressed in plain terms making it clear that the press are able to attend, and are likely to be permitted to report, subject to restrictions. It was also felt that the guidance should include a section on ensuring accurate and responsible reporting and a reminder that these are families' and children's real lives that are being broadcast to the public and that the families and children are likely to be able to recognise themselves, even if anonymisation is thorough enough to prevent identification by third parties.

12. The FLBA also wishes to raise other issues relating to transparency and the court process – this is in relation to fundamental issues such as the way in which hearings are recorded, how those recordings are stored and the issue of judgments across the whole of the Family Court system. Transparency was necessary in order:

- a. to develop the trust of users (and consequent engagement) (administration of justice)
- b. to develop the trust of the public in the system
- c. to facilitate public debate (democratic accountability)
- d. to facilitate systemic learning,

but that these aspects were distinct from and additional to Article 10 freedom of expression rights and responsibilities.

13. Hence questions such as data management need to be addressed with a review of the way in which recordings are made and stored in the family courts. Noting that the recommendations made below will have a resource issue, the matters are highlighted due to the known methods of storage in Family Courts of data relating to parties' cases and the need to review and reframe how hearings are recorded and how those recordings are held and stored.

14. In addition to the above the group encourages the review to consider the following areas of possible work or exploration:

- a. Searchable accountable basic court outcome data / recordings available for parties / researchers
- b. Systems for recording all judgements at all tiers and to produce transcripts of all judgements – possibly automatic transcripts (it was noted that technology is already in place for this e.g. commercial court and automated voice to text services that are being trialled)

- c. Fundamental review of access to records of the cases by those who are the subject of the cases and methods to systematise how data is retrieved
 - d. Searchable text-based database of hearings from evidence to judgements
 - e. System of Archiving listings to create visibility
 - f. Systemisation of management of information
 - g. System for safe anonymisation of judgements through an independent unit which would carry out anonymisation and support judges in the publication of safely anonymised judgments, such as the Australian anonymisation unit, which would develop and apply standardised cross checks and methods of redaction / anonymisation and de-identification (some manual / visual and some automated) with triple checks built in.
15. The access to this material (for example by requests for access to the material for research) and/ or by a young person wishing to review their files, is a matter for further consideration and scrutiny.
16. The need for confidence in the system arises from the need to understand the process and for court users to feel that their hearing and journey through the court system has been open and fair. It is noted that the current system of a total lack of recording in the magistrates courts and a regular lack of reviewable judgment by District Judges may form part of the issues in public concern for a lack of transparency as to the process.
17. At all times the association wishes to acknowledge the ongoing difficulties in reporting or publishing cases and the need to take clear steps to avoid jigsaw identification. The added pressure on the judiciary and to the advocates involved in having to anonymise judgments is also recognised and the Family Court may in the future need to review the methodology taken to anonymise family judgments and consider and implement an approach similar to that in Australia where there is a centralized unit tasked with that function.