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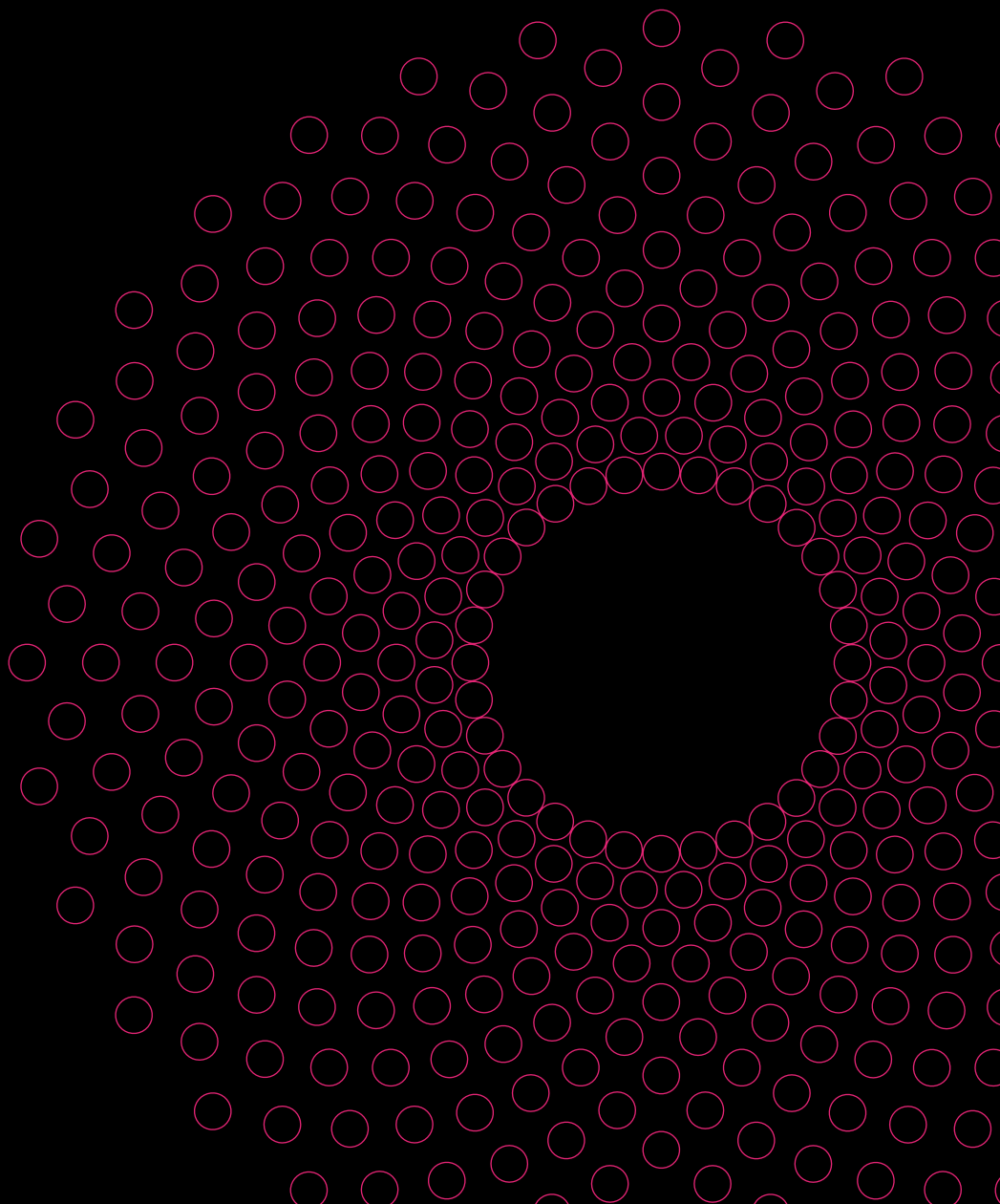
Confidence & confidentiality:

Openness in family courts – a new approach



HER MAJESTY'S COURTS SERVICE
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Confidence and confidentiality:
Openness in family courts – a new approach

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

June 2007

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Contents

Foreword

Family courts make decisions that have far-reaching and often permanent effects on the people involved. Where children are involved the welfare of the child must be paramount.

Family courts can decide whether children are brought up by their parents or taken into the care of the state. They can decide which parent should look after a child and the extent to which the other parent should see a child. They can decide on whether couples can adopt a child. They provide protection for the victims of domestic violence. They resolve financial issues on divorce. Decisions made in the family courts have wide and far-reaching effects on so many of our children and on adults too.

Family courts are important. And it is important that family courts can command the confidence of the public, if the public – including those involved in proceedings – are to accept their judgments in such essential and sensitive areas.

We know there have been criticisms of the way family courts carry out their work – accusations of secrecy, of lack of transparency, of being insufficiently open. We know that these and similar criticisms, however legitimate they may be, run the risk of undermining confidence in the family courts.

So we published proposals in 2006 which we believed would strike the right balance between confidence and confidentiality. We received a considerable number of responses, which identified a clear and material difference of view on the way forward. On the one hand, media organisations strongly supported our proposals to allow the media in to the family courts as of right in order to increase openness and improve confidence. On the other, children, young people and the organisations which protect, support and represent them were strongly opposed to allowing the media in to the family courts as of right.

Since publishing our initial proposals in 2006 we have reflected on the best ways of making the culture of family courts more open, while maintaining the privacy of those involved – especially children.

In the light of the consultation, we have decided to take forward those key proposals which were widely welcomed by respondents to the consultation paper. To meet our objectives of openness in family courts and the protection of children, we are also consulting on further proposals.

We have decided not to proceed with proposals to allow the media in to family courts as of right. I understand that this will disappoint some people – especially media organisations themselves. But I believe it is the right decision.

Governments of all political persuasions are often accused of not taking consultations seriously – of putting proposals out to consultation with little or no intention of significantly altering them in the light of responses. This is a clear case of the opposite.

We have listened to what people said in response to our original proposals. We have carefully considered the responses. And we have changed our mind. I believe that in this case, with the welfare of children at stake, that this is clearly the right thing to do.

We believe instead that a new approach is required. This paper, *Confidence and confidentiality: Openness in family courts – a new approach*, sets out proposals which we believe form that new way forward.

Rt Hon Lord Falconer
Lord Chancellor and Secretary of State for Justice

Executive summary

- Family courts are **vital** institutions which make judgments about key issues affecting individuals and families – especially children
- Most family court proceedings are held in **private**, with decisions taken in court not generally made public – usually for very good reason
- But confidentiality in family courts has attracted **criticism**, leaving family courts open to accusations of secrecy, bias or even injustice, which can run the risk of eroding confidence
- We want to improve public confidence in the family courts and at the same time safeguard the privacy of those involved in proceedings – especially **children**
- We put forward proposals in July 2006 with the aim of improving confidence, including allowing the **media** in to family courts as of right
- Media organisations, amongst others, strongly **supported** these proposals
- But children, young people and organisations which protect, support and represent them strongly **disagreed**, and argued against the media being allowed in to family courts as of right
- In the light of these responses, we believe that we need to establish and work by a key overriding principle informing any changes we propose: that **children must come first**
- In line with that principle, and with the views of children, young people and organisations which protect, support and represent them, we **do not intend to take forward** proposals to allow the media in to family courts as of right
- Instead we need a **new approach**
- We will focus on improving the openness of family courts not by the numbers or types of people **going *in*** to the courts, but by the amount and quality of information **coming *out*** of the courts
- We want to **consult** on a range of proposals to:
  - provide **better information** about cases involving children
  - provide **better information** to people involved in family proceedings, including to adults who were involved in family proceedings when they were children
  - provide better information **to the public** about the way decisions were reached in **cases in the public interest**
  - **pilot** the provision of information to families through making either the judgment of a family court decision or a brief summary of that decision available

  - develop a new **online information source**, the Family Court Service Information Hub, to provide better information
  - change the current rules on **disclosure of information** by parties in order to avoid unnecessary restrictions
  - amend court rules so that disclosure will be permitted primarily for the **purpose** for which the information is disclosed
  - review provisions on **onward** disclosure
  - protect the **identity** of children beyond the end of proceedings
  - provide for the media not to attend family court proceedings as of right, but to **apply to attend** on a case by case basis
  - change the law in relation to who may attend **adoption proceedings**
  - make family court **reporting arrangements consistent**
- We **value** the responses to our original proposals, and are keen to see responses to these revised proposals
- We believe this new approach, based on information about courts, not attendance at court, will be in the **best interests of children and the public**

one: Introduction

Family courts are of the greatest importance to justice and to the way we all live our lives. Family courts have to make judgments about key issues affecting individuals, families, communities and society more generally. More people are affected by the work of the family courts than ever before: the changing nature of families means that family court decisions impact on a wider number and a wider range of people than used to be the case. Family breakdowns cause unhappiness and disputes. While only about 10 per cent of families use the courts to make arrangements for the care of children when relationships break down, many of those who do use the family courts do so in situations which are charged with conflict. Family courts have to make their judgments in circumstances which are often very difficult. Their judgments can have profound and long-term effects on the lives of all those involved.

In this light, many of the proceedings of the family courts are held in private. The decisions taken by the family courts are not generally made public. There are usually very good reasons for this level of confidentiality. Family courts often deal with cases in which the evidence concerned, and the vulnerability of many of those involved – especially children – make this confidentiality entirely appropriate.

At the same time, though, this confidentiality has attracted criticism – that the family courts are too secretive, leaving them open to accusations of bias or even injustice. Such criticisms are not limited to campaigners. Some members of Parliament, of the judiciary and of the legal profession share the concerns which lie behind the criticisms. Criticism can chip away at confidence, undermining the work and the acceptability of the family courts and the judgments they make. Some argue as a result that there is a case for more openness, so that people can understand family justice, better scrutinise the work of the family courts and as a result have greater confidence in the decisions which family courts have to and do make every day about families and about children.

Striking a balance on these issues – confidence and confidentiality – is difficult. Public confidence is essential. Without such confidence, the authority of the family courts may be diminished, and the judgments run the risk of being seen as neither fair nor just. But confidentiality is essential too. Without privacy, cases run the risk of not being properly resolved and those involved in a case risk losing the protection of the courts they both seek and rightly feel they deserve.

The Government has sought to strike a balance on these issues with a series of proposals aimed at both improving public confidence in the family courts and at the same time safeguarding the privacy of those involved in proceedings. In *Confidence and confidentiality: Improving transparency and privacy in family courts*[1] published on 11 July 2006, we tried in particular to focus on protecting the interests of children.

1 CP 11/06

The publication of these proposals led to a number of responses from people with an interest in the work of the family courts. We published these responses on 22 March 2007 as *Confidence and confidentiality: Improving transparency and privacy in family courts – response to consultation*.[2] We said in that document that we would in due course be bringing forward our proposals for change and improvement. Our proposals are contained in this document, *Confidence and confidentiality: Openness in family courts – a new approach*.

2 CP(R) 11/06

two: What we have done

In *Confidence and confidentiality: Improving transparency and privacy in family courts*, we put forward a range of proposals to improve the operation of the family courts.

In summary, these were to consult on measures to:

- Make attendance and reporting restrictions consistent across all family proceedings
- Allow the media, on behalf of and for the benefit of the public, to attend proceedings as of right, though allowing the court to exclude them where appropriate to do so and, where appropriate, to place restrictions on reporting of evidence
- Allow attendance by others on application to the court, or of the court's own motion
- Ensure reporting restrictions provide for anonymity of those involved in family proceedings (adults and children), while allowing for restrictions to be increased or relaxed, as the case requires
- Introduce a new criminal offence for breaches of reporting restrictions
- Make adoption proceedings a special case, so that there is transparency in the process up until the placement order is made, but beyond that proceedings remain private

We argued that these proposals would mark a major change in the way family courts conducted their business, and would be a major step forward towards the dual objective of confidence and confidentiality.

In *Confidence and confidentiality: Improving transparency and privacy in family courts – response to consultation*, we summarised the arguments and the issues raised in the consultation on our proposals.

In addition to collating the 245 formal responses from individuals and organisations, we also arranged a series of events and activities, which gave people the opportunity to debate the proposals. As part of this more than 200 young people and children contributed their views.

Issues raised by respondents to the consultation

The key themes emerging from responses to this extensive consultation were outlined in the response paper and the *Children's and young people's guide to responses*, which was published in March 2007. The main issues highlighted by respondents were:

- The need to focus on children so that their needs, interests and welfare are at the centre of any proposals we make, in particular the protection of their privacy
- The need for more information about how the family justice system works, both for improving public understanding, and for helping families involved, or about to be involved in family proceedings
- What does 'openness of family courts' actually mean? Is it about allowing a broader range of people to attend, including the media? For example, should we rely on the media to act as a 'proxy for the public' or 'watchdog of the family courts'? Are there other means to create more openness?
- Concerns about the resource implications and possible delays which could result from an increased workload for the judiciary

Responses to the proposals

Responses showed broad support for:

- Increasing the volume and quality of information available, both for those involved in proceedings and for the wider public
- 'Later life judgments', that is, when a final order is made, retaining either a summary of the reasons behind the decision or the full transcript of the judgment to be made available to the adult who was involved in proceedings as a child on request
- Consistency across the different tiers of family courts on who could attend hearings and what could be reported
- People with an interest in the proceedings to be allowed to apply to attend, with judicial discretion to allow or refuse

There was some support for:

- Making courts private but giving them the discretion to decide on a case by case basis whether to allow people with an interest, including the media, into proceedings
- Treating adoption differently from other family proceedings so that after a placement order has been made, the media would not be allowed into proceedings.

- Allowing MPs and others into family courts as a right. However views were not consistent across different groups

There was little support for:

- Giving the media the automatic right to attend family courts. Generally, the media was not seen as 'a proxy for the public', or responsible for scrutinising the courts, but instead it was seen as only interested in reporting on certain types of (often high profile) case

We said in *Confidence and confidentiality: Improving transparency and privacy in family courts – response to consultation* that our original proposals were a genuine attempt to make the family courts more open, and that we would continue to protect the privacy of those involved in family proceedings. We also said that having considered the responses very carefully, we would bring forward our proposals for change. We are basing these proposals on a new approach to openness in family courts.

three: A new approach

We are proposing to adopt a new approach to the issue of the openness in the family courts rather than the approach set out in the *Confidence and confidentiality* consultation paper.

The media and the family courts

In *Confidence and confidentiality*, we put forward a number of proposals with the aim of improving both the public's confidence in the family courts, and safeguarding the confidentiality of those involved in proceedings.

Following Mr Justice Munby's *Re B* judgment[3] we consulted and then subsequently changed the rules on disclosure of information in family proceedings involving children and heard in private. The Constitutional Affairs Select Committee (CASC) inquiry into the family courts (Sixth Session 2005-2006)[4] found no widespread crisis of confidence in the family courts but did make specific recommendations about making family courts more open.

In connection with that, central to the approach of *Confidence and confidentiality* was the ability of the media to attend family courts as of right as a proxy for the public. The proposals in *Confidence and confidentiality* were therefore based on the premise that, by opening the courts to the media, confidence and openness in family courts could be improved.

We proposed media attendance as of right in response to calls from the public, the media and Parliament to improve scrutiny of the family courts, and transparency of the decision making process.

Take, as an example of the case put forward by the media and others, the submission of the Newspaper Society, which represents a large number of key media organisations:

> *"We fully support the proposal that the media should be allowed to attend ALL family courts as of right…The principle of a general presumption of openness must be established if public confidence and accountability is to be achieved. The role of the press as representative of the public particularly in relation to attendance at court proceedings is well established and understood."*

[3] [2004] EWCA Civ 567) March 2004
[4] HC 1086. "Family Justice: the operation of the family courts revisited". Pub. 11 June 2006.

Or this, from ITN:

> *"There may be rare circumstances where it is justified to exclude reporters but this should be very much the exception. In such cases it would be worth considering whether the number of reporters could be restricted as opposed to complete exclusion."*

Or this, from Channel 4:

> *"The 'proxy' role that the DCA is hoping that the media will assume would be utterly compromised if there were to be automatic exclusion from whole categories of cases or parts of cases. It is essential that the principle of open justice in family cases is clear and uncompromised."*

Or this, from the Society of Editors:

> *"The current restrictions on both attendance and reporting should be lifted across all family proceedings and replaced by a consistent rule that the courts should be open to the media, without automatic reporting restrictions."*

The responses to the consultation showed that, without exception, all media respondents were in favour of allowing the media into family courts as of right.

But by contrast, we were very struck in the responses to our proposals by the views of children and young people and the groups which support, protect and represent them who all indicated that allowing media access could jeopardise children's rights to privacy and anonymity. They strongly disagreed with the proposal.

Take this summary of those views, from the National Children's Bureau:

> *"(We have) concerns about the assumption that the media will work on behalf, and for the benefit, of the public alone. Allowing the media access to family courts proceedings would give the public greater awareness of the complexities involved in making difficult decisions about a child's care and welfare. However, the media also inevitably has a function to find news that will increase readership and sell newspapers and magazines. Any plans for opening up the courts must address this conflict of interest to ensure that the courts are open to scrutiny in a manner which keeps the child's welfare and protection paramount."*

Or this, from One Parent Families:

> *"In order to have a good understanding of a case it is necessary to be able to follow its progress through the courts and have access to much of the paperwork – not simply to sit in and report on the final judgment. We do not feel that the media will have sufficient resources to devote to gaining and adequate understanding of a case....By and large, their reports will not increase public understanding of how the family courts operate or increase public confidence that the decisions made are sound."*

Others, from different perspectives, agreed. Take this, from the President and the High Court Judges of the Family Division:

> *"It is not in the best interests of children, who are the subjects of litigation between their parents or in care proceedings, that intensely private matters should be laid bare to the public at large; or is it in the public interest. Children of whatever age are, we believe, entitled to as much privacy as possible from intrusion by the media and the public during their formative years."*

Or this, from the Law Society of England and Wales:

> *"Family hearings should be in private unless the court orders otherwise."*

Or this, from the Association of Lawyers for Children:

> *"It is the welfare of children and young people that the family justice system exists to prioritise and protect. We forget this at our peril."*

Children first

We believe this point is vital. We believe that the issue of the welfare of children involved in family cases should and must be at the heart of an approach to the openness of the family courts. **So we need to establish and work by a key overriding principle informing any changes we propose: that children must come first.**

In the light of this principle, we have reflected on the responses to our original proposal to allow the media into family courts as of right. In line with the overwhelming evidence from children and young people and the groups which support, protect and represent them, we now believe that the right course of action is not to proceed with this proposal. We do not believe that allowing the media into the family courts as of right would improve public confidence while at the same time safeguarding confidentiality. We do not believe that allowing the media in to family courts as of right strikes the right balance between confidence and confidentiality. We instead agree with the views of children and young people, and the groups which represent them, that allowing the media in to the family courts as of right would not make children's welfare and children's protection

paramount. We do not believe that allowing the media in to the family courts as of right is consistent with the principle that children must come first. The court will still have discretion to allow media attendance on application.

Though that is the Government's view, a number of outstanding issues in connection with the media remain:

Better understanding by the general public:

Arguably, there is very little understanding of the way the family courts work amongst the general public. Unless someone has been directly involved in proceedings, the decision making process is often misunderstood. In addition, the work of the courts and others in the family justice system is not well understood by the public, reported only in the most high profile cases and without a clear strategy to educate the public better. Where cases are reported, most of the readership will not be in a position to recognise the accuracy of the reporting either in terms of the process, or the outcome.

Better understanding by families involved in proceedings:

The implementation of the Review of the Child Care Proceedings Systems in England and Wales[5] will, in the longer term, ensure that families involved in Children Act proceedings are better prepared and better informed. However, cases dealt with in the county courts and the High Court do not routinely receive any written account of the decisions made or how they were reached. Furthermore, unless arrangements are made at the time of judgment, there is no permanent record of the judgment retained. Not only does this make the system difficult to scrutinise, it fails to record as a matter of public record, the reasons why a child may have been removed from their family. It also fails to offer parents something which they can reflect on later, or to provide a lasting record which children can access should they wish once they are adults. The responses to the consultation were overwhelmingly supportive of 'later life judgments' for people who had been involved in proceedings as children.

Better scrutiny of the family justice system:

As a number of respondents to the consultation suggested, courts need to retain discretion to admit the media or not, and need to balance the competing European Commission on Human Rights (ECHR) rights as part of that decision making process.

The responses to the consultation paper, and the views expressed by children and young people clearly reflected that not only do courts need to have discretion, **but** that they trusted them to make the right decisions about whether the media should be admitted.

[5] http://www.dca.gov.uk/publications/reports_reviews/childcare_ps.pdf

Media attendance at family proceedings:

The right of the media to attend proceedings received a particularly negative response from the legal profession, parts of the judiciary, the voluntary sector, and children and young people themselves.

The responses indicated first, that the media are not trusted by many to act responsibly, nor to be objective in their reporting (though it may be argued that the latter is not their role). Secondly, they indicated that the presence of the media, based on their current attendance at family proceedings courts (ie: magistrate's courts), is unlikely to be widespread in the large majority of proceedings but would be likely to be much more common in high profile cases or those involving a degree of celebrity. So the media would be unlikely to fulfil the 'guarantor' role identified for them in our previous consultation.

Excluding the media from proceedings and not allowing them to apply to attend would mean that the proceedings would never be in public and would probably be a breach of Article 10 (freedom of expression) and Article 6 (right to a fair and public hearing) of the European Convention of Human Rights.

The ECHR has recently considered an Austrian case, ***Moser v Austria***,[6] in which the applicant's son had been taken into care. The Court held that there had been a breach of Article 6. They contrasted the position in Austria with the position in the UK. The case in Austria was heard in private and did not expressly allow the judiciary to exercise a discretion to hold the proceedings in public. The Court said that the English system was different, and that when the Court had considered the English system it "attached weight to the fact that the courts had discretion under the Children Act to hold proceedings in public if merited by the special features of the case and a judge was obliged to consider whether or not to exercise his or her discretion in this respect if requested by one of the parties".

It is also worth noting that the Court in the Austrian case distinguished between proceedings involving private individuals (the UK case) and proceedings involving state interference in a family (the Austrian case). The Court held that where there is State interference then, "the reasons for excluding a case from public scrutiny must be subject to careful examination".

As well as not being Convention compliant, the presumption of total exclusion would run contrary to the line of recent judicial interpretation. The approach of the courts in relation to attendance at and reporting of Children Act proceedings has been to adopt a balancing test of competing ECHR rights when determining whether a hearing should be open to the public/media or reported.

A new approach

Our view is that the cost to children and young people of allowing the media in to family courts as of right outweighs the public interest in doing so. Therefore the media should not be allowed in as of right.

6 [2006] 3 FCR 107

There is an argument that family courts should be treated the same as other courts, where there also may be sensitive or difficult issues under discussion. We believe however that family courts are different – not least because they deal with children who are almost certainly a part of the proceedings reluctantly and through circumstances not of their making. The welfare of the children involved must be the primary concern and cannot be compromised. We believe that any proposals that have a negative impact on the children involved, whether real, or perceived, should not form the basis of the way forward.

We have considered very carefully the range of views expressed in the consultation, and concluded that we need to find a new approach to improve confidence in the family courts and family court proceedings.

Our proposed approach is not to focus on the question of which people are allowed access to the family courts as of right, but on the more fundamental issue behind that: the decisions the family courts take, and the information provided by the family courts in the reaching of those decisions.

In the light of responses to the consultation, we believe that the key question is not who has access to family courts in order to obtain information about the cases for the purposes of reporting them. We believe that the key question is who has access to the information coming out of the courts about the decisions the courts take.

Interestingly, this approach may be in line with experience elsewhere. As part of the *Confidence and confidentiality* consultation, a brief comparison of the attendance and reporting arrangements for family proceedings in other jurisdictions was undertaken. In particular, we focused on arrangements in British Columbia and New Zealand, both of which were deemed to be more open than the family justice system in England and Wales.

Dr Julia Brophy at the University of Oxford has recently completed extensive research for the Nuffield Foundation. Her research, *Openness and transparency in family courts: Messages from other jurisdictions* will be published shortly, but concludes that even in jurisdictions such as Australia where the rules are inconsistent across the different types of court and the media are permitted to attend some hearings, media access has not achieved its policy objectives of achieving greater public understanding of the work of courts. Most importantly, findings support the view that the quality and timeliness of information about how the system works, and accurate and understandable information about how and why decisions are made is likely to be much more important to both the families involved and the public, than whether the media has access to proceedings. A summary of the main findings is set out at Annex A.

In the light of the responses to the consultation, and because of the very private nature of the information concerned, in its simplest form our approach is clear: **we will focus on improving the openness of family courts not by the numbers or types of people going *in* to the courts, but by the amount and quality of information coming *out* of the courts**.

Instead of a debate about openness focusing on whether the media should be able to attend family courts as of right, we believe that this approach will protect the privacy and identity of vulnerable people, allow proper scrutiny of the courts and a better understanding of the reasons behind judicial decisions. This is the new approach on which we will be building change and improvement. It is the approach through which we will bring about real openness without cost to the child.

four: What we are going to do

Based on this new approach, we will now take forward some of the proposals on which we have already consulted, and make some further proposals to support and underpin the way in which the family courts balance privacy with public interest.

The Government will not compromise the independence of the judiciary or seek to interfere with the decision making process - but it can ensure that the process is open, fair and easily understood. Local authorities also have a role to play in ensuring that their procedures support this information-led public facing approach.

We believe that by taking a new approach to openness, and focusing on information flowing from the courts, we can balance the interests of children involved in proceedings with the wider public interest. So we are seeking views on a number of new proposals.

We also want to make courts consistent in terms of who can attend and what can be reported. We have already consulted on some of the changes we want to make and which we set out here.

So there are two broad groups of changes: changes in relation to the information coming out of the courts, and changes in relation to attendance at the courts. We believe that, seen together, these changes strike the right balance between protecting children and families, and broadening people's understanding of the work of the family courts and the decisions that they make.

Information coming out of the courts

Provide better information

It was clear from responses to the consultation paper, and from discussions with stakeholder groups, that more information needs to be readily available about the workings of the family court system. Some people who had been involved in family proceedings told us they did not know how decisions were reached or what to expect in the court. Children and young people told us that they wanted an objective account of their case, which they could access once they were adults. Others have commented that the family court system is seen to be closed and secretive. We believe that providing more information about the work of the family courts and the decisions made would go a significant way to meeting these concerns.

Who needs information?

In the 2006 consultation we consulted on what type of information court users would find most helpful. There was overwhelming support from adults for all proposed types of information, including an accessible recording held on file, a copy of the order, a summary of the judgment and the full transcript of the judgment. Over 200 children contributed to the consultation – about half of whom had been involved in care proceedings – and their views were clear. They wanted to have an objective account about proceedings they had been involved in as children – and the reasons for the decisions that had been made about them. For some, it would be the first true account of what had happened to them.

The media also want more information about family courts and have argued that their attendance at courts and wider reporting of cases would allow them to provide more information to the public. Although we have already decided against press attendance as of right – we agree that the public needs more information. Public perception of some cases can be changed if judgments have been published, as has been seen by some recent high profile cases.

We have listened very carefully to what people have told us and agree that providing more information is central to improving the openness of family courts. But providing that additional information will signal a significant and costly change to the family courts – so we want to make sure we get it right. We want to make sure that the information can help the public at large understand why decisions are made. We want to make sure that the families involved understand why decisions were reached. And we want the children involved to have a document available to them as adults which will help to explain the decisions the courts took about them which will have had far-reaching implications on their lives.

We have considered the sorts of cases where this information is particularly important. Children Act public law cases where the State is intervening in a family's life, particularly where a child is removed from their home are obvious examples. However we know that some decisions made in private law cases

involving children (for example contact and residence cases) can also have a significant impact on the children and families involved. Private law cases can also result in loss of contact with a parent.

So we have decided **we will provide more information** in all significance cases to the families and children involved, and/or the wider public. We have spoken to our stakeholders and identified the cases below (public and private law) as those warranting further information as a matter of routine.

Information will be provided in cases where a final order has been made in either the family proceedings courts (ie: magistrate's courts), county courts (Circuit or District Judges) or the High Court where:

- Either parent is given leave to permanently remove a child from the UK
- Any final order is given which would lead to no contact between a child and either or both parents
- Any final order in Children Act public law cases, including where contact continues
- The final order has depended on contested issues on matters of religion, culture or ethnicity
- The court has had to decide between medical or other expert witnesses where there were significant differences of opinion
- Where there are significant human rights issues

The information will have **three purposes**. It will be:

- Provided to the families involved so they had a written record of the judgment which they could retain
- Retained for the child involved so they could request access to it when they were older (from age 16 or 18) and
- Where the case is of public interest, published anonymously online so that it can be seen by the wider public (including the media)

What information will be provided?

In each of the cases above, we want the courts to provide **ONE** of the following:

- A full transcript of the judgment **OR**
- A decision summary (a brief document, maybe only a page or so, which summarises the court's reason for reaching its decision) **OR**
- Written reasons for the decision (already provided in all cases heard in the family proceedings courts (ie: magistrates' courts)

We believe the courts will be in the best position to decide which should be provided in each case.

Other cases involving children

We know that some people would like information provided in **all cases** involving children. All cases heard in the family proceedings courts (ie: magistrates' courts)

already receive written reasons for decisions – but this is not the case in either the county courts or the High Court (although a copy of a transcript can be requested and paid for by the parties involved).

Family courts are asked to make difficult decisions about families. Even if they are not as significant as the cases listed above they can still have a significant impact on the children (and adults) concerned. We will also ask courts to consider in all other cases whether there should be a transcript or decision summary made for parents to keep, and a copy retained for the child for when they are older. In family proceedings courts (ie: magistrates' courts) parents will already receive written reasons but we would want them to consider how children will be able to access these when they older.

Many people will welcome these changes – but at the same time they present a real challenge for people working in the family justice system – particularly the judiciary. So we intend to **pilot** the provision of information so we can test the full impact, resource implications and benefits, as well as identifying any unintended negative effects of producing additional information.

Some of the key questions we need to answer are:

- What would be the impact on people working in the family courts – particularly the judiciary?
- What would be the likely impact on children and families, particularly whether changes would lead to delays?
- What would it cost?

So this pilot will do two things. It will look at the impact of providing information in the cases mentioned above – which clearly have the most profound and far-reaching effects on the children and families involved **and** the impact of asking the courts to think about whether information should be provided in other cases involving children.

Practical considerations

Providing additional information will create some practical issues which we will need to consider. These include storage of the documents, how long they should be retained for, and how to ensure that the adult who was the subject of proceedings as a child can access them There will also be cost and resource implications for the judiciary. We will be considering all of these as part of the pilot.

Develop a website to provide better information

To clearly show what goes on in family courts we believe a website which acts as a central hub for all family court information would be invaluable. Not only could it provide a location for either the transcript, decision summary or written reasons document to be placed, but it could also be a central conduit for all information and guidance relating to what goes on in family courts. Bringing together all the pieces of guidance currently published by HMCS, Family Justice Council, Judicial

Studies Board and the various support networks into one place will ensure that there is easy access to information. Hard copy versions of much of the guidance could also be made available.

We plan to make the following information available:

- General information about the family courts, including information on the different tiers of family court and what happens in each
- Examples of 'typical' cases of a variety of private and public law hearings, how they progress, and on what basis the judge makes a ruling (see Annex B on 'typical' family cases which could be included)
- Statistical data on how judges find in certain types of hearing and why
- Information on what a person who is going to be involved in family proceedings should expect, and what they can do to prepare, together with contact information on other locations for support or advice
- Support for litigants in person, including links to further advice

The effects of some judgments are so important that we believe the reasons for the decision should be a matter of public record. In the cases shown on page 19, and where it is clearly in the public interest, we believe that either an anonymised decision summary or the full transcript of the judgment should be made available online shortly after the conclusion of the case. Where such cases are dealt with in the family proceedings courts (ie: magistrates' courts), the written reasons document would be anonymised and made available.

This document would explain the issues behind the case and the reasons for the decision. Unless a judge rules otherwise, we believe the information should be completely anonymous, including the removal of any information about the child's location and other identifying factors.

Making the anonymised judgment or decision summary available online would enable researchers and the media to look at results of a broader set of family law cases, across a range of courts, without having access to personal details about who was involved in a case. We believe this would allow the public and the media to be better informed about how and why decisions have been made. It would allow a clear and pronounced move to further analysis of family law cases, and enable the courts to defend accusations of unfairness (or worse).

In a speech to Jordan's Family Law Conference in October 2005, Mr Justice Munby said: [7]

> *"It must never be forgotten that, with the State's abandonment of the right to impose capital sentences, orders of the kind which judges of the family courts are typically invited to make in public law proceedings are among the most drastic that any judge in any jurisdiction is ever empowered to make."*

7 Published in December 2005 Family Law

With the courts power to make such drastic orders, it is crucial that the wider public has the opportunity to understand the reasons for that decision.

Where would this information be accessible from?

The HMCS website would be the appropriate online location for the Family Court Service information hub. We anticipate the work involved in researching and producing this information online and in hard copy would take around four months. This would include design, testing and roll-out. This would form part of a broader project to review the content and navigation of the HMCS website.

Further proposals

We are also proposing some further changes that, in conjunction with the proposals above, will provide a package of measures to improve the openness of family courts in line with the principles this consultation paper has set out.

We would like your views on the following proposals:

- **Allowing wider disclosure of information by parties**
- **Protecting children's identity beyond the end of proceedings**
- **Making things simpler so that, as far as possible, legislation on who may attend and arrangements for family proceedings involving children is readily accessible and easily understood.**

Wider disclosure of information by parties

We have already changed the law and rules of court, which deal with disclosing information about proceedings involving children and which are heard in private. In 2004, s12 Administration of Justice Act 1960 was amended so that it would not be a contempt to disclose information about family proceedings involving children which were heard in private, where rules allowed for that.

In addition, we amended Rule 10.20 of the Family Proceedings Rules 1991 which deals with disclosure of information in cases involving children and which are heard in private. The new rules came into effect in October 2005. The changes allow people involved in proceedings to share certain information with other specified people, so long as it is for a specified purpose. The effect of the changes mean that people can now, for example, seek advice and support from a range of people, including legal advisers, close family members, medical practitioners and elected representatives. However, there remain restrictions on what information they can disclose. The Statutory Instrument setting out the changes to the rule is reproduced at Annex C.

Having been in operation for almost two years, it is now clear that in some cases the rules remain unnecessarily restrictive and complex. By making some changes to the existing rules, we can make it easier for people to discuss their case and get timely and appropriate advice and support. The general principle is that those

involved in proceedings should be able to discuss and share information about their case more widely.

Q. Do you agree that the current court rules on disclosure should be altered to allow for wider disclosure of information in cases involving children and heard in private?

Disclosure for purpose

We are proposing to amend court rules so that disclosure will be permitted primarily for the purpose for which the information is disclosed rather than what information can be disclosed, or to whom it can be disclosed.

Purposes

As seen at Annex C, the current court rules specify who may disclose the information, the purpose for which the information may be disclosed, and to whom it may be disclosed. Information may be disclosed for the purposes of:

- Obtaining advice and assistance in relation to the proceedings
- Confidential discussions so that they can receive support from their spouse, cohabitant or close family member
- Obtaining health care or counselling
- Referring an issue to 11 Million (formerly the Office of the Children's Commissioner) or the Children's Commissioner for Wales
- For mediation in relation to the proceedings
- For an approved research project
- For the purposes of making a complaint or investigation or determination of a complaint in relation to a legal representative or a professional legal adviser
- To enable the elected representative or peer to give advice, investigate any complaint or raise any question of policy or procedure following the hearing
- For making a complaint to the General Medical Council
- For a criminal investigation
- To enable the Crown Prosecution Service to discharge its functions
- To enable the legal representative or professional legal adviser to obtain a quality assurance assessment
- To enable a legal representative or professional legal adviser to obtain accreditation

These purposes for disclosure do allow scope for parties to disclose information. However, the further restrictions on what information, to whom it can be disclosed and what the recipients are able to do with it make the rules overly complex, and do not meet the original policy intentions behind the 2005 changes.

We propose to focus on carefully defined purposes, while removing some of the existing restrictions on what information can be disclosed, and to whom. So for example, a party to a case would be able to talk to or confidentially share documents with a close friend (which they are currently unable to do).

Another example is that the current rules allow for a party to disclose only the judgment or a summary of a judgment to their MP, which by definition limits any disclosure until after the proceedings have ended. This is clearly unhelpful and confusing for constituents wishing to discuss their case with their MP for whatever reason. It also places MPs in a difficult position if the information disclosed to them is not provided for in the current rules. Both constituents and MPs might expect some further appropriate action as a result of the disclosure. However, by forwarding information that is outside the current rules (even to a Minister) the MP may be in contempt of court.

We believe that the rules about disclosure need to be reviewed so that confidential disclosure for a defined purpose is made easier and simpler. However, the very private nature of some of the information, particularly that which is contained in confidential documents, means that there would need to be restrictions on who could receive the information, and what those receiving the information could do with it.

So we are not proposing to make changes to the current restrictions which prevent disclosure through publication of information to the public at large or a section of the public.

Q. Do you agree that the court rules should be amended so that they concentrate on the purposes for which the information is disclosed rather than on who the information is disclosed to?

Onward disclosure

We intend to review the onward disclosure provisions as part of these changes. The current rules allow for only one further onward disclosure in support of the purpose for which it was originally disclosed. In the example above, under the present court rules, a party may disclose a judgment or summary of a judgment to their MP in order that they may investigate a matter of policy or procedure. The MP may, in turn, disclose the information onward to the appropriate Minister for the same purpose of investigating a matter of policy or procedure. However, the Minister concerned cannot forward it to any other person, Minister or organisation for further investigation or information without permission of the court. Similar restrictions also apply to parties who wish to make a formal complaint, or disclose information to the police for the purpose of child protection.

Our proposals provide for unlimited onward disclosure, so that, in the example, a Minister who receives information from an MP would be able to forward on information to help pursue a question of policy or procedure raised by an MP on behalf of their constituent. The aim is to provide those involved in proceedings with the best support and advice available.

Q. Do you agree with allowing unlimited onward disclosure of information for the same purpose as the original disclosure?

Protect the identity of children beyond the end of proceedings

As we have stated throughout this consultation paper any move towards greater openness must be balanced against the welfare, privacy and well-being of children. In July 2006 the decision in *Clayton v Clayton*[8] clarified the position of at what point protection under s97(2) Children Act 1989 comes to an end. The President of the Family Division, Sir Mark Potter, decided that:

"The practical consequence which flows from this judgment is that henceforth it will be appropriate for every tribunal, when making what it believes to be a final order in proceedings under the 1989 Act, to consider whether or not there is an outstanding welfare issue which needs to be addressed by a continuing order for anonymity. This will, I think, be a useful discipline for parties, judges, and family practitioners alike. If there is no outstanding welfare issue, then it is likely that the penal consequences of s97of the 1989 Act will cease to have any effect, and the parties will be able to put into the public domain any matter relating to themselves and their children which they wish to publish, provided that the publication does not offend against s12 Administration of Justice Act 1960 [that is, disclose information about the details of the procedures which are held in private]."

Following *Clayton v Clayton*, the anonymity of the child is not protected unless there is an order to the contrary on welfare grounds. While it is right that the individual circumstances of each case should be considered at the end of each case in deciding whether details can be disclosed, we believe that the starting point at least should be in favour of protecting the child. We are therefore proposing that while the active process and requirement to consider the circumstances of each case should continue, the balance should be shifted so that the identity of the child continues to be protected after the conclusion of proceedings unless there is an order to the contrary. We believe that this change would be in the interests of the vast majority of children and where this is not the case, the court will have discretion to lift anonymity.

Q. Do you agree that the identity of the child should be protected beyond the conclusion of a case, unless there are welfare grounds to the contrary?

[8] [2006] EWCA Civ 878.

Attendance in the Courts

Who will be affected by these changes?

The changes will apply to cases involving children and which are heard in private. When we consulted on proposals to allow the media into family courts as of right, we also proposed that the anonymity of adults should be preserved in a similar way to that of children, even where no children were involved in the proceedings. This proposal was intended to ensure that allowing the media to attend family courts would not result in a loss of anonymity or privacy for adults.

However, we have decided not to allow the media in as of right to proceedings held in private. In addition, the decision about who may attend and what may be reported in these cases will be at the discretion of the court. For these reasons, we no longer believe that there is a need for any additional protection for adults over and above the protection that courts are already able to provide for cases which are heard in private. In cases involving only adults, for example in some ancillary relief cases, the media would still be able to apply to attend but it would be for the courts to approve the application and decide whether reporting restrictions are appropriate.

Making family courts consistent

Attendance

We consulted on proposals to allow the media to attend family courts as of right (with judicial discretion to exclude) and allow other people with an interest to apply to attend. While there was significant support for the latter to apply to attend (for example, family members), there was only limited support for allowing the media to attend as of right, and even then with complete judicial discretion to exclude.

We have decided against allowing the media into any tier of family court as of right. Instead, they and any others with an interest in proceedings could apply to attend hearings in family proceedings courts (ie: magistrates' courts), county courts and the High Court. We have also decided not to make any changes to the current attendance arrangements for elected representatives or Her Majesty's Inspectorate of Court Administration (HMICA) inspectors.

We are clear that the move to improving openness through better information rather than allowing the media to attend proceedings as of right is the right one. We intend to bring forward changes to current legislation so that the rules for attendance in the family proceedings courts (ie: magistrates' courts) will be consistent with those already in existence for county courts and the High Court. The change will mean that the media, and others with an interest, will be able to apply to attend proceedings and it will be up to the courts to decide on a case by case basis, depending on the particulars of the case.

Although this will reverse the current position for the media in relation to attending family proceedings courts (ie: magistrates' courts), this will be balanced by the provision of additional information about the family courts, including the publication of judgments or summaries in cases where there is public interest. Given that the media do not attend or report about proceedings in family proceedings courts on any significant scale, even though they are able to attend, the likely net effect of change will be that more, and not less, information will be put into the public domain than is currently the case.

Guidance on attendance

In their response to the consultation, the Family Justice Council proposed a statutory checklist to guide the exercise of judicial discretion in determining whether or not to admit the media, family members or any others who may have an interest in the proceedings (for example, researchers, policy officials, elected representatives, etc).

The checklist suggests that the court should have regard to the following:

- The welfare and interests of the child involved in proceedings
- The nature of the proceedings
- Any effect or likely effect on the conduct of the proceedings, particularly the willingness or ability of the parties, and/or witnesses, to provide the evidence
- The views of the parties, and of any other person whose views the court considers relevant
- The public interest in the administration of justice
- The range of powers available to the Court
- Any other circumstances which the court considers relevant

We propose to use this guidance as a starting point when looking towards the future implementation of these changes.

Applications to attend proceedings

By deciding to change arrangements about who may attend family proceedings, we will also need to look at the process of applying to attend. There are instances where parties may ask for another person to attend proceedings with them. This is usually a new partner or other family member, though there are others, such as Domestic Violence Support workers. In some cases this may also include members of the media. The court should have discretion to decide whether to approve each application on a case by case basis.

We intend that for courts, where there is already a system in place which applies to parties, the current arrangements should continue. However, we will need to consider how others with an interest (including the media) will be able to apply to attend, independently of the parties. We will want to talk to the judiciary, court staff, the media and others as part of developing such arrangements. As part of these changes, we may also need to consider access to court lists.

Adoption proceedings in family proceedings courts

We also propose to change the law about who may attend adoption proceedings. The current situation is that county courts and the High Court have discretion about who may be allowed in to adoption proceedings, which could include, for example, new siblings or other family members. The family proceedings courts (ie: magistrates' courts) have no such discretion and are prohibited from allowing anyone other than parties into court. We want magistrates to have the same discretion as other courts to allow (or refuse) others to attend on application if they feel it is appropriate. In public law cases where a placement order is made, a decision summary or full judgment should be published.

Making reporting arrangements consistent

As set out in Annex B to the *Confidence and confidentiality* consultation paper, there are various statutory provisions that have the effect of automatically prohibiting reporting in the media. For example, s97(2) Children Act 1989 imposes a prohibition on the publication to the public at large, or a section of the public, information which is intended or likely to identify a child as being involved in children's proceedings. The court has discretion to dispense with this prohibition if it is satisfied that the welfare of the child requires it. However, in the recent *Re B* judgment, Mr Justice Munby considered that restrictions need to be considered, not just in a child's interests but balanced against the ECHR rights of others.[9] He said:

> ***"In my judgment, section 97(4) cannot be construed in this restrictive way. In Clayton v Clayton [2006] 3 WLR 599, the Court of Appeal held that the effect of s3 of the Human Rights Act 1998 was to require s97 to be read in a Convention-compliant way, because s97 constitutes a specific restriction on the media's rights under Article 10. In the same way, s97(4) must likewise be construed in a Convention-compliant way, not limiting the occasions on which section 97(2) is dispensed with to those where the welfare of the child requires it but extending it to every occasion when proper compliance with the Convention would so require. In other words, the statutory phrase "if... the welfare of the child requires it" should be read as a non-exhaustive expression of the terms on which the discretion can be exercised, so that the power is exercisable not merely if the welfare of the child requires it but wherever it is required to give effect, as required by the Convention, to the rights of others."***

Other provisions give the court power to impose restrictions on reporting in the media. For example, s39(1) Children and Young Persons Act 1933 gives the court power, in any proceedings in which a child is concerned, to direct that no newspaper report of the proceedings shall reveal certain identifying information.

The High Court has the inherent power to grant an injunction imposing reporting restrictions on disclosure to third parties or the world at large, but the county court does not.

[9] [2006] EWHC 2733 (Earn)

We intend to rationalise the position so that the family proceedings courts (ie: magistrates' courts), county courts and the High Court have the same powers to impose reporting restrictions on the media about proceedings held in private relating to children.

Make legislation simpler

We wish to simplify the position as far as possible, so that the legislation on who may attend court hearings relating to children, and what may be reported about such proceedings, is readily accessible and easily understood. We will consider this as part of the legislative requirements needed to effect our proposed changes to current arrangements.

five: Conclusion

We want to make the family justice system more open so that the people involved and the wider public have a better understanding of the work of the courts, the difficult decisions they have to make and how they reach those decisions. This needs to be balanced against the needs and wishes of those involved in proceedings.

We have listened to what people told us, in particular the views of children and those organisations representing their interests. We would like to thank all those who have taken part in the extensive consultation process so far. The views of those who have taken part have been essential in identifying what we believe are real improvements to encourage openness in the family courts. The final package of proposals on which we are consulting will benefit hugely from the views of those working in the field of family justice, those who have been involved in family court proceedings and the wider public, and we encourage all those involved to continue to participate.

We have concluded that **information about courts**, not **attendance at court** is the key to openness. We want to have a family justice system that is more open, but continues to put the welfare of children at the heart of everything it does. We believe that this balance between on the one hand providing more information about proceedings at all levels to users and the public; and on the other, giving courts the discretion on who should be able to attend, is the right one.

These changes will challenge everyone involved in the family courts, particularly the judiciary. However, we know that there is considerable support at all levels for a more open, accessible and a better understood family justice system. We are convinced that together we can work towards a successful new approach to openness in family courts. A new approach which is in the best interests of children and the public.

Appendices contents

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Consultation

When we published our response to the *Confidence and confidentiality* consultation, we said that we wanted to reflect further before bringing forward our proposals for change. Some proposals received strong support while others were more mixed.

This paper sets out our decisions on the way forward for those proposals on which we have already consulted extensively. However, we recognise that we need to ask a further limited set of questions on a small number of new proposals which, we believe, are necessary to ensure we have a balanced package of measures.

This consultation is aimed at all court users, professionals, the general public and the media in England and Wales. It is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The Consultation Criteria have been followed.

During the development of these proposals we have worked and consulted with a range of key stakeholders. We will also be holding a number of events and meetings during the consultation period.

A Partial Regulatory Impact Assessment indicates that the judiciary and other court users are likely to be particularly affected. The proposals are not likely to lead to additional costs or savings for businesses, charities or the voluntary sector. Comments on the enclosed Partial Regulatory Impact Assessment are also welcome (see page 39).

Copies of the consultation paper are being widely distributed, including to:

- The senior judiciary, the Council of HM Circuit Judges, the Association of District Judges, the Family Justice Council, Law Society, Family Law Bar Association, Magistrates' Association, Justices' Clerks' Society, Resolution and the Association of Lawyers for Children
- Parliament, the Constitutional Affairs Committee (formerly "CASC"), Local Government Association, 11 Million (formerly "Office for the Children's Commissioner"), The Newspaper Society, Trade Unions for court staff
- NSPCC, Adoption UK, Women's Aid Federation of England, Families Need Fathers, Voice of the Child in Care, National Family Mediation, Family Mediators' Association, Childlaw UK, British Adoption Agencies Federation, NYAS
- CAFCASS (Children and Family Court Advisory and Support Service), CAFCASS Cymru, Legal Services Commission

This list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper. Details of how you can respond to this paper are on page 37.

The consultation criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Consultation co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact the Ministry of justice Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at: consultation@justice.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Laurence Fiddler
Consultation Co-ordinator
Ministry of Justice
5th Floor Selborne House
54 Victoria Street
London
SW1E 6QW

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **How to respond** section of this paper at page 37.

Questionnaire

We would welcome your thoughts on the proposals as laid out in this consultation paper. Unless otherwise requested, please read the following statements and tick the box that relates most strongly to your view. If you wish to expand on your answer, please continue on a separate sheet of paper.

1. **The current court rules on disclosure need to be amended to allow for wider disclosure of information in cases involving children and heard in private.**

Strongly agree ☐ Agree ☐ Unsure ☐ Disagree ☐ Strongly disagree ☐

2. **The court rules should be amended to concentrate on the purposes for which the information is disclosed rather than who the information is disclosed to.**

Strongly agree ☐ Agree ☐ Unsure ☐ Disagree ☐ Strongly disagree ☐

3. **The court rules should be amended to allow unlimited onward disclosure for the same purpose as the original disclosure.**

Strongly agree ☐ Agree ☐ Unsure ☐ Disagree ☐ Strongly disagree ☐

4. **Unless there are welfare grounds to the contrary, the identity of the child should be protected beyond the conclusion of a case.**

Strongly agree ☐ Agree ☐ Unsure ☐ Disagree ☐ Strongly disagree ☐

Thank you for participating in this consultation exercise

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (eg. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Please see note on confidentiality on page 37 .

How to respond

Please send your response by 1 October 2007 to:

Mr Misto Miah Chowdhury
Ministry of Justice
Family Justice Division
4th floor
Selborne House
54 Victoria Street
London
SW1E 6QW

Tel: 020 7210 2673
Fax: 020 7210 8681
Email: family.consultation@hmcourts-service.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address. It is also available on-line at http://www.justice.gov.uk

Publication of response

A paper summarising the responses to this consultation will be published within 12 weeks of the closing date of this consultation. The response paper will be available on-line at http://www.justice.gov.uk

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Partial Regulatory Impact Assessment

Title of proposal

1. *Confidence and confidentiality: Openness in family courts – a new approach*

Purpose and intended effect of measures

(i) Objective

2. The new approach to openness in family courts concentrates on getting the right balance between providing more and better information to the public and protecting the best interests of the child. In particular, we are working towards four guiding objectives:

   - To protect the welfare and best interests of the child
   - To promote a culture of openness in the family justice system
   - To encourage better scrutiny of the family justice system
   - To enable better understanding of the family courts by the general public and by families involved in proceedings.

(ii) Background

3. The *Confidence and confidentiality: Improving transparency and privacy in family courts* consultation paper was published on 11 July 2006 and put forward a number of proposals with the aim of improving public confidence in the family courts, and safeguarding the privacy of those involved in proceedings. We want to ensure public confidence in the family courts. Important court decisions are made every day directly affecting the lives of children and families. For children particularly, decisions to remove them from their families impact not only on their childhood, but can continue to have repercussions into adulthood. People need to know that those decisions are made on a sound basis.

4. The legislation governing attendance at and reporting of family proceedings is complicated and depends upon both the level of court and type of family proceedings.

5. Ministers' original decision to propose media attendance as of right was largely driven by their desire to improve scrutiny and ensure transparency of the decision-making process. We believe that the issue of the welfare of children involved in family cases should and must be at the heart of an approach to the openness of the family courts. So we need to establish and work by a key overriding principle informing any changes we propose: that children must come first.

6. In the light of this principle, we have reflected on the responses to our original proposal to allow the media into family courts as of right. In line with the overwhelming evidence from children and young people and the groups which support, protect and represent them, we now believe that the right course of action is not to proceed with this proposal. We do not believe that allowing the media into the family courts as of right would improve public confidence while at the same time safeguarding confidentiality. We do not believe that allowing the media in to family courts as of right strikes the right balance between confidence and confidentiality. We instead agree with the views of children and young people, and the groups which represent them, that allowing the media in to the family courts as of right would not make children's welfare and children's protection paramount. We do not believe that allowing the media in to the family courts as of right is consistent with the principle that children must come first.

7. In its simplest form, and because of the very private nature of the information concerned, **the future openness of family courts will focus not by the numbers of people going into the courts, but by the amount and quality of information coming out of the court**.

(iii) Rationale for Government intervention

8. Currently, the law applicable to each level of court is different and therefore changes should be made to harmonise rules in the various family courts. The aim is to streamline the rules to achieve a family justice system that is accessible, fair and efficient, and with rules that are simply expressed.

9. To improve public awareness and ensure confidence in the family justice system, the family courts need to operate more openly. Public scrutiny is an important part of this and will contribute to an increased public awareness of how the family courts operate. High profile cases such as *Re H (Children)* [2005] EWCA Civ 1325, have added to concern about the way family courts work and how decisions are reached, particularly when those decisions have such a profound impact on people's lives.

10. In 2005 the Constitutional Affairs Committee ("CASC") made recommendations about improving the openness of the family courts.

    They were:

    - The press and public should be allowed into the family courts under appropriate reporting restrictions, and subject to the judge's discretion to exclude the public
    - Anonymised judgments should normally be delivered in public unless the judge in question specifically chooses to make an order to the contrary
    - The press should continue to be restricted to publishing those matters which have been made public by the court

On 2 May 2006, there was a follow up session to CASC's Fourth Report of Session 2004-05 on *Family Justice: the operation of the family courts*. The Committee invited a panel of judges including Sir Mark Potter, President of the Family Division, Mr Justice Munby and District Judge (Magistrate's Court) Nicholas Crichton. As a result, a follow up report was published on 11 June 2006, which commented that the committee looked forward to the consultation paper which was published in July 2006.

Consultation

Within government

11. The proposals to improve the openness of family courts have been the subject of extensive consultation both within Government and with wider stakeholders. Throughout the previous consultation period we held a number of stakeholder events with different groups, including with children and young people, providing them with a platform where they could air any concerns and discuss their views. There has been wide discussion across Government departments during the development of this policy. We have discussed improving the openness of family courts with:

- Home Office
- Department for Education and Skills
- Department of Health
- Department for Work and Pensions
- Department for Trade and Industry
- Department for Culture Media and Sport
- Crown Prosecution Service
- Northern Ireland Court Service
- Children's Commissioner for Wales
- Legal Services Commission
- CAFCASS (Children and Family Court Advisory and Support Service)
- Welsh Assembly
- 11 Million (formerly, the Children's Commissioner for England)

Consultation events

12. A number of pre-consultation stakeholder meetings took place prior to the first consultation paper to help inform policy development. A number of events were held during the consultation for all stakeholders. This included specific opportunities for children and young people to contribute their viewsd on the proposals. In all, over 200 young people participated. Other stakeholders included all levels of the judiciary, members of the legal profession, members of the medical profession, the voluntary sector, including those working with children and young people.

13. During the development of the new set of proposals, we have continued to engage with key stakeholders. We will be arranging a series of events and meetings during the consultation period.

Family Justice Council

14. The Family Justice Council established a working group to feed in their views and suggestions. DCA also worked with the Family Justice Council Young People's group.

Proposals – What we are going to do

- Provide **better information** about the workings of the family justice system for families involved in proceedings; adults who were involved in family proceedings as children; and the public at large.
- We will do this by **piloting** the provision of decision summaries or transcripts of judgments in particular cases.
- Develop a **website** to provide a central hub for information about the family courts, along with anonymised judgments and/or decision summaries
- We will make **attendance** and **reporting** of family courts consistent across the family proceedings courts (ie: magistrates' courts), county courts and the High Court

We are seeking views on some **further proposals**:

- Changing the rules to provide for **wider disclosure** of information for parties involved in children proceedings which is are held in private to focus on the purpose for which the information is disclosed, and the onward disclosure of that information.
- **Protecting** the identity of children beyond the end of Children Act proceedings
- **Simplify the legislation** as far as possible, so that information on who may attend court hearings relating to children, and what may be reported about such proceedings is readily accessible and is easily understood

15. The following paragraphs go into detail on what we are going to do and how much we estimate it will cost to implement.

Better information about the workings of the family justice system

16. It was clear from responses to the consultation paper, and from discussions with stakeholder groups, that more information needs to be released on the workings of the family courts system. People felt that they did not know how decisions were reached or what to expect in the court. The family court system was seen to be closed and secretive, and more general information would refute many of these impressions. We will make information available online, some of which will also be available in hard copy in courts across the country. This could include:

    - General information about the family courts including information on the different tiers of family court and what happens in each
    - Examples of 'typical' cases for a variety of private and public law hearings, how they progress, and on what basis the judge makes a ruling (see Annex B)
    - Information on what a person who is going to be involved in family proceedings should expect, and what they can do to prepare, together with contact information on other sources of support or advice
    - Statistical data on judicial decisions in certain types of hearing and why
    - Online anonymous summaries or full transcripts of judgments where cases are matter of public interest
    - Support for litigants in person, including links to further advice

Better information for people involved in children's proceedings. In some cases, the document will be made public in an anonymised format for closer scrutiny

18. A clear message from the responses to the earlier consultation paper was the need for parties to a case to better understand the reasons behind a judicial decision. Arguably, there is very little understanding amongst the general public about the way family courts work. Unless people have been directly involved in proceedings, the decision making process is, at best, confusing.

19. We will **pilot** production of decision summaries or transcripts in certain cases.

Providing decision summaries or transcripts in certain cases involving children

20. In certain cases involving children the court will have discretion to produce either a decision summary or a transcript of the judgment. This document would be given to the people involved in the case, retained for the child who was the subject of the hearing, and made available online for public scrutiny. The cases where this will be **necessary** are:

    - Final orders heard in family proceedings courts (ie: magistrates' courts), county courts (Circuit or District Judges) and the High Court where:

- Either parent is given leave to permanently remove a child from the UK
- Any final order is given which would lead to no contact between a child and either or both parents
- Any final order in Children Act public law cases, including where contact continues
- The final order has depended on contested issues on matters of religion, culture or ethnicity
- There was significant differences of opinion between medical or other expert witnesses
- Where there are significant human rights issues

21. The court will be asked to consider whether to produce decision summaries or transcripts **in other cases**, depending on whether they were deemed sufficiently significant.

22. Many of the above categories are not currently recorded. Therefore the pilot will quantify the likely volume of cases where the production of a decision summary or transcript will be necessary. For the purposes of this partial Regulatory Impact Assessment, we are providing figures for only the number of public law orders in county courts and the High Court in 2005. The pilot will reveal the true number of cases where additional information will be required. In addition, it is impossible to tell the length of a transcript, so we are providing costs for example three different lengths – 20 pages, 50 pages and 80 pages. The pilot will identify the average length.

23. The MoJ contract for the provision of typed up judgments was let on 1 February 2007. It allows the MoJ/HMCS and other authorised bodies such as parties to the case and solicitors to approach any of 19 authorised suppliers for transcription services. Each of these suppliers offers slightly different rates so for the purposes of calculations in this paper an average rate is used, which is £1.16 per folio (72 words). If we calculate that there are three folios per page, each page would cost £3.48.

24. The contract envisages the information being provided for transcription by tape or by disk (digital recording). For the purposes of this paper no consideration has been given to any potential cost benefits of using digital audio recording (from disk), as the current work ongoing elsewhere in MoJ is limited to the Criminal Court jurisdictions. No business case or funding has been allocated for the family courts. This is something which could be considered in the future.

25. The table below shows the costs involved to transcribe a decision summary or transcript of the judgment, which would be approved by the judge and given to the people involved in proceedings. The figures are taken from Judicial Statistics 2005.

Number of public law orders per year	Magnetic/Reel to Reel		From Disk	
14,554	Evidence	Judgment	Evidence	Judgment
Rate per folio (72 words)	**£1.05**	**£1.16**	**£ 0.57**	**£0.61**
Number of pages (3 folios per page)				
1	**£3.15**	**£3.48**	**£1.71**	**£1.83**
2	**£6.30**	**£6.96**	**£3.42**	**£3.66**
20	**£63.00**	**£69.60**	**£34.20**	**£36.60**
50	**£157.50**	**£174.00**	**£85.50**	**£91.50**
80	**£252.00**	**£278.00**	**£136.80**	**£146.40**

A two-page judgment costs £6.96 to transcribe. Producing a **two-page decision summary** in all public law cases would cost:
£6.96 x 14,554 = £101,296

A 20-page judgment costs £69.60 to transcribe. Producing a **20-page judgment** in all public law cases would cost:
£69.60 x 14,554 = £1,012,958.

A 50-page judgment costs £174.00 to transcribe. Producing a **50-page judgment** in all public law cases would cost:
£174.00 x 14,554 = £ 2,532,396.

A 80-page judgment costs £278.40 to transcribe. Producing an **80-page judgment** in all public law cases would cost:
£278.40 x 14,554 = £4,051,834.

26. No costings have been calculated for the family proceedings courts (ie: magistrates' courts) as written reasons are already produced as a matter of general practice, and given to parties.

27. The decision summary would be retained for adults who were involved in family proceedings as children so they can receive information about the decisions made about them.

28. We anticipate that there will be few additional storage costs involved in retaining the document for the child when they reach maturity as adoption files and the local authority files are currently retained until the child's 75th birthday. As part of the pilot, we will discuss the possibility of adding the transcript or decision summary to the file. It is possible that HMCS will be responsible for any additional costs incurred for storage, retrieval and destroying the additional documents.

Legal aid impact of producing transcripts and summaries of judgments

29. We have considered the possible legal aid implications that may arise as a result of the scenarios listed below. However we concluded that each of the scenarios listed below currently exists, so the effect on legal aid would be negligible. The scenarios are:

    - Where an adult who has gone through public law care proceedings as a child may ask for legal advice from a solicitor on where to find information
    - Where judgments cannot be revealed for any reason (eg: where there are mental health issues), an adult may ask for legal aid in lodging an appeal for information
    - Where an adult has received information regarding the public law care proceedings experienced as a child and believes there is a case for appeal to the local authority or court, based on proceedings or the result
    - Where one of the parties (who is legally aided) requests a transcript, the Legal Services Commission (LSC) pays if they believe there are sufficient grounds for appeal
    - Where there may be an appeal regarding the judicial decision, either to refuse an application for others to attend at the start of a case, or to refuse to make documents available at the end of a case, or both

Judicial time for reading and correcting the document

30. We have estimated below the additional judicial time and cost if a judge took 30 minutes to read through and approve the transcript of the full judgment, and 15 minutes to read through and approve the two-page decision summary that had been transcribed.

31. The costings below are underpinned by the following assumptions:

    - Judges work, on average, an 8 hour day (including both sitting time and reading time)
    - Judges work 200 days a year (assumes 240 network days and 40 days annual leave per year)
    - District and Circuit judges will produce 50% of county court summaries each
    - It would take 15 minutes for a judge to read and proof a two-page decision summary, and it would take 30 minutes for a judge to read and proof the full transcript of the judgment

32. Due to the difficulty in working out the most accurate costing for production of the summaries and transcripts and the judicial time involved, we are proposing that we use the pilot to gauge an accurate true projection of resources and monetary costs.

If 30 minutes per transcript				
	Number of orders*	**Time per order**	**Total Time (mins)**	**Total Cost if 30 mins**
County court	13,961	30	418,830 (6,980 hours)	£678,889
High Court	593	30	17,790 (296 hours)	£43,095
			Total Cost	**£720,000**
If 15 minutes per summary				
	Number of orders	**Time per order**	**Total Time**	**Total Cost if 15 mins**
County Court	13,961	15	209,415 (3,490 hours)	£339,445
High Court	593	15	8,895 (148 hours)	£21,547
			Total Cost	**£360,000**

* Figures from Judicial Statistics 2005

We will make the laws on attendance and reporting consistent across the family proceedings courts (ie: magistrates' courts), county courts and the High Court.

33. We consulted on proposals to allow the media to attend family courts as of right. (This will mean that the media, and others with an interest, will be with judicial discretion to exclude) and allow other people with an interest to apply to attend. While there was significant support to allow others with an interest to apply to attend (for example, family members), there was only limited support for allowing the media to attend as of right, and even then with the proviso that there would be complete judicial discretion to exclude. There were also very clear views that whatever changes are made, they should apply consistently across family proceedings courts, county courts and the High Court.

34. We therefore intend to bring forward changes to current legislation so that the rules for attendance in the family proceedings courts (ie: magistrates' courts) will be consistent with those already in existence for county courts and the High Court. This will mean that the media and others with an interest will be able to apply to attend proceedings and it will be up to the courts to decide on a case by case basis. Although this will reverse the current position for the media in relation to attending the family proceedings courts, it will be balanced by the provision of additional information about the family courts.

Adoption

35. We will also change the law about who may attend adoption proceedings. The current situation is that the High Court and county courts have discretion about who may be allowed into adoption proceedings, and this could include, for example new siblings or other family members. The family proceedings courts (ie: magistrates' courts) have no such discretion and are prohibited from allowing anyone other than the parties into court. We want magistrates to have the same discretion as other courts to allow (or refuse) others to attend on application if they feel it is appropriate.

Cost to Government of others applying to attend family courts

36. These will fall to the Ministry of Justice and HMCS.

37. For MoJ and HMCS, the costs would lie in the changes by extending the attendance by others with an interest in proceedings, and particularly the cost of court time in additional substantive hearings and potentially lengthier direction hearings. Some of the identified proposals are currently unfunded. The cost of directions hearings and legal aid would need to be factored into future spending plans; in this respect, taking forward any proposals will only be undertaken by the Ministry of Justice and HMCS as and when priorities and resources allow.

Court Time

38. Extra court time may be needed to consider applications. For example, for attendance of the press and others with an interest in the proceedings; and whether reporting restrictions should be imposed. Research previously undertaken by the Ministry of Justice has concluded that an average direction hearing takes an hour (this was checked with court managers who felt the hour estimate was reasonable). Therefore with the 1% of the estimated 236,448 cases having a further hearing (for objections) there will be around 2,364 additional hours spent on hearings in a year.

Legal Aid Impact of changes to attendance

39. We simply do not know how often objections to the press or others attending may be raised, though the changes will not be significantly different from the current arrangements. We have therefore costed out the result of objection rates between only 1% and 25% of family proceedings, based on 236,448 applications to all tiers of court, excluding divorce in 2005. Of course, this might turn out to be an underestimate so there is a risk that legal aid costs in particular could be significantly higher.

Objection rate (%)	1%	2%	5%	10%	15%	20%	25%
No. cases	2,364	4,729	11,822	23,645	35,467	47,290	59,112
Cost to HMCS	191,484	£383,049	£957,582	£1.9m	£2.87m	£3.83m	£4.79m
Cost to LSC	£295,500	£591,125	£1,477,750	£2.96m	£4.43m	£5.91m	£7.39m

40. Where court time may be required (see above) and the party is publicly funded, there will be extra legal aid costs. These costs are estimates only. We expect that the impact is likely to be at the lower end of the range. This is something we intend to test before implementation.

41. The cost to MoJ (Legal Aid) and HMCS is underpinned by these assumptions:

- Based on data from HMCS and LSC, we estimate the legal aid costs of a directions hearing at approximately £125 and a cost to HMCS of £81 (accommodation, judiciary, administration etc)
- We have no comparison for how frequently objections are likely to be raised. We do know that the press rarely attend family proceedings courts (ie: magistrate's courts) and there are very few objections to the press and public attending when they do so. So after some initial interest, as was evident in Australia, it seems probable that objections will not be raised very often
- Costings were formulated using application figures from Judicial Statistics 2005 and cover family proceedings courts, county courts and the High Court and all types of proceedings
- Applications rather than orders have been used to formulate the costings as this data is collected in a comparable format across all tiers of court. When looking at contested hearings in county courts, it is necessary to use order records from the family court service database (FamilyMan)
- On the costs referred to above, for illustration, if 1% of family cases did result in objections, we estimate that this would result in an additional cost to legal aid of £295,500 and a cost to HMCS of £191,484

42. When we consulted on the proposal to allow the media into family courts as of right, we also proposed that the anonymity of adults should be preserved in a similar way to that of children, even where no children were involved in the proceedings. This proposal was intended to ensure that widening attendance by the media to family courts would not result in a loss of anonymity or privacy for adults. **However, we have already rejected the proposal to allow the media in as of right – though they will be able to apply to attend any court. We have also decided that discretion about who may attend and what may be reported will also be a decision for the court. For these reasons, we no longer believe that there is a need for any additional protection for adults over and above the protection that the court will be able to decide upon a cases by case basis.**

Options – Other new changes we are proposing

43. In addition to the measures we have already consulted on, we are proposing some further changes, which will, together, provide a package of measures, which will improve the openness of family courts.

44. The further measures we are consulting and seeking views on are:

Option 1: Do nothing

Option 2: Wider disclosure of information by parties

Option 3: Protect identity of children beyond the end of proceedings

Option 4: Making things simple

Option 1 – Do nothing

45. The family courts will continue to be criticised for lacking openness and operating in secret.

Option 2 – Wider disclosure of information by parties

46. In 2005, we amended rule 10.20 of the Family Proceedings Rules 1991 which deals with disclosure of information in cases involving children which are heard in private. Having been in operation for almost two years, it is now clear that in some cases the rules remain unnecessarily restrictive and complex. By making some changes to the existing rules, we can make it easier for people to discuss their case and get timely and appropriate advice and support. The general principle being that those involved in proceedings should be able to discuss and share information about their case more widely.

47. We are proposing to amend court rules so that disclosure will be permitted primarily for the purpose for which the information is disclosed rather than what information can be disclosed, or whom it can be disclosed to. We propose to focus on carefully defined purposes, while removing some of the existing restrictions on what information can be disclosed, and to whom. We are not proposing to make changes to the current restrictions, which prevent disclosure through publication of information to the public at large or a section of the public.

48. We intend to review onward disclosure provisions as part of these changes. The current rules allow for only one further onward disclosure in support of the purpose for which it was originally disclosed. We are proposing the rules be amended so that there is unlimited onward disclosure, so long as the purpose remains the same.

Option 3 – Protect the identity of children after the conclusion of proceedings

49. Any move towards greater openness must be balanced against the welfare and well-being of children. In July 2006 the decision in *Clayton v Clayton* [2006] EWCA Civ 878 clarified the position of at what point protection under s97(2) of the Children Act 1989 comes to an end. Following *Clayton v Clayton*, the anonymity of the child is not protected unless there is an order to the contrary on welfare grounds.

50. While it is right that the individual circumstances of each case should be considered at the end of each cases in deciding whether details can be disclosed, we believe that the starting point at least should be in favour of protecting the child. We are therefore proposing that while the active process and requirement to consider the circumstances of each case should continue, the balance should be shifted so that the identity of the child continues to be protected after the conclusion of proceedings unless there is an order to the contrary.

Option 4 – Making things simple

51. We wish to simplify the position as far as possible, so that the legislation on who may attend court hearings relating to children, and what may be reported about such proceedings, is readily accessible and is easily understood. We will consider this as part of the legislative requirements needed to effect our proposed change to current arrangements.

Cost and Benefits

Benefits

Option 1 – Do nothing

52. There would be no additional economic or social benefit arising from this option.

Option 2 – Wider disclosure of information by parties

Social benefit

53. Having been in operation for almost two years, it is now clear that in some case the rules remain unnecessarily restrictive and complex. By making some changes to the existing rules, we can make it easier for people involved in family proceedings to discuss their case and get timely and appropriate advice and support.

Economic benefit

54. None.

Option 3 – Protect the identity of children at the end of proceedings

Social benefit

55. Any move towards greater openness must be balanced against the welfare and well-being of children. We have always believed that openness should not be at the expense of the privacy or well-being of the children involved. We believe that this change would be in the interest of the vast majority of children and where this is not the case, the court will have discretion to lift anonymity.

Economic benefit

56. None.

Option 4 – Making legislation simple

Social benefit

57. Simplifying laws relating to attendance – pulling together all – the different legislation will benefit the public, lawyers, judges and others with an interest in the law.

Sectors and groups affected -The proposed changes will affect:

- **Judiciary** – Changes will have an impact on the judiciary, who will need to consider each case to decide whether reporting restrictions should apply. Additional judicial time may be needed for directions hearings and within substantive hearings where parties can apply for proceedings to be in private. There is a risk that improved openness would increase delay in the family justice system. Extra judicial time would be required to read and approve a two-page decision summary, or full transcript of a judgment once the transcribers have completed typing it up. Anonymisation is currently done by the transcribers free of charge as part of their service level agreement with the Ministry of Justice.
- **Press** – If the press are allowed to attend family proceedings on application to the court, it will be important to ensure that they fully understand the reporting restrictions and the consequences of breaching them.
- **Children and young people** – Some of our proposals will offer more protection and will safeguard the privacy of any children involved in family proceedings.
- **Anyone involved in family proceedings** – All of the proposals will affect members of the public who are involved or will be involved in family proceedings.

Equity and fairness

58. The proposals included in the consultation paper are intended to make the family courts more transparent. The revised proposals will not have any disproportionate effect on any one business sector or group of individual.

Compensatory simplification measures

59. If legislation is introduced it will provide simple and consistent arrangements for attendance at and reporting of family proceedings, covering family proceedings courts (ie: magistrates' courts), county courts and the High Court. This will replace the current range of different and complex legislation which deals with attendance and reporting restrictions.

Consultation with small business: the Small Firm's Impact Test

60. The proposals will impact on private individuals involved in family cases and Court Service staff. There are no impacts arising from these proposals which will affect the private sector or small firms disproportionately.

Competition assessment

61. The current transcription contract for transcribing judgments is managed by the Civil Procedures Branch of the Ministry of Justice. Currently there are 19 authorised transcribers on a panel who the courts and other authorised bodies such as parties to a case or the solicitors can approach to request a transcript of the judgment transcribed. It is envisaged that the possible increase in judgments being transcribed will have little or no effect on competition in the typing pool sector. The current guidance on using the transcribers suggests that all the companies on the list should be used. The contractors will take any necessary action in terms of ensuring adequate resources are in place to deal with any work they may receive under this contract.

Enforcement and sanctions

62. We wish to simplify the position as far as possible, so that the legislation on who may attend court hearings relating to children, and what may be reported about such proceedings, is readily accessible and is easily understood.

63. These proposals would take some time to come into effect since they will require a change in the law. This will be when parliamentary time allows.

Summary and recommendation

64. No specific recommendations on the new identified options have been made at this stage. This partial RIA will be subject to further development, taking account of stakeholders' views on these questions and further Government consideration of the issues following the consultation.

Implementation and delivery plan

Post-implementation review

Summary costs and benefits table

Option	Total benefit per annum: economic, environmental, social	Total cost per annum: • economic, environmental, social • policy and administrative
1		
2		
3		
4		

The sections above will be completed after consultation and included in the full RIA.

Declaration and publication

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs.

Signed .....

Rt Hon Lord Falconer
Lord Chancellor and Secretary of State for Justice

Date

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Partial RIA Appendix – Number of orders in county courts and the High Court, 2005

Number of county court orders made in 2005

Public law

	Orders Made	Contested	%
Care	4,371	3,987	91%
Contact with a child in care	186	164	88%
Discharge of care	478	381	80%
Refusal of contact	1,012	983	97%
Emergency protection order	133	133	100%
Secure accommodation	144	137	95%
Supervision	1,636	1,342	82%
Supervision order – discharge	–		
Adoption	2,692		
Section 8:			
Residence	1,691	1,241	73%
Contact	1,328	968	73%
Prohibited Steps	166	153	92%
Specific Issue	124	108	87%
Total	13,961	9,597	

Private law

	Orders Made	Contested	%
Parental Responsibility	6,194	3,398	55%
Section 8:			
Residence	22,575	13,910	62%
Contact	54,794	31,342	57%
Prohibited steps	7,929	7,068	89%
Total	91,492	55,718	
Total county court orders	105,453	65,315	

Notes:

1. Numbers of orders are from Judicial Statistics 2005
2. The proportion of orders contested is from FamilyMan which is then applied to the number of orders made to estimate the number of orders that were contested.

Number of High Court orders made in 2005

Public law	539
Private law	832
Adoption	54
Total	**1,425**

Total orders made in county courts and the High Court in 2005 – **106,878**

Annex A – Openness and transparency in family courts: Messages from other jurisdictions

Background

- Some of the arguments for media or public access to family courts in countries such as Australia, New Zealand and Canada are similar to those voiced in England and Wales; however there are important differences
- These differences are rooted in specific cultural and political conditions and systems of government and law. Some conditions – notably the impact of colonialism on legal and welfare practices with indigenous families – remain central to debates about 'law' and media and public access to proceedings in these other countries

Legislation and practice

- Contrary to 'received wisdom', all courts in these jurisdictions are not open to the media/public. For example, differences exist between courts in state/territories dealing with child protection issues, and those (Federal) Family Courts dealing with other family law matters
- Moreover, despite a history of media access to family hearings, as in Australia (and recently, New Zealand), issues are far from resolved
- Substantial tensions remain regarding the willingness of the media to attend hearings given reporting restrictions that protect the privacy of the individuals involved. In practice, the press do not generally attend courts -and allegations about unfairness, gender bias and 'secrecy' continue

Audiences for transparency and methods of accountability

- These jurisdictions developed a considerable infrastructure to support the work of media in courts but some have also moved beyond reliance on the press to explain the work of family courts. To improve transparency both for those involved in cases and for wider communities, some jurisdictions have invested resources in an extensive range of direct services
- For litigants, there are on-line resources (e.g. guides to law, court structures, case preparation and progression, how to complain about issues etc, all in simplified language). For wider communities there are extensive educational packages and programmes (e.g. 'court open days' enabling people to meet family judges) plus outreach work with rural communities, indigenous and minority ethnic groups

Audiences for transparency and methods of accountability

- With regard to written reasons/judgments for litigants, practices vary. Courts dealing with family law matters generally provide parties with written reasons/judgments. There appears to be more variation in practices in child protection courts, some provide written decisions, others restrict these to contested final hearings
- While jurisdictions differ in coverage, anonymised judgments are increasingly available online – although not for all cases and at every court level. These are seen as generally offering people a fuller and more accurate picture of cases and reasons for decisions

Research evidence

- With the exception of New Zealand there seems to be no independent research in this area and specifically no research on the views of parents, children and young people involved in cases and whether, for example, they are or would wish to be consulted about media/public presence in court
- Overall the review indicates the relationship between notions of transparency and trust is more complex than generally assumed
- There is a hierarchy of audiences for whom 'transparency' is important; parents and children and young people involved in cases are arguably a priority

Dr Julia Brophy, University of Oxford
Funded by the Nuffield Foundation

Annex B – Typical cases to enable public understanding

We believe that in the interests of those members of the public who are about to go into a family court case, it would be beneficial to give them a real life idea of what to expect. There would therefore be anonymous examples from the following sorts of cases:

(a) Matrimonial – divorce, nullity of marriage or separation

(b) Legitimacy

(c) Contact and residence cases

- Care cases – gives the local authority parental responsibility but does not remove parental responsibility from the parents. The local authority can then make decisions which are necessary to safeguard and promote the child's welfare
- Refusal of contact cases
- Contact with a child in care
- Emergency Protection Orders (An emergency protection order is made when a child is in immediate danger and may have to be taken away from home quickly or kept in a safe place)
- Appointment of Guardians
- Supervision orders – imposes upon the supervisor (usually a local authority social worker) a duty to advise and assist the supervised child
- Parental Responsibility Order – giving a parent all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property

(d) Adoption

(e) Applications for consent to the marriage of a minor

(f) Declarations as to status (including marital status)

(g) Declarations and consents (including status) relating to civil partnership

(h) Family homes and domestic violence applications

(i) International parental child abduction applications

(j) Applications for consent to the formation of a civil partnership by a minor

Annex C – Amendments to Family Proceedings Rules 1991 on communication of information relating to proceedings

STATUTORY INSTRUMENTS

2005 No. 1976 (L.18)

FAMILY PROCEEDINGS, ENGLAND AND WALES

SUPREME COURT OF ENGLAND AND WALES

COUNTY COURTS, ENGLAND AND WALES

The Family Proceedings (Amendment No 4) Rules 2005

Made - - - -	*18th July 2005*
Laid before Parliament	*19th July 2005*
Coming into force - -	*31st October 2005*

We, the authority having power under section 40(1) and (4)(aa) of the Matrimonial and Family Proceedings Act 1984 ([1]) to make rules of court for the purposes of family proceedings in the High Court and county courts, in the exercise of the powers conferred by section 40 of that Act, make the following Rules:

Citation and commencement

1. These rules may be cited as the Family Proceedings (Amendment No 4) Rules 2005 and shall come into force on 31st October 2005.

Amendments to the Family Proceedings Rules 1991

2. The Family Proceedings Rules 1991([2]) shall be amended in accordance with the provisions of these rules.

3. In the Arrangement of Rules—

(a) omit the entry for rule 4.23;

(b) after the entry for rule 10.20 insert—

([1]) 1984 c.42; section 40(1) was amended by the Courts and Legal Services Act 1990 (c.41) and section 40(4) was amended by the Civil Procedure Act 1997 (c. 12), the Children Act 2004 (c. 31) and the Civil Partnership Act 2004 (c. 33).

([2]) S.I. 1991/1247, amended by S.I. 1997/1056, S.I. 2000/774, S.I. 2001/821 and S.I. 2005/559; there are other amending instruments but none is relevant.

"10.20A

Communication of information relating to proceedings".

4. Omit rule 4.23.

5. In rule 10.20(3) for "and 3.16(10)" substitute ", 3.16(10) and 10.20A".

6. After rule 10.20 insert—

"Communication of information relating to proceedings

10.20A—(1) This rule applies to proceedings held in private to which these Rules apply where the proceedings—

(a) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;

(b) are brought under the Act of 1989; or

(c) otherwise relate wholly or mainly to the maintenance or upbringing of a minor.

(2) For the purposes of the law relating to contempt of court, information relating to the proceedings (whether or not contained in a document filed with the court) may be communicated—

(a) where the court gives permission;

(b) subject to any direction of the court, in accordance with paragraphs (3) or (4) of this rule; or

(c) where the communication is to—

(i) a party,

(ii) the legal representative of a party,

(iii) a professional legal adviser,

(iv) an officer of the service or a Welsh family proceedings officer,

(v) the welfare officer,

(vi) the Legal Services Commission,

(vii) an expert whose instruction by a party has been authorised by the court, or

(viii) a professional acting in furtherance of the protection of children.

(3) A person specified in the first column of the following table may communicate to a person listed in the second column such information as is specified in the third column for the purpose or purposes specified in the fourth column.

Communication of information without permission of the court

Communicated by	To	Information	Purpose
A party	A lay adviser or a McKenzie Friend	Any information relating to the proceedings	To enable the party to obtain advice or assistance in relation to the proceedings.
A party	The party's spouse, cohabitant or close family member		For the purpose of confidential discussions enabling the party to receive support from his spouse, cohabitant or close family member.
A party	A health care professional or a person or body providing counselling services for children or families		To enable the party or any child of the party to obtain health care or counselling.
A party or any person lawfully in receipt of information	The Children's Commissioner or the Children's Commissioner for Wales		To refer an issue affecting the interests of children to the Children's Commissioner or the Children's Commissioner for Wales.
A party or a legal representative	A mediator		For the purpose of mediation in relation to the proceedings.
A party, any person lawfully in receipt of information or a proper officer	A person or body conducting an approved research project		For the purpose of an approved research project.
A party, a legal representative or a professional legal adviser	A person or body responsible for investigating or determining complaints in relation to legal representatives or professional legal advisers		For the purposes of making a complaint or the investigation or determination of a complaint in relation to a legal representative or a professional legal adviser.
A legal representative or a professional legal adviser	A person or body assessing quality assurance systems		To enable the legal representative or professional legal adviser to obtain a quality assurance assessment.

Communicated by	To	Information	Purpose
A legal representative or a professional legal adviser	An accreditation body	Any information relating to the proceedings providing that it does not, or is not likely to, identify any person involved in the proceedings	To enable the legal representative or professional legal adviser to obtain accreditation.
A party	An elected representative or peer	The text or summary of the whole or part of a judgment given in the proceedings	To enable the elected representative or peer to give advice, investigate any complaint or raise any question of policy or procedure.
A party	The General Medical Council		For the purpose of making a complaint to the General Medical Council.
A party	A police officer		For the purpose of a criminal investigation.
A party or any person lawfully in receipt of information	A member of the Crown Prosecution Service		To enable the Crown Prosecution Service to discharge its functions under any enactment.

(4) A person in the second column of the table in paragraph (3) may only communicate information relating to the proceedings received from a person in the first column for the purpose or purposes—

(a) for which he received that information, or

(b) of professional development or training, providing that any communication does not, or is not likely to, identify any person involved in the proceedings without that person's consent.

(5) In this rule—

"accreditation body" means—

(a) The Law Society,

(b) Resolution, or

(c) The Legal Services Commission;

"approved research project" means a project of research—

(a) approved in writing by a Secretary of State or the President of the Family Division, or

(b) conducted under section 83 of the Act of 1989 or section 13 of the Criminal Justice and Court Services Act 2000([3]);

[3] 2000 c.43.

"body assessing quality assurance systems" includes—

(a) The Law Society,

(b) The Legal Services Commission, or

(c) The General Council of the Bar;

"body or person responsible for investigating or determining complaints in relation to legal representatives or professional legal advisers" means—

(a) The Law Society,

(b) The General Council of the Bar,

(c) The Institute of Legal Executives, or

(d) The Legal Services Ombudsman;

"cohabitant" means two persons who although not married to each other, are living together as husband and wife, or (if of the same sex) in an equivalent relationship;

"criminal investigation" means an investigation conducted by police officers with a view to it being ascertained—

(a) whether a person should be charged with an offence, or

(b) whether a person charged with an offence is guilty of it;

"elected representative" means—

(a) a member of the House of Commons,

(b) a member of the National Assembly for Wales, or

(c) a member of the European Parliament elected in England and Wales;

"health care professional" means—

(a) a registered medical practitioner,

(b) a registered nurse or midwife,

(c) a clinical psychologist, or

(d) a child psychotherapist;

"lay adviser" means a non-professional person who gives lay advice on behalf of an organisation in the lay advice sector;

"legal representative" means a barrister or a solicitor, solicitor's employee or other authorised litigator (as defined in the Courts and Legal Services Act 1990([4])) who has been instructed to act for a party in relation to the proceedings;

"McKenzie Friend" means any person permitted by the court to sit beside an unrepresented litigant in court to assist that litigant by prompting, taking notes and giving him advice;

4 1990 c.41

"mediator" means a family mediator who is—

(a) undertaking, or has successfully completed, a family mediation training course approved by the United Kingdom College of Family Mediators, or

(b) a member of the Law Society's Family Mediation Panel;

"peer" means a member of the House of Lords as defined by the House of Lords Act 1999([5]);

"professional acting in furtherance of the protection of children" includes—

(a) an officer of a local authority exercising child protection functions,

(b) a police officer who is—

(i) exercising powers under section 46 of the Act of 1989, or

(ii) serving in a child protection unit or a paedophile unit of a police force;

(c) any professional person attending a child protection conference or review in relation to a child who is the subject of the proceedings to which the information relates, or

(d) an officer of the National Society for the Prevention of Cruelty to Children;

"professional legal adviser" means a barrister or a solicitor, solicitor's employee or other authorised litigator (as defined in the Courts and Legal Services Act 1990) who is providing advice to a party but is not instructed to represent that party in the proceedings;

"welfare officer" means a person who has been asked to prepare a report under section 7(1)(b) of the Act of 1989.î

7. In rule 10.21A for "nothing in rules 4.23 (confidentiality of documents), 10.20 (inspection etc of documents in court)" substitute "nothing in rules 10.20 (inspection etc of documents in court), 10.20A (communication of information relating to proceedings)".

Sir Mark Potter, P
Mr Justice Charles
David Salter
Philip Waller
Duncan Adam
Angela Finnerty
Bruce Edgington
Charles Hyde
Falconer of Thoroton, C

18th July 2005

[5] 1999 c.34.

EXPLANATORY NOTE

(This note is not part of the Rules)

These Rules amend the Family Proceedings Rules 1991 ("FPR") and deal with the communication of information relating to children cases.

These Rules follow on from the amendments made by section 62 of the Children Act 2004 (2004 c.31) and in particular the amendment made by section 62 to section 12(4) of the Administration of Justice Act 1960 (1960 c.65) (publication of information relating to proceedings in private). Section 12(4) provides that nothing in section 12 of the Administration of Justice Act 1960 shall imply that any publication is punishable as contempt of court where in particular the publication is not so punishable by reason of it being authorised by rules of court.

Rule 6 of these Rules introduces a new rule (rule 10.20A) into Part X – Procedure (General) – of the FPR entitled, "Communication of information relating to proceedings".

Paragraph (1) of rule 10.20A sets out the types of family proceedings held in private to which the new rule will apply. Broadly, these are proceedings concerning the welfare and upbringing of children.

Paragraph (2) of rule 10.20A sets out 3 circumstances in which it is permissible, for the purposes of the law of contempt, to communicate information. These are (1) when the court gives permission; (2) in the circumstances provided for in the table in paragraph (3) and the onward disclosure rule in paragraph (4); and (3) when the communication is made to specified and listed people. Disclosure in accordance with the table and paragraph (4) may be modified or restricted in any way by a direction of the court under paragraph (2)(b).

Paragraph (4) of rule 10.20A provides that a recipient of information pursuant to the table in paragraph (3) may only communicate that information for the purpose or purposes for which he received that information (set out in the table) or for the purpose of professional development or training. In the latter case, however, it is a requirement that the communication should not identify, or be likely to identify, any person involved in the proceedings unless that person has consented.

Rule 4 of these Rules omits rule 4.23 (confidentiality of documents) from the FPR. Rule 10.20A applies to information and includes documents held by the court. In doing this it replaces rule 4.23.

Rules 5 and 7 of these Rules make consequential amendments to the existing rules following the introduction of rule 10.20A and omission of rule 4.23.

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