
**THE FINANCIAL REMEDY COURT TRANSPARENCY PROPOSALS**

**RESPONSE OF THE TRANSPARENCY PROJECT TO THE CONSULTATION**

**NOVEMBER 2021**

## THE TRANSPARENCY PROJECT

1. The Transparency Project is a registered educational charity operating in England & Wales, whose charitable objects are:

    i. To advance the education of the public in the subject of family law and its administration, including the family justice system in England and Wales and the work of the family courts, in particular but not exclusively through the provision of balanced, accurate and accessible information about the work of family courts and the facilitating of public discussions and debates which encompass a range of viewpoints.

    ii. To promote the sound administration and development of the law in England and Wales, in particular, family law, by encouraging and contributing to the transparency of processes in the family justice system, contributing to public legal education concerning family law and matters of family justice, enhancing access to justice in matters of family law and by such other means as the trustees may determine.

2. In short, our objectives are to make family justice clearer.

3. The Project has three trustees: Lucy Reed (barrister), Dr Julie Doughty (lecturer Cardiff University), and Paul Magrath (ICLR). Together the trustees authored the first family court practitioner textbook relating to transparency issues (Transparency in the Family Courts: Publicity and Privacy in Practice, Bloomsbury, 2018). In addition, the Project has a core group of volunteers, including family, Court of Protection and media lawyers and academics, and journalists (Jack Harrison, Malvika Jaganmohan, Polly Morgan, Dr Emma Nottingham, Barbara Rich, Louise Tickle, Dr Judith Townend, Alice Twaite). The Project is also supported by a 'pool' of occasional writers (mainly practising lawyers) and guest writers from a range of disciplines and viewpoints.

4. We made lengthy submissions to the Transparency Review, and our chair, Lucy Reed, gave oral evidence to the review panel in early 2021.

**OUR RESPONSE TO THE CONSULTATION - OVERVIEW**

5. We welcome the step forward towards greater transparency that the consultation proposes. We welcome the concept of a 'reporting permission order' ('RPO').

6. We offer some constructive suggestions about how the proposals might be refined to make them more workable for all participants, based on our collective experience as practising lawyers, and as legal bloggers and journalists who have attended hearings to observe and report. Those suggestions fall under three headings:

    a. Anonymisation
    b. Documents
    c. Guidance

7. Anonymisation and documents are considered separately; the issue of guidance is considered throughout.

**ANONYMISATION**

8. We note the references to anonymisation *of judgments* in the main body of the consultation document that :

    *"…Commonly, the judgment will be anonymised and the rubric may stipulate preservation of the anonymity. Nothing here seeks to alter that regime although anonymisation may be futile if there has been contemporaneous reporting of the proceedings pursuant to the terms of the proposed RPO."*

9. Whether as a natural consequence of prior un-anonymised reporting permitted via the RPO, or as a result of the newly signalled approach in *BT v CU* [2021] EWFC 87 and *A v M* [2021] EWFC 89, it appears that the majority of family cases which are reported / published will now make their way into the public domain without anonymity for the parties.

10. We do not take issue with the analysis of the law and principles underpinning this change of practice set out in those judgments, and adopt the comments of Sir James Munby on the topic[1].

11. Whilst the (general) removal of anonymity in this field may be somewhat jarring and counterintuitive, we note that historically (particularly in appellate matters) there has been publication of names of some adults *and* on occasion the minor children, and news reports often feature pictures of family homes and the parties, without apparent cause for alarm. To give just two examples :

    a. The judgment in Miller and McFarlane includes the following passage :
    *Kenneth McFarlane and Julia Chocholowska married on 1 September 1984. They lived together for two years before then. There were three children of the marriage, a boy Jamie and two girls Sarah and Helen. They are now aged 16, 15 and 9 years. They are being educated at private schools. During their marriage the parties lived in south west London. They separated in December 2000. So the marriage lasted effectively for 16 years. A divorce decree nisi was made on 22 February 2002 and this was made absolute on 28 May 2003. The parties are now 46 years old.....*
    *In addition to the matrimonial home in Barnes, south-west London, the parties had a holiday home in Devon. At the trial the matrimonial home was valued at*

[1] More Transparency In The Financial Remedies Court, Sir James Munby, 16 November 2021, Transparency Project blog : https://www.transparencyproject.org.uk/more-transparency-in-the-financial-remedies-court/.

*£1.5 million and the holiday home at £255,000. In June 2000 a flat in Clerkenwell, just north of the City, was bought in the husband's name for £415,000.*

b. News coverage of *Jones v Kernott [2011] UKSC 53* featured pictures of the apparently angry Ms Jones standing outside the former family home with crossed arms.[2]

12. Nonetheless, whilst on one view this new proposal is doing little more than bringing first instance reporting in line with appellate reporting, as noted in Sir James' blog post, the shift this will represent in practice has come as some surprise to many FR practitioners (and no doubt some litigants), and will be likely to meet with some resistance. Our observations are that little attention has been paid to the question of transparency in FR proceedings to date, and much of the evidence submitted to the Transparency Review (including our own) focused primarily on children matters, as does the main Review document published in October, save for a mention of this consultation and a general endorsement of it.

13. We note that the approach to anonymisation that is proposed in FR proceedings is different to that proposed in connection with children matters. We acknowledge that this is at least in part because of the different nature of proceedings, and that the children of the family are (usually) not the subject of or directly concerned with the FR proceedings. However, there is still potential for an indirect impact upon children of the identification of their parents in published judgments or reports in the media about their parents' financial remedy disputes.

14. We think it is realistic to acknowledge that the proposals to permit the following facts in conjunction with one another will potentially identify children to their peers and the local community, though that in itself would not necessarily lead to harm :

[2] https://www.thetimes.co.uk/article/supreme-court-to-decide-how-unmarried-couple-divides-ownership-of-their-home-ncst8w9mdlx.

a. Names (and photos) of parents
b. County in which the family live
c. Some detail of the assets, presumably including the family home (as to which see below)

15. We think that there will need to be some clear guidance as to how to navigate the risks that *might be associated* with the proposed default position *in some cases* involving children, meaning that (for instance) it might be appropriate NOT to permit naming of parents or photographs *in some cases*. In addition, drawing on best practice in connection with children proceedings, there are a number of factual matters relating to children in respect of which the RPO could make clear must NOT usually be published, namely :
    a. Precise date of birth of child (as opposed to years old)
    b. Precise town
    c. Specific date of any incident involving the police, any criminal trial or conviction that may be linkable to the family, for example through press coverage of those matters.

16. Whilst consideration could be given to NOT naming the parties in cases involving children or where there are concurrent children proceedings as a generality, we think that would be regressive and would lead to distortion in the publicly available material – the fact is that many cases DO involve families with minor children and it is important that these are represented in the body of published information about the work of the FRC where possible, particularly since cases involving children often involve challenging issues around the respective roles of the parents, their career sacrifices and contributions, and the potential unequal division of assets in small asset / 'needs' cases, which are issues of general public interest (even if not always obviously newsworthy).

17. We think that parties, judges and lawyers are likely to find it useful to have further clarification by way of guidance as to how to deal with anonymisation :

a. Where there are minor children of the parties and where there are concurrent children proceedings;
b. Where the children of the parties are likely to be particularly adversely affected by publicity that might lead to their identification by peers and members of their local community (for example children who have particular vulnerabilities);
c. Where the issues or evidence is particularly sensitive (e.g. conduct issues such as domestic abuse, although these may be both sensitive and may hold particular public interest);
d. Where there are prospective or ongoing criminal proceedings touching upon or relating to live issues within the FR proceedings;
e. Where there are issues of commercial sensitivity or security risk to an individual;
f. How to deal with anonymisation where that might lead to identification of third parties such as extended family members or business partners;
g. The need generally to conduct a parallel analysis of the sort set out in *Re S (A Child) (Identification: Restrictions on Publication)* (HL(E)) [2005] 1 AC 593, [2004] UKHL 47, §17, in cases where identification is contentious, and based on the particular facts of the case;
h. We would also draw attention to the principles in *Murray v Big Pictures Ltd* [2008] EWCA Civ 446 that children of famous or celebrity parents have a reasonable expectation of privacy, which may need to be considered before moving on to the exercise of balancing Articles 8 and 10.

18. We note that the President intends to revise and reissue the existing guidance on transparency and publication in general, and we suggest that these issues are dealt with in composite guidance.

19. Quite apart from assisting the parties to further the overriding objective by dealing with issues relating to reporting of proceedings expeditiously, the provision of guidance in these areas will no doubt assist lawyers to give sound advice and parties to make informed decisions as regards their options if concerned about privacy issues, for

example whether they should use NCDR vehicles to resolve their dispute (if they are able to do so).

**DOCUMENTS**

20. We endorse the concept behind proposals to give greater access to reporters (by which we mean bloggers and media) of documents that will assist them in understanding the proceedings and in reporting them accurately.

21. We are not convinced that the RPO as currently drawn will work smoothly in practice. We think it likely that it will lead to unnecessary points of contention, that the court and parties will then need to deal with. We would like to suggest some modifications to the structure and terms of the draft RPO to assist.

22. Generally speaking, when our journalist and legal blogger members attend hearings, we are greatly assisted by having access to documents before the hearing, which give us the shape of the case and the main issues and areas of contention. We are unlikely, in advance of most hearings, to have time to read in deeply (though of course, this might not apply in all cases). It may be that in some cases additional documents will be required subsequently in order to support accurate reporting.

23. The RPO gives an entitlement in all cases to any reporter to ask for a significant volume of material, leaving the parties to object if they see fit. We think that the parties will be very likely in many cases to object; the broader the range of documents that reporters are entitled to see the greater the rate of objection likely. We understand anecdotally that since Covid restrictions a greater number of FDAs are being resolved without the attendance of the parties being required (virtually or otherwise) because parties are working constructively together to agree directions. We are worried that if there is a high rate of objection raised to documents being provided to reporters then hearings will need to be kept in the list or reconvened in order to deal with such issues, where otherwise the costs and court resource would be saved.

24. The basis on which the parties may object is drawn widely and in subjective language. Pursuant to §4.e. a request can be rejected wherever the party (or their lawyer) 'considers' that it is 'exorbitant, unfocused or otherwise disproportionate'. Although this is redolent of the 'just exceptions' provisions (historically?) used in the questionnaire process, it is the party's lawyer (or the litigant if in person) who may unilaterally determine what is and is not 'exorbitant' etc. As worded, that person may merely assert exorbitance or a lack of focus etc. in order to reject a request outright (though we note that §6 of the order does anticipate that the court will deal with the question of whether a rejection was 'reasonable' at the FDA).

25. We suggest that §4.e. should be reworded to clearly state that a party may *object* to a request for documents which is *asserted* to be *disproportionate in volume or to represent a disproportionate interference with the parties (or children's) Article 8 rights*. We do not think the term 'exorbitant' adds anything to 'disproportionate'.

26. As regards provision to reject (or object to) a request that is 'unfocused'. Respectfully, we cannot see how a reporter, who knows nothing of a case, has no prior access to documents, and who may not be able to use technical language to identify particular categories of documents, can be expected to produce a 'focused' request. For example, most journalists will not know what a 'Form E' is, nor what will or should be attached to it. Nor will journalists necessarily appreciate the distinction between 'filed' documents and other documents.

27. We suggest that the risk of the parties being troubled by requests lacking in focus can be mitigated by providing for specified documents to be provided on initial request, which would in turn facilitate informed and focused further requests, where appropriate. If *further* requests are 'unfocused' they are probably also 'disproportionate' and an objection could then properly be made. Whilst there may still in some cases be additional time spent dealing with such a dispute we think this would arise in far fewer cases and would be capable of being more efficiently because the requesting reporter

would have some base information upon which to advance their request and make submissions.

28. We think an email sent pursuant to §4.e, as revised, should trigger judicial consideration of the reasonableness objection, but respectfully suggest that the order should provide for that exercise to be carried out prior to the FDA on paper where practical and appropriate, both to save time and costs and to enable the reporter if possible to access and digest the materials in question before the hearing itself. We recognise that a number of practical issues may arise here (not least judicial resource) but think that there should be a clear flag that courts will be encouraged to deal creatively and flexibly with any objections to best further the overriding objective *and* the interests of open justice.

29. The structure of the RPO is complicated and difficult even for lawyers to follow. If we understand it correctly :

    i. a reporter may request copies of <u>any filed</u> document from each party (whether or not it contains 'protected information' as defined in §5),
    ii. a party may reject the request on grounds that it is exorbitant, disproportionate or unfocused,
    iii. when documents are provided, the providing party must flag which ones contain 'protected information' and which therefore are subject to the proviso which restricts the extent to which those documents can be quoted from,
    iv. The reporter must then work out which parts of which documents can and cannot be reported, with reference to the RPO, and in particular the proviso.

30. The description of what documents are in fact required to be disclosed on request (subject to §4.e.) is not sufficiently defined. We think there is a risk that, without very careful reading, reporters (or lawyers) may mistakenly interpret the documents listed in §5 as a list of documents that a reporter is entitled to request, rather than a list of

documents which are subject to distinct restrictions on publication, as a result of them having entered the case as a result of compelled disclosure.

31. As currently drafted, a reporter would be entitled to request disclosure of the primary evidence such as bank statements and credit card statements, payslips and the like. We foresee a very great likelihood of entirely legitimate objection to such disclosure in many cases. That is not to say that there will be no cases in which it is appropriate for those documents to be disclosed to reporters, but in the vast majority of cases we think that broader disclosure will neither be necessary nor justified (at least in the first instance) and moreover, will potentially drown a reporter whilst placing a data protection responsibility on them that they may not welcome. Alternatively, such a request may place the parties in the position of having to undergo a costly and time-consuming process of redaction of personal data, such as bank account numbers etc.

32. We are conscious that the primary records that form a part of financial disclosure might well include detailed information about an individual's movements and habits, their spending patterns, their lifestyle, and much information of no relevance to the proceedings or any legitimate reporting of it. We anticipate that many separating spouses would find this intrusive and would be concerned about a stranger having access to this material as a matter of course, and they may be concerned as to how it might be deployed and how securely it would be kept. With respect, we are not sure it is justifiable as a generality.

33. We think that it would be helpful for reporters and lawyers if the order were to identify categories of documents which are required to be filed and which should be disclosed to reporters on request. We do not think that those documents should include the primary documentary evidence, such as bank statements and payslips etc i.e. the exhibits to form E or questionnaires. We think the list should include :

    a. Practice Direction documents i.e. case summaries, chronology, statement of issues, position statements, skeleton arguments, schedules of assets

b. Forms E (without exhibits)
c. Responses to questionnaire (without exhibits)
d. Any part 25 witness statements.

34. These are the sorts of documents which are most likely to be of use to reporters, first to help them decide whether they want to invest time in attending, secondly to help them understand the hearing and thirdly to help inform a decision as to whether there are further documents that they wish to see, and to be able to formulate a focused request for those documents and an explanation of why this is justified in the particular case. We think this approach would represent a better use of the resources of the court, the parties and reporters.

35. We also note that no process is laid down for how an objection should be dealt with – for example at the next hearing, or beforehand? On paper or at a discrete hearing? How should the reporter's representations be fed into the process? If a significant volume of material is sought, but this material requires heavy redaction, the invidious choice for the judge may be between adjourning the hearing or denying the reporter access to otherwise useful material from the case.

36. We have struggled to make sense of the restrictions in connection with protected information. Again, it is difficult, particularly for a lay person to track through the logic of the order from paragraph 2 (what is permitted) to paragraph 3 (a prohibition on reporting any information given under compulsion) to paragraph 5 (which defines that material as 'protected' to the proviso (which sets out an exception to the absolute bar on referencing protected information back in paragraph 3.

37. Moreover, we are not sure in practice what the 'proviso' below §5 does and does not permit, and we anticipate therefore that reporters will find it difficult to be sure that they are on the 'right side of the line' when attempting to report within the terms of the order.

38. In particular, we are unclear as to how 'a broad description of the types and amounts of the assets, liabilities, income, and other financial resources of the parties, without identifying the actual items, or where they are sited, or by whom they are held' should be interpreted in practice.

39. If the asset being described is the former matrimonial home, can it be described as a 20 bedroom mansion (or 3 bedroom semi) in Berkshire? Can the reporters say it is in Windsor? Can the street be named? Can a picture be shown? An aerial picture? Which of these would amount to 'identifying the asset' or 'where [it is] sited'? We think it is likely that this wording was aimed at not identifying particular business assets e.g. company X or shares in Y, and possibly also at identifying a property by postal address as opposed to general location – and we think the limitations in the proviso need to be redrawn in more concrete terms so as to be clear to those required to work them in practice.

40. We note that the second limb of the proviso refers back again to §5a. to e. <u>but not to §5.f</u>. We think that the different treatment of oral evidence and of submissions should be explicitly set out in the order. We think that reporters (and others) may miss or misunderstand this important distinction. We wonder if the order could be more simply expressed to reflect that a reporter may not report the contents of the documents provided save

    a. to the extent the proviso permits,
    b. as referred to in court in evidence or submissions, or in a skeleton argument, position statement or case outline (or other appropriate list of documents)
    c. to the extent the information is already in the public domain.

41. We also suggest that some thought may need to be given to the fact that schedules of assets arguably fall under §5d, but may be part and parcel of written submissions under §5.f – does the second limb of the proviso apply to these or not?

42. Additionally, we are not sure that reporters will necessarily know what an 'open proposal' is, though perhaps that matters less since they are unlikely to have access to or hear reference to without prejudice proposals.

43. In fact, there are a number of pieces of terminology used in the RPO which, although familiar and self-explanatory to lawyers, may not be comprehensible to reporters – we suggest that plain English is used insofar as possible, and that where this is not possible some sort of glossary or key should be provided (whether in related guidance or at the foot / explanatory note to the RPO). Examples of such terms are : 'open proposal', 'filed', 'form E', 'E1' etc – and 'information derived from Form E' etc (which presumably means 'exhibited to Form E' etc), 'pre-action disclosure'.

44. The framing of the proviso connects back to the points we make about anonymisation and the potential identification of children by peers.

45. Overall, we think the RPO is quite challenging to interpret, and think it would benefit from structural simplification.

46. We are also not sure how the court proposes to ensure that the undertaking to destroy documents after 6 months is adhered to. We think that guidance should specify the mechanism through which compliance will be notified to the court and parties (for example whether the court will the court forward a certificate filed by the reporter to the parties or whether it should it be filed and served simultaneously) and what action should be taken in default of compliance.

47. We would welcome clarification of whether the expectation that judges publish 10% of all judgments will apply to FRC judges and if so which judges and which judgments (e.g. all judgments or only those already in writing or going to be transcribed anyway as per the 2014 guidance?) – for the avoidance of doubt we think it should, and we are particularly keen to see publication of judgments at DJ level which are likely to be far more representative of the sorts of scenarios facing most families and the work of the

FRC in general. The issues we raise above about issues concerning anonymisation and children will inevitably arise more frequently if 10% of judgments across the board are to be published.

The Transparency Project Team

24 November 2021