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Department for Constitutional Affairs
Justice, rights and democracy

# Confidence and confidentiality
# Improving transparency and privacy in family courts

## Consultation Paper

Code Number CP 11/06

This consultation will end on 30/10/2006

HER MAJESTY'S COURTS SERVICE
hmcs

# Confidence *and* confidentiality
# Improving transparency and privacy in family courts

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

July 2006

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# Foreword

**Foreword by Lord Falconer, Lord Chancellor and Secretary of State for Constitutional Affairs, and Harriet Harman QC MP, Minister of State, Department for Constitutional Affairs**

The work of the family courts is of the greatest importance.

The family courts have to make judgments in the most difficult of circumstances – judgments which will often have profound and irrevocable effects on the lives of those involved.

The comfortable certainties which used to be the context in which the family courts did their work have gone. The roles of men and women at home are changing; cultural diversity requires an understanding of different family traditions and civil partnerships; and, ground breaking fertility treatment means new issues come before the court. Problems of drug addiction have grown alongside the longstanding problems caused by alcoholism. And there are more cases coming to the family courts as more marriages break down. But what has not changed is the need for the courts to protect children from cruelty and neglect and to make judgments when parents can't agree about the care of the child.

The greater the importance of the work of the court, the greater the need for public confidence. That is necessary for its own sake – all courts should command public confidence. But it is necessary in the family courts if:

- those affected by difficult judgments are to accept them
- those working in the family justice system are to get the recognition they deserve and
- the courts are to command the human and financial resources that they need.

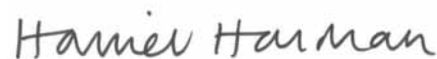
The fact that the family courts sit in private contributes to the fact that the work of the family courts is not widely understood and trusted, let alone valued for the important work it does.

In order to ensure that the public can have confidence in the work of the family courts, we make proposals in this consultation document to open up the family court while ensuring that we protect the privacy of the personal lives of those involved in family proceedings – particularly children.

We make firm proposals to allow the press into the courts and about how we plan to protect anonymity. We invite further consideration on what information should be available to adults who were involved in family proceedings as children. We do not propose to change access to the courts by the inspectorates – Her Majesty's Inspectorate of Court Administration and the Commission for Social Care Inspection – or for those who have democratic accountability for the family justice system, such as Lead Members in local authorities responsible for Children's Services and Members of Parliament. But we invite further consideration of their position.

The courts are there to make difficult judgments in individual cases and in so doing, protect the public interest. We hope that as well as all those involved in the work of the family court, we will hear the views of those whose families have been involved in family court proceedings and the wider public generally.

Rt Hon Charlie Falconer
Secretary of State for
Constitutional Affairs
and Lord Chancellor



Rt Hon Harriet Harman QC MP
Minister of State
Department for
Constitutional Affairs

## Executive summary

- Family courts are a vital institution to help people reach settlements
- Family courts dealt with more than 400,000 applications in 2004
- Most family court proceedings are held in private, with decisions taken in court not made public – often for very good reason
- But there is also a case for more openness, so that people can understand, better scrutinise decisions and have greater confidence
- We want to make family courts more open, but we want as well to ensure people's anonymity
- Family courts in different countries around the world take different approaches to the issues of transparency and openness
- We want to consult on a number of proposals to:
  - Make changes to 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 on 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 believe that these proposals mark a major change in the way family courts conduct their business, and a major step forward towards the dual objective of confidence and confidentiality.

- In addition to proposals, we want to consider:
  - Whether we should make special provisions for HMICA and CSCI inspectors and specified other groups
  - Options on the further provision of information

# 1. Introduction

There are few people who have not felt or seen, directly or otherwise, the effects of the family courts. The changing nature of families means that many more people are affected by decisions of the family courts than used to be the case. The number of individuals affected by these cases is now likely to be much larger than in the past – parents, children, grandparents, the extended family and friends.

In the past the courts had far fewer cases to deal with. They would not have had to understand the different cultural issues arising from attitudes towards the family that now exist in the multiplicity of cultures in our communities. The courts could rely on comfortable certainties about the respective roles of men and women within the family. They would hardly ever have to deal with children from parents in different countries. And they would never have had to deal with family law issues around a child born through IVF to a woman in a civil partnership which had broken down. There are fewer comfortable certainties.

Change in family structures, in social attitudes, greater cultural diversity, new reproductive technologies and global mobility bring new challenges to the family courts, for instance:

- Once, married people used to stay married - now one in three divorces
- Almost all children were born into families where their parents were married – but in 2004, 42% of births were outside marriage
- About a third of children are living either with a lone parent or with one parent and a step-parent. New patterns of family formation pose new problems for the courts
- Changes in previously accepted social attitudes have presented the family courts with new challenges. Sometimes a child's best interests will be to live with the father rather than the mother. Sometimes it is right to leave a child with parents with learning difficulties where the family can have the support it needs
- New social problems have emerged and have become prevalent – such as children put at risk of harm because their parents are locked into drug or alcohol abuse.

Some certainties do remain. Family breakdown causes dispute and unhappiness. Only about ten per cent of families use the courts to make arrangements for care of children when relationships break down. But many of those who do use the family courts do so after other methods have proved ineffective and are, by then, in highly conflicted situations. They look to the courts to make decisions on their behalf. The courts are doing that, with the number of decisions rising: in 2004 the family courts received over 400,000 applications.

Most of the proceedings in the family courts are held in private and the decisions taken are not generally made public. The current operation of the family courts attracts criticism to the family justice system as a whole and lays it open to accusations of bias and injustice which cannot be satisfactorily refuted. There is a public perception and concern that family courts operate in an unjustifiably secret forum rather than a necessarily private one. Some members of the judiciary, legal profession and Parliament share these concerns.

There are very good reasons for personal confidentiality – the family courts often deal with cases in which the evidence and the vulnerability of those involved, particularly children, make this appropriate. But there is also a case for more openness, so that people can understand, better scrutinise and have confidence in family justice – and the very difficult decisions that have to be made every day about children and families.

This is a difficult area. There is a wide range of views and opinions. We believe that there is broad acceptance that change is either desirable or necessary. But we know that there is a range of options about what that change might look like, or how far those changes should go.

There are two principal areas of concern. Firstly, the need for openness for the purpose of greater public scrutiny. The main issues here include:

- less 'secrecy' of proceedings – that is, more access to the courts in operation, (either by the press and/or the public at large and/or limited numbers of others)
- more access to the outcomes of those decisions (either through press reporting, anonymised judgments given in open court, or access to published judgments which set out the decisions which were made and the reasons for them)
- comparable levels of public accountability between the family and criminal courts of those giving evidence in a professional capacity (particularly in cases of alleged offences against children)
- a lack of awareness about the family justice system generally and how it works (so, for example, people would be able to recognise where press reporting of events may be inaccurate or unbalanced).

Secondly, more openness in the form of more information, for those – adults and children alike – involved in proceedings. The main issues here include:

- concerns about maintaining anonymity and privacy. There is concern that this will be particularly difficult in small communities where, despite reporting restrictions preventing identification, they will still be identified through other (reportable) information
- being clear about what to expect during proceedings (the process, inside and outside court and how long it may take)

- knowing why decisions are made that directly affect them, and for many, having access to a written record of the reasons why a decision has been made
- for children and young people particularly, access to information both at the time a decision is made, and a written record to refer to later as adults
- for children and young people, having a witness to the proceedings, especially since they are unlikely to attend proceedings. For example, the opportunity to nominate an independent adult of their choice to sit as an observer on their behalf.

Public confidence in the family court system is essential. Without public confidence, the judgments of the family courts run the risk of being seen as neither fair nor just. Without public confidence, the authority of the courts may be diminished – and with it, the ability of the family courts to do their job.

But confidentiality is also essential. Without proper protection for those involved in cases which go to family courts, parties to proceedings and all those involved would not have the benefit of privacy over sensitive issues, at times when they are often highly vulnerable. Privacy is vital, not only for the proper resolution of cases but is a protection which those involved in them rightly feel they deserve. So the challenge for any changes to the family courts is to balance confidence and confidentiality – to find the way in which both transparency and privacy can be improved. That is the objective which this document is striving to secure.

## 2. Consultation

In preparing this document, we have talked to a wide range of people already.

We have held round-table events, invited the Family Justice Council to set up a working group, and held individual meetings. We have talked to those directly involved in the legal system – all levels of the judiciary, legal professionals, other professionals, and voluntary sector organisations – as well as those with a specific interest in children's welfare – such as the Children's Commissioners, voluntary organisations and others involved with looked after children. We have spoken to children and young people themselves to hear their views and concerns.

This consultation is aimed at all court users, the general public and the press in England and Wales.

This consultation 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.

The following specific measures have been taken to ensure that consultation is as effective as possible. DCA is committed to strengthening government's democratic engagement so, for the first time, the DCA will be running on-line forums during the consultation period for both adults and young people. These forums are being jointly piloted between the DCA and the Hansard Society, as part of an electronic-participation project that looks at how new technologies can be used to improve communications between central government and the public. You can log on to the adult forum by going to www.familycourtsforum.net. The young people's online consultation site will be based on an interactive cartoon storyboard. Young people will create a character to introduce to the storyboard and will then follow the board to inform themselves about the consultation proposals, and at various stages have their say by filling out speech (or thought) bubbles. This forum will run from **1 September** until **30 October 2006**. You will be able to take part by logging on to www.ofcf.net. The Department is already working with a number of existing groups who will be discussing the issues in depth and feeding back their views.

An initial regulatory impact assessment indicates that the judiciary, the legal profession and other court users are likely to be particularly affected. The proposals are likely to lead to additional costs or savings for businesses, charities or the voluntary sector, or the public sector. A Partial Regulatory Impact Assessment is included. Comments on this Regulatory Impact Assessment are also welcome.

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

- Parliament, the Constitutional Affairs Select Committee, Local Government Association, 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 Association for Adoption and Fostering
- CAFCASS, Legal Services Commission

However, 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 60.

# 3. How family courts work

## What do family courts do?

Family courts deal with a wide range of issues concerning family relationships. They are most often called upon to resolve matters that arise when relationships break down. Issues requiring resolution can include everything from division of property, children's living arrangements, adoption, divorce, nullity and dissolution of civil partnerships. These are usually referred to as 'private law' proceedings, that is when the court is asked to resolve issues between individuals.

In 2004 there were 167,000 divorce petitions received by the courts and 107,000 private law children applications.[1]

Family courts also deal with 'public law' cases brought under Part IV, Care and Supervision and Part V, Protection of Children of the Children Act 1989.

In 2004, 22,000 public law children applications were made to the courts.[2]

These cases usually involve a local authority which wants to act to protect a child from significant harm or the threat of significant harm. These proceedings can result in a child being removed from their immediate family environment and placed in the care of the local authority, either on a long or short term basis. Many children are eventually able to return home but for a few, the result may be that they are adopted by a new family. In these very difficult cases, the State is, in effect, intervening in the life of a family to protect children from harm. These decisions are some of the hardest that any courts are asked to make. A complete list of family proceedings is shown at **Annex A**.

So family courts have to make difficult decisions that have important effects on people's lives, and for some, particularly children, these are life-changing. Denying a parent contact with their child effectively ends that parent/child relationship, while failing to deny contact may sometimes lead to a risk of harm for the child or parent. The courts ensure, as far as they can, that the safety of the child and residential parent is secured before, during and after contact ordered by the court. Taking a child from its family, and eventually placing him or her for adoption, changes the life of that child irrevocably. If the decision taken by the courts is the wrong one, the injustice is no less than a wrongly imposed life sentence – both for the family and the child.

1 Judicial Statistics 2004

2 As above

# 3 Family Courts: Now

## What is meant by the family courts?

There are five tiers of courts in England and Wales dealing with family cases. These are the family proceedings courts (those magistrates' courts hearing family proceedings); county courts; the Family Division of the High Court ('the High Court'); the Court of Appeal; and the House of Lords.

The majority of cases are dealt with in the first three tiers of court: that is, in family proceedings courts, county courts and the High Court. The Court of Appeal and the House of Lords deal with appeals only. Some applications have to be made to a particular tier of court. For example, all care applications have to made to the family proceedings courts, although cases can then be transferred to the county courts if necessary. All divorce petitions have to be issued in county courts.

In 2004, 33,000 applications were made to the family proceedings courts, 370,000 applications were made to the county courts and 500 applications were made to the High Court.[3]

This consultation makes proposals for improving openness in the first three tiers of court (family proceedings courts, county courts and the High Court), in all types of family proceedings and in all parts of all hearings (with different arrangements for adoption proceedings). Please see *Annex A* for a definition of what types of applications are included as 'family proceedings'. Most matters affecting children are dealt with under the Children Act 1989.

## Current position on openness

It is important in considering openness to distinguish between who can **attend** at court and what can be **reported**.

## Who can attend?

Most family proceedings are heard in private. This means that in many (but not all) cases, only those involved in the proceedings (the parties), their legal advisers and those giving evidence are allowed into the courtroom. The decisions that are taken, and the reasons for them, will be known only to those involved, unless the court decides to issue an anonymised judgment of those decisions.

Private hearings can apply in both 'private' law – for example, about a child's living arrangements when parents separate; and in 'public law' – in which the State, usually a local authority, has asked the court to make an order that can include the child being cared for by the local authority. There is no automatic right for those cases or those decisions to be placed in the public domain.

Representatives of the media can attend courts in England and Wales and report their proceedings through different arrangements, depending on both the court in

[3] Judicial Statistics 2004

question and the type of case being considered. The primary purpose of media attendance is to provide for the media acting as a proxy for the public. The media can attend and report court proceedings on behalf of the public, providing a channel through which the public can access the courts if they are unable, or do not wish, to attend courts themselves.

In addition, by helping to ensure that court proceedings are open and transparent, the opportunity for the media to attend court and report proceedings within the limits set by legislation and by the courts, including reporting restrictions as appropriate, provides a measure of public scrutiny and accountability – again by the media acting as a proxy for the public. Court proceedings therefore provide material for media outlets to deploy, within the defined limits of the law. The fact that court proceedings provide material for the media is as a result of the media's role as a proxy for the public, and not for the purpose of the media being able to attend court and report court proceedings.

In the family courts, the current arrangements for public and media attendance and for reporting proceedings are complicated and inconsistent between levels of court. Who may attend a family court hearing and what information may be reported varies according to level of court and also according to the type of family proceedings involved.

In family proceedings courts the press may attend most cases (other than adoption proceedings)[4] unless specifically excluded for a particular reason, though we know that they rarely attend.

In 2004 there were 33,000 family applications in the family proceedings courts, of these 14,500 were public law applications and 17,500 were private law applications.[5]

In the county courts and the High Court different rules apply. In 2004, the county courts and the High Court dealt with over 3,750 contested divorce cases, judicial separation cases and nullity cases, which are held in open court.[6] Of course, this is only a very small percentage of the cases that the courts deal with. In other family cases (i.e. those relating to financial disputes and disputes over children), judges have a discretion whether to open proceedings to the public. However, these proceedings are usually held in private.

In 2004, there were over 370,000 cases, the bulk of family proceedings, dealt with the county courts and the High Court. Of these, 167,000 were divorce petitions, 90,000 were private law children applications and 7,500 were public law children applications.[7]

4 Section 69 (2) of the Magistrates' Courts Act 1980.

5 Judicial Statistics 2004.

6 See Rule 2.28 of the Family Proceedings Rules 1991.

7 Judicial Statistics 2004.

This means, for example, currently, the press may attend most children cases starting in the family proceedings courts – but if they are later transferred to a county court or the High Court, the press is then excluded.

The Court of Appeal and House of Lords have different arrangements again from the first three tiers of court.

Hearings in the Court of Appeal are almost invariably open to the press and public to attend. In sensitive cases involving children in the Court of Appeal and the High Court, it is common practice for an approved anonymised transcript to be prepared for publication in the law reports. Judgments of the High Court and Court of Appeal are also often published on the HMCS website when the judge considers the case to be of significant public interest. These judgments are available online at: http://www.hmcourts-service.gov.uk/cms/judgments.htm

### What can be reported?

At present, the following provisions enable the publication of the names, addresses and occupations of the parties and witnesses:

- section 1 of the Judicial Proceedings (Regulation of Reports) Act 1926 (judicial proceedings for dissolution of marriage/civil partnership and nullity),
- the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 (failure to maintain, proceedings under Family Law Act 1986, Part III and applications for a declaration under Family Law Act 1986, section 56); and
- section 71 of the Magistrates' Courts Act 1980 (reporting of family proceedings in magistrates' courts – subject to the restriction in section 97(2) of the Children Act 1989).

The existing system preventing publication of information relating to family proceedings is a mixture of the law of contempt and statutory criminal offences. The system is complex and operates in different ways for different levels of court and different proceedings. The rules and provisions providing for reporting restrictions are set out in the table in **Annex B**.

The sanctions that apply at present operate in different ways. For example, the offence under the Judicial Proceedings (Regulation of Reports) Act 1926 restricting the publication of reports in relation to any judicial proceedings for the dissolution of a marriage or a civil partnership, allows for the imposition of a fine of up to £5,000 and imprisonment of up to 5 years. The offence of publishing material identifying a child or likely to identify a child as being involved in proceedings to the public at large or a section of the public under section 97(2) of the Children Act 1989, only allows for the imposition of a fine of up to £2,500.

It is potentially a contempt of court to communicate information about the substance of a case concerning a child which is heard in private under section 12

of the Administration of Justice Act 1960. A person found in contempt of court may be liable to a term of imprisonment of up to two years under section 14 of the Contempt of Court Act 1981, and there is no statutory limit upon the fine that may be imposed by the Divisional Court.

In relation to family proceedings not involving children in a magistrates' court, it is possible to report the names, addresses and occupations of the parties and witnesses, the grounds of the applications, submissions on any point of law and the decision of the court. Reporting of other material is liable to a fine of up to £2,500.

The procedures involved in enforcing these sanctions also operate differently. For example, prosecutions under the 1926 Act (dissolution of marriage and civil partnership) and under section 71 of the Magistrates' Courts Act 1980, require the consent of the Attorney-General. Prosecutions under section 97(2) of the Children Act 1989 (prohibiting publication identifying children involved in proceedings) do not require the consent of the Attorney-General.

Responsibility for investigating and bringing prosecutions in relation to the statutory criminal offences rests with the police and the Crown Prosecution Service. There have not been any recorded prosecutions under section 97(2) of the Children Act 1989.[8]

Applications to commit a person for contempt following publication in a newspaper or on the internet of information relating to proceedings involving children which are heard in private, are usually brought by the Attorney-General and are usually heard by the Divisional Court.

[8] The 1926 Act was last considered in detail in England and Wales in 1997 in *Moynihan v Moynihan* (No.1) [1997] 1 FLR 59.

## 3 Family Courts: Now

The following table shows a general overview of current arrangements:

| Court | Current arrangements – Open/Closed |
|---|---|
| **Family Proceedings Court** | Adoption cases always in private.<br>Press may attend other proceedings subject to reporting restrictions.<br>The press may be excluded by the bench on the grounds of the interests of the child and on the grounds of public decency or the administration of justice during the taking of indecent evidence.<br>Others people directly concerned in the case may attend.<br>Court may permit any other person to be present. |
| **County Court** | Generally in private with judicial discretion to open the court to the public/press.<br>Some proceedings in open court – for example decrees nisi are pronounced in open court in the special procedure used for most divorces, judicial separation and nullity (and civil partnership equivalent) (but subject to reporting restrictions). |
| **High Court** | Starting point is proceedings held in private with judicial discretion to open the court. If in open court, reporting restrictions *could* apply depending on the type of proceedings.<br>Judgments increasingly given in open court if deemed in the public interest. |
| **Court of Appeal** | Open to press and public.<br>Judgments anonymised on a case by case basis.<br>Reporting restrictions at judicial discretion. |
| **House of Lords** | Open to press and public.<br>Judgments anonymised on a case by case basis.<br>Reporting restrictions at judicial discretion. |

### Care and Adoption

Wherever possible, children should live with their parents and if necessary parents should be helped to keep their family together. Local authorities have a duty under the Children Act 1989 to try to help parents care for their children. Generally, care and support plans work well for families and parents are able to learn how to provide safe care for their child. However, the child's welfare is the paramount consideration and it may be necessary in some cases to remove a child from his or her parents.

In 2004, there were 4,800 adoption applications. Around 1,100 of these were applications by step-parents and other family members. Of the other 3,700 applications, almost all were made by local authorities.[9]

The average age of children adopted was 4½ years, as was the average age of those adopted from care.[10] Approximately 80 per cent of people applying to county courts for an adoption order ask for a serial number to be assigned to their case.

Where a local authority considers that a child should be taken into care, it will need to obtain an interim care order. In some cases of particular concern a local authority may need to apply for an emergency protection order to provide urgent protection and care for a child. Ultimately it is the responsibility of a court to scrutinise the evidence and make the decision. Section 31(2) of the Children Act 1989 requires that to make an interim care order or a care order the court has to be satisfied:

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to-

   (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

   (ii) the child's being beyond parental control.

Where the court is considering such an application, a children's guardian is appointed to advise the court on how the child's best interests should be met. Where the court makes an interim care order or a care order, the local authority has a duty to continue to work with the family with a view to reunifying the child with his or her parents. However, in some cases it becomes apparent that even with support this is not going to be in the child's best interests. At this point the local authority must review the options for providing the child with permanence and make alternative plans to provide the child with a permanent family. Adoption is one way of providing this. It is appropriate for some children, depending on the facts of each individual case.

Under the Adoption and Children Act 2002, a child may not be placed for adoption without the witnessed consent of the child's mother and father (if he has parental responsibility) or without a placement order made by the court. A care order may no longer be used to place a child for adoption. A placement order may be applied for jointly with a care order. Where both a care order and placement order are made, the care order is suspended while the placement order remains in force. Generally, prospective adopters will not be parties in placement order hearings.

[9] Judicial Statistics 2004.

[10] HMCS county court case management system (Family Man)

However, there is a possibility of them being drawn into proceedings if it is known that prospective adopters have been identified by the local authority and the court is considering whether to make a contact order when making a placement order.

Before making a placement order or an adoption order, the court must have regard to the matters set out in the welfare checklist in Section 1 of the 2002 Act, which cover matters such as the child's ascertainable wishes, the child's needs and background and the relationship the child has with his or her relatives. The court is also required by section 1(6) "not to make any order under this Act unless it considers that making the order would be better for the child than not doing so."

## European Convention on Human Rights

Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[11] provides for the public hearing and the public pronouncement of judgments, but with the proviso of exclusion of the press and the public from all or part of the trial "in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require."

The European Court of Human Rights has held that the present system regarding attendance in family courts in England and Wales is compliant with Article 6 of the Convention.[12] The Court of Appeal has reaffirmed that this is the case.[13] However, the Court of Appeal accepted Dr Pelling's criticism of its practice of automatically applying reporting restrictions. Since that judgment, the Court of Appeal has only anonymised newspaper reports in exceptional cases.

The European Court of Human Rights noted that the restrictions regarding attendance and reporting must always be subject to the court's control and the court must always consider whether or not to exercise its discretion to relax the normal restrictions if requested by one of the parties.[14]

The Convention also enshrines the right to freedom of expression (Article 10). This is a right to receive and impart information and ideas without interference by a public authority. The Convention also enshrines the right to respect for private and family life (Article 8). These rights may be in conflict when, for example, a newspaper wishes to publish details about a case but a family involved in proceedings wants to restrict that publication.

In these circumstances, the court will balance the competing rights using the facts of the individual case to determine which right has precedence over the other.

[11] (Rome, 4 November 1950; TS 71 (1953); Cmd 8969 (as now set out in Schedule 1 to the Human Rights Act 1998).

[12] *B v United Kingdom* [2001] 2 FLR 261.

[13] *Pelling v Bruce Williams* [2004] EWCA Civ 845.

[14] See at paragraphs 39 to 40 of *B v United Kingdom* [2001] 2 FLR 261.

## 4. Recent developments

Improving the openness of family courts is not a new issue, but what is new is the increasing concern expressed by broad sections of society. The Lord Chancellor's Department consulted on this issue in 1993[15] when it explored access to and reporting of family proceedings. However, responses at the time proved inconclusive about an appropriate way forward and no changes to the system were made.

Since then, there have been significant developments in the information available to the public at large, supported by the introduction of the Data Protection Act 1998 and the Freedom of Information Act 2000. People's expectations of what information and procedures should be in the public domain have changed too – and those expectations are now focussing on family courts again.

Parliament continues to show interest in improving openness; and, the Constitutional Affairs Select Committee (CASC) report[16] about the operation of the family courts published in February 2005 recommended that:

- 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; and
- The press should continue to be restricted to publishing those matters which have been made public by the court.

There continues to be interest from CASC. Openness of family courts was covered at a further session on 2 May this year, with the President of the Family Division (Sir Mark Potter), other judges and a Justices' Clerk giving evidence. CASC's sixth report of Session 2005-06, "Family Justice: the operation of the family courts revisited" was published on 11 June 2006.[17]

Recent high profile cases such as *R v Cannings*[18] and *Re H*[19] 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.

Angela Cannings, Sally Clark and Trupti Patel are names well known to the public. They were the subject of criminal trials. Angela Cannings and Sally Clark had their convictions for killing their own children quashed and Trupti Patel was acquitted by jury. All those cases had involved expert evidence from Sir Roy Meadow. The cases

15 'Review of Access to and Reporting of Family Proceedings', August 1993.

16 HC 116-II.

17 HC 1086.

18 *R v Angela Cannings* [2004] EWCA Crim 1, [2004] 1 FCR 193.

19 *Re H (Children)* [2005] EWCA Civ 1325.

raised many concerns about what evidence is given in the course of courts making life changing decisions. If evidence is given in private, there is concern about the ability to challenge the evidence properly and so concern about whether decisions are made on a sound basis.

Following the Attorney-General's statement[20] that possible cases of miscarriages of justice both in the criminal and family courts would be referred to the Court of Appeal, only two cases of alleged miscarriage in family proceedings were brought to the Court of Appeal and both were dismissed.[21]

In response to *R v Cannings*, the former President of the Family Division, Dame Elizabeth Butler-Sloss (as she then was) issued a Memorandum dated 28 January 2004 about arrangements to be adopted by judges of the family courts. The memorandum includes the following:

> *"It is also worth giving consideration to increasing the frequency with which anonymised family court judgments in general are made public. According to current convention, judgments are usually made public where they involve some important principle of law which in the opinion of the judge makes the case of interest to the law reporters. In view of the current climate and increasing complaints of the "secrecy" in the family justice system, a broader approach to making judgments in public is desirable."*

In an interview with The Times earlier this year, the President of the Family Division, Sir Mark Potter said:

> *"There is undoubtedly a need to make the family justice system more transparent, if only because it has been on the receiving end of a lot of largely unjustified criticism. In a number of cases the courts are unable to defend or correct inaccurate reports or statements without falling foul of legislation, which dictates privacy. However, I hope to see rapid development of a culture of greater openness."*

Such recent criminal cases have given rise to concerns about the possibility of similar miscarriages of justice in the family justice system, particularly in relation to care cases. As Mr Justice Munby commented in a speech he gave to Jordan's Family Law Conference in October 2005:[22]

> *"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."*

20 Hansard 19 January 2004, Column WS38

21 *Re B and Re U* [2005] Fam 134

22 Then published in December [2005] Family Law

In a recent (public) judgment,[23] considering international child trafficking, Mr Justice Ryder commented that:

*"Aside from the public interests that I highlighted at the beginning of the judgment, there is also a public interest in knowing of the work that is done in the family courts an interest that is sometimes narrowly characterised and equated with one of its components i.e. public scrutiny of the fairness of family justice. Provided the private and family lives of people are respected, i.e. inter alia personal confidentiality if protected from prurient interest and salacious comment and that the vulnerable are protected, a greater measure of public information about the work of the family courts may go some way to engender public confidence in the sensitive balancing of people's rights and needs that is an essential component of the social contract that is family justice."*

*Re H* concerned two children who had been taken into care by a local authority. The case received a high profile in the media and the press questioned whether the decision to take the children into care was justified. There was speculation that the decision was made to help meet Government adoption targets and only because the biological parents were not "clever enough" to care for them. The anonymised transcript of the judgments given in the High Court and Court of Appeal were then published on the HMCS website so that the reasons for the decision are available for all to read and debate.

In a recent case brought by the BBC in the High Court, Mr Justice Ryder decided that two social workers' anonymity should not be preserved from previous wardship proceedings. Those wardship proceedings had involved 20 children from six families and were known as 'the Rochdale satanic abuse case'. Apart from four of those children, all were returned to or remained with their families, and the allegations of satanic and ritual abuse were found not to have been made out. Injunctions had been made to protect the identities of the children involved. In his judgment, Mr Justice Ryder said,

*"In addition to the public interest in the former wards and the BBC in the publication of details of the events of 1990/1991, there is a strong public interest in maintaining the confidence of the public at large in the courts… An important means by which such confidence is achieved and maintained is through permitting proper scrutiny of court proceedings."*[24]

There are also concerns about private law children cases, and allegations on the one hand of bias in the system against non-resident parents, and on the other, that contact may be taking place when it is not safe. Current access and reporting

[23] At paragraph 97 of Re C [2004] EWHC 2580 (Fam).

[24] *The British Broadcasting Company and Rochdale Metropolitan Borough Council and X and Y* [2005] EWHC 2862 (Fam) [paras 59-60].

arrangements make the allegations difficult to refute, and contribute to a view that there is a decline of public confidence in the family justice system. Lord Justice Wall recently made a report[25] to the President of the Family Division on the publication by the Women's Aid Federation of England (WAFE) about "Twenty nine child homicides."[26] WAFE's report identified 29 children from 13 families who, over a ten year period from 1994 to 2004, were killed by their fathers following the breakdown of the relationship between their parents. The report focussed on five cases (involving 11 of the children) identified as involving the court and set out what lessons can and should be learned from the cases.

Lord Justice Wall stated at the outset of his conclusions and recommendations in his report,

> *"Nothing in what follows is intended, or should be read, as seeking in any way to minimise the appalling human tragedies represented by each of the 29 homicides identified by WAFE. Equally, nothing in what follows should be read as indicating that there are no lessons to be learned from the cases under discussion or that the system operating in the Family Courts does not require constant vigilance, re-examination and improvement."*

An important judgment, *Clayton v Clayton*,[27] was published on 27 June 2006. The case clarifies that criminal sanctions for publishing material identifying a child involved in any proceedings only last while the proceedings are current. However, contempt of court provisions continue to apply and the court also retains its power to make specific orders about the child and any media activity. When deciding whether to make such an order the court will balance the child's right to privacy against any competing right to freedom of expression under the ECHR.

The judgment is described as a "small step towards greater transparency" but is very clear that it is not concerned with dealing with the broad question of whether or not family proceedings should be heard in private or in open court. Lord Justice Wall states specifically that,

> *"That is an issue on which the Government is shortly to undertake a public consultation. What this appeal is about is the extent to which the parties to proceedings are entitled to put into the public domain information about themselves and their children which has derived from the disputes between them, and which has been the subject of proceedings under Children Act 1989 held in private".*[28]

[25] A Report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection with particular reference to the five cases in which there was judicial involvement (March 2006).

[26] "Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection" published by Hilary Saunders in 2004. Weblink: http://www.womensaidorg.uk/landing_page.asp?section=000100010009000500050009004

[27] [2006] EWCA Civ 878.

[28] at para 84.

So we know that there is a growing body of opinion, which includes some members of the judiciary, the legal profession and Parliament, that family courts need to be more open. This opinion is also supported by the media and family interest groups.

# 5. International experience

### A comparison of approaches to openness in family courts

How open are the family courts in other countries? Family courts operate in a number of different ways around the world, with varying degrees of openness. At the end of this section there is a table giving further information on legal arrangements abroad.

In considering changes to the family courts in England and Wales, we have looked at various models, but have concentrated in particular on the models adopted in two specific areas – New Zealand and British Columbia.

There is a sharp contrast in the volumes of applications dealt with relative to the size of population:

### Population and Court Volumes

| | Population | Family Court Applications |
|---|---|---|
| British Columbia | 3.9 m | 13,000 (est 2005) |
| New Zealand | 4.0 m | 66,000 (06.04 – 05.05) |
| England and Wales | 52 m | 410,000 (2004) |

Both New Zealand and British Columbia have different approaches and legislation from our own and from each other. There often appears to be a discrepancy between the apparent legal position and what actually happens in practice.

### New Zealand – In Law

The law changed on 1 July 2005 (when the Care of Children Act 2004 came into force). The changes mean that, for children cases:

- Accredited media representatives are able to attend
- Courts are able to permit limited members of the public with a legitimate interest to attend, including support persons
- Any person is allowed to publish reports of children proceedings provided all identifying details are removed.

Anonymisation guidelines have been drafted so that every judgment is to be written in such a form that it is ready for professional publication, and those wishing to publish to the general public are responsible for removing any further details.

The new openness applies only to children's cases and the Care of Children Act, and accounts for the bulk of the Family Courts' work. Other types of proceedings remain governed by their own legislation, including adoption proceedings, which remain private.

### New Zealand – In Practice

Following are recent comments received from the Principal of the Family Courts of New Zealand, Judge Peter Boshier:

> *"Since the Family Court was opened, in this limited fashion to the media, very few have attended the Court. This was predicted and has turned out to be a reality. Even when the Family Court is opened up in the rest of its proceedings (and that will be in a further Bill to be introduced this year) I do not predict much in the way of media attendance.*
>
> *There is a very clear system of accrediting news media so that we know who is who, in Court. Court takers must identify and note members of the media and the media must wear identification stickers.*
>
> *No reported incidences of any misbehaviour by the media. Interestingly enough, the bother we continue to have with the media is in cases where they don't go to court at all, but rather just rely on the report of a litigant that they've been badly treated."*

#### Publication of transcripts

There have been very few problems with anonymised judgments. However there is one exception. In a case from a very small provincial town in the North Island, although the names of the parties and children were anonymised, a detail was left in as to where the mother worked. Someone happened to be reading judgments on the web at the same provincial town and had no difficulty identifying that it was her. The Ministry of Justice accordingly closed down the decisions section on the website and having trawled through many hundreds of decisions is now beginning to put some back on again. There are no reported incidents of any families having been traced or "door stepped".

There is no power for the Family Court to close to the media during highly sensitive cases. The media is permitted in, as of right. But what the media cannot do is publish any identifying information without leave of the Court.

Research is due to be published in December this year about what sort of coverage the media has given to the New Zealand Family Court since members of the media have been allowed to attend.

The Supreme Court publish all their decisions on the web with all details included and the Court of Appeal have a selection of 'interesting' cases on the web. The Family Court website contains a section for decisions, with initials rather than full names.

### British Columbia – In Law

In Canada, each province has supreme courts (their judges appointed by the federal government) and inferior (provincial) courts (their judges appointed by provincial government). Generally, the type of proceedings dictate which court deals with them. So for example, divorce, division of property and adoption are dealt with by the supreme courts. Provincial courts deal with child protection, separation, and contact and residence cases.

The starting assumption for both the supreme and provincial courts is that they are open to the press and the public to attend. This is based on a mixture of statutory and inherent jurisdiction. However, there is also legislation in relation to specific proceedings, which can limit attendance in court. Publishing and reporting of information is subject to similar arrangements.

### British Columbia – In Practice

Anecdotally, we hear:

- There is little interest from the public and press in attending proceedings (though more so where there are celebrity cases)
- Adoptions are mostly dealt with on paper (by supreme courts). Where attendance is required, the judge exercises his discretion for them to be held in private.
- In child protection cases the requirement for case conferences means that they may not result in a court hearing. Where they do, the widespread practice is for judges to use their statutory powers to exclude others so that only the social worker(s) and witnesses for the director of child protection appear and the family of the child or children who are the subject of the hearing and their witnesses.

  *"If a member of the public wanders in (and they stand out when they do) I stand down and ask the deputy sheriff or court clerk to ask them to leave, explaining that a child protection hearing is being held (i.e. where evidence is being called). That seems to work and I don't recall having to make an order. I would have no hesitancy in closing the courtroom. The discretion to do so is quite broad."*

  Judge Ross Tweedale – Provincial Court of British Columbia

As far as can be established, there has been no research on court users' views of public and press attendance. The concept appears to be so entrenched in Canadian culture that it is beyond question.

Objections to others attending appear to relate to those who may be called as witnesses (and therefore may be excluded by the judge).[29]

### Publication of transcripts

The procedure varies according to courts. The Provincial Courts Act prevents the identification of those involved in family proceedings (adults and children). Any reporting, or published judgments must be anonymised. Legal publishing organisations provide guidance about anonymisation on their websites. Provincial court judgments are taped but not automatically published. The tape recordings are retained indefinitely.

Publication of family law judgments on the British Columbian Supreme Court website was suspended in 2002 following concerns about identification of those involved. Judgments were still available through court-houses and for legal publication. Publication resumed on 1 January 2006, following concerns raised that the policy of non-publication was impeding the ability of the public and lawyers to access the law in family matters. In deciding to resume publication, Chief Justice the Honourable Donald I. Brenner explained the decision.

> *"Our court has considered that concern and revisited the question of the publication of family law judgments on the court's website. The question is a difficult one involving competing issues of protection of privacy and ensuring access to the court and its process."*[30]

Judgments published on the Supreme Court website since January 2006 contain the full names of those involved, rather than initials. We were told this was to minimise confusion for the public and the legal professionals in referring to previous cases. This would not, however, cover child protection cases, which are dealt with in the provincial court, or adoption where there are different rules in place regarding access to information.

### What can we learn?

Both jurisdictions offer more open systems than England and Wales. Both systems believe they are 'open to the public' and public scrutiny despite the discrepancies in their law and practice. The law permits media representatives and only limited members of the public to attend in New Zealand, whereas anyone who wishes to attend can in British Columbia (subject to exclusion). However, practice does not appear to reflect the law.

[29] (Provincial Court Act [RSBC] 1996 Chapter 379 section 5)

[30] Notice to the Profession re publication of family law judgments on The Supreme Court of British Columbia website, dated 28 November 2005.

The Chief Justice of New Zealand has commented,[31]

> *"Openness of the Family Court here has been addressed partially through the passing of the Care of Children Act…It has quite radically changed the public perception of our Court. Before this, it was often regarded as a secret Court and criticised in the media. That has all but ceased…"*

A key issue in 'being open' for both systems is the provision of transcripts of judgments to the public. In New Zealand both levels of courts provide these; in British Columbia only supreme courts make their judgments available (in the provincial courts there is no automatic publication). It was due to concerns about lack of openness that the Supreme Court in British Columbia resumed publication on their website.

However, both New Zealand and British Columbia recognise that the key competing issue is the need for privacy in particular types of proceedings. e.g. Adoption and some child protection cases in British Columbia and mental health cases in New Zealand.

We believe that there are important lessons to be learned from these models which could help inform the future operation of family courts in England and Wales. The sharp contrast between the scale of the number of cases dealt with in New Zealand, British Columbia and England is clear. However, ultimately, the systems adopted appear to reflect the inherent culture of the society and institutions concerned. Our system must strive to do the same.

[31] Current Chief Justice: Rt Hon. Dame Sian Elias, GNZM. Chief Justice is head of New Zealand judiciary & sits in the Supreme Court. Represents the judiciary in dealing with the Ministry of Justice and other government agencies and is ultimately responsible for the management of the work of the Supreme Court, Court of Appeal and High Court Judges.

## Family proceedings: International comparisons

| Jurisdictions | Public attendance | Press attendance | Reporting restrictions | Penalties for breaching reporting restrictions |
|---|---|---|---|---|
| **Australia – Federal Court** | Public allowed to attend.<br>s97(1) Family Law Act 1975 | Press allowed to attend.<br>s97(1) Family Law Act 1975 | Restrictions on public dissemination of details of proceedings<br>s121(1) Family Law Act 1975 | Offence punishable, upon conviction by imprisonment for a period not exceeding one year.<br>s121(1) Family Law Act 1975 |
| **Australia – State Court** | Public allowed to attend.<br>s212(1) Family Court Act 1997 | Press allowed to attend.<br>s212(1) Family Court Act 1997 | Restriction on publication of court proceedings that identifies:<br>• A party to the proceedings<br>• A person<br>• A witness in the proceedings<br>s243 Family Court Act 1997 | Financial penalty, imprisonment<br>s243 Family Court Act 1997 |
| **Canada – Nova Scotia** | Proceedings are heard in private. The following persons are allowed to attend: the Officers of the Court, the parties, their counsel, witnesses and such other persons as the presiding judge of the Court may require.<br>s10 (3) Family Court Act, RSNS. 1989,c. 159 | Press allowed to attend.<br>s10 (3) Family Court Act, RSNS. 1989,c. 159 | No reporting by media is permitted on family proceedings.<br>s10 (1) Family Court Act, RSNS. 1989,c. 159 | Imprisonment, fine, penalty.<br>Art 2 (1)(a), Summary Proceedings Act, C450 of the revised statutes,1989 |
| **Canada – Ontario** | Proceedings are heard in private.<br>s45(4) Child and Family Services Act, RSO 1990, c. C11 | Limited number of representatives are allowed in.<br>s45(5-6) Child and Family Services Act, RSO 1990, c.C11 | Reports on family proceedings are allowed but they don't have to contain information of the child, witness or person linked to the case.<br>s45(7-8) Child and Family Services Act, RSO 1990, c.C11 | Imprisonment, fine.<br>S85(3) Child and Family Services Act, RSO 1990, c.C11 |

# 5 Family Courts: Abroad

| Jurisdictions | Public attendance | Press attendance | Reporting restrictions | Penalties for breaching reporting restrictions |
|---|---|---|---|---|
| **Canada – British Columbia** | Public allowed to attend.<br><br>s3(1) Provincial Court Act, [RSBC 1996] Chapter 379 | Press allowed to attend.<br><br>s3(1) Provincial Court Act, [RSBC 1996] Chapter 379 | Reports on proceedings are permitted if information released do not disclose identity.<br><br>s3(6) Provincial Court Act, [RSBC 1996] Chapter 379 | |
| **Canada – Quebec** | Sittings are generally heard in public.<br><br>Code of Civil Procedure, RSQ c. C-25, Book 1, Title I, art 13 | Media is allowed if they prove their capacity to attend sittings.<br><br>Code of Civil Procedure, RSQ c. C-25, Book 1, Title I, art 13 | Reports are permitted provided they do not contain identifying information.<br><br>Code of Civil Procedure, RSQ c. C-25<br><br>Title IV, Chapter 1, Division II, art 815.4<br><br>Youth Protection Act RSQ, chapter P-34.1, art 83 | Liable to a fine.<br><br>Youth Protection Act RSQ, chapter P-34.1, art 135 |
| **Ireland – Eire** | Only the parties, their representatives and witnesses attend family hearings.<br><br>s29 Child Care Act 1991 | Press not allowed to attend.<br><br>s29 Child Care Act 1991 | Reporters on family law (barristers or solicitors) are allowed to provide reports with identifying information withheld.<br><br>s40 of the Civil Liability and Courts Act 2004 | Fine or imprisonment.<br><br>s31(3) Child Care Act 1991 |

| Jurisdictions | Public attendance | Press attendance | Reporting restrictions | Penalties for breaching reporting restrictions |
|---|---|---|---|---|
| **New Zealand** | The following persons are allowed to attend:<br>• Officers of the Court<br>• Parties to the proceedings and their lawyers<br>• Lawyers appointed under section 7(1)<br>• Witnesses<br>• Persons the Court agrees to hear under section 136<br>• Persons who may attend under section 138(2)(b)<br>• Persons whom the Judge permits to be present<br>s137(1) Care of the Children Act 2004 | Accredited news media reporters are allowed in.<br>s137(1)(g) Care of the Children Act 2004 | Allow publication of reports but identifying information is to be withheld.<br>s139 Care of the Children Act 2004 | For individuals:<br>• Fine of $200<br>• Imprisonment<br>For a company:<br>• Fine of $10,000<br>• Imprisonment<br>s139 Care of the Children Act 2004 |
| **Northern Ireland** | Family proceedings are heard in private.<br>Art 170(1) The Children (Northern Ireland) Order 1995 | Family proceedings are heard in private.<br>Art 170(1) The Children (Northern Ireland) Order 1995 | Reporting is allowed if no identifying information is disclosed.<br>Art 170 The Children (Northern Ireland) Order 1995 | Financial penalties.<br>Art 170(9) The Children (Northern Ireland) Order 1995 |
| **Scotland** | Children (Panel) Hearings can be by:<br>• A member of the Council on Tribunals, or of the Scottish Committee of that Council<br>s43 Children (Scotland) Act 1995<br>Informal Child Welfare hearings can be called by a sheriff and held in private. | The following persons are allowed to attend a children's hearing:<br>• A bona fide representative of a newspaper<br>S43 (b) Children (Scotland) Act 1995 | No reporting is permitted.<br>s44 (1) Children (Scotland) Act 1995 | Financial penalties.<br>s44 (2) Children (Scotland) Act 1995 |

# 6. Principles and arguments

Changes to the arrangements for openness in the family courts should, we believe, be based on the following principles:

- Ensuring public confidence in the family justice system through public scrutiny
- Improving understanding of the decisions that the courts make
- Protecting the privacy of families, especially children
- Ensuring that there are strong sanctions and rigorous enforcement where privacy is breached
- Providing arrangements that are simple, easily understood, consistent and workable

## Ensuring public confidence through public scrutiny

Public confidence in any part of the legal system is necessary for its own sake but it is also necessary if:

- people affected by court judgments are to accept them
- the work of those in the professions involved with the family justice system is to be properly respected and valued; and
- the system is to attract, on a sustained basis, the human and financial resources it needs to do such important work.

A recent report[32] produced by the Henley Centre for the Department for Constitutional Affairs identified two key trends in relation to transparency. As is generally accepted, the public, is by and large less, trusting of institutions nowadays. Distrust of the legal system rated highly. As a result, as the report identified, organisational transparency is increasingly important to the public. However, there is also a strong counter trend to organisational transparency which is individuals' increasing personal desire for privacy.

It is much less convincing to defend a system from accusations of bias and discrimination if it operates behind closed doors. When the courts are criticised, rebuttal of those criticisms has to depend on assertions from those within the system. The public's demand for scrutiny and accountability of the family courts matches its demands of other institutions. The effect of the current legislation has been to stifle public debate, and encourage an atmosphere of secrecy.

The media have a valuable role to play in improving public understanding and awareness of the work of the courts, and providing a platform for discussing the issues which concern the public. In the criminal justice system, the media do this through attendance and reporting of proceedings. The general public, on the

[32] DCA Key Trends Report by Henley Centre, November 2004.

whole, do not attend criminal courts in large numbers even though they are free to do so. Instead they rely, in part, on the media to report cases of interest to them. The fact that the media are able to do this reassures them that the system is open to scrutiny. The media is seen as an important part of the necessary checks and balances to ensure the system is fair and effective.

The same cannot be said of the family courts where the media do not currently have the same level of access. Neither do the general public have a similar level of understanding about the work of the family courts as they do, say, of the criminal courts. If we want to open the family courts to a wider public, but continue to protect those involved from the direct gaze of the public, this may be best achieved through allowing the media access to family courts. The media could act as a proxy for the public, and for the benefit of the public. And while we believe that it is right that the public should be able to scrutinise the operation of the family courts, an important line needs to be drawn between what the public is interested in, and what is in the public interest. So there would need to be adequate safeguards for people involved in family proceedings so that their identity was protected.

Allowing greater openness and distribution of information would also allow practitioners and experts to learn from the observations of the courts. There is some concern expressed about a dwindling pool of experts willing and available to give evidence in family cases. Proceedings with the press and others in attendance may deter experts from providing evidence and reduce the available numbers further. However, as professionals, their evidence will contribute to life changing decisions about children and families. There is an unjustified disparity between the use of expert witnesses in the family courts, where they are often afforded anonymity, and the criminal courts, where they are not. This is further contributing to the view that the family courts and those working in them remain closed to scrutiny. Nevertheless the effect of greater scrutiny on the willingness of experts to undertake family justice work must be considered.

It is also important that those who have representative interests in, or are accountable for, the operation of the family courts and associated services, such as MPs, Ministers, and Lead Members in local authorities for Children's Services, can easily access family courts so that they can give a proper account to the public of the way in which the family justice system operates. Parliament often makes family laws 'in the dark' – that is, without any clear picture of how the family justice system works, or the eventual impact of those laws once they are in place. Lead Members in local authorities are responsible for the delivery of local services for children – and yet the family courts which play a key role in making decisions on behalf of those same children are often a mystery to those with responsibility for their wellbeing.

We want to encourage MPs and other elected officials to see for themselves how the system works in practice, so they can both scrutinise the system, and be able to deal with their constituents' concerns and questions more confidently.

Finally, we want to consider an aspect of the current court inspection arrangements. The courts inspectorate, HMICA,[33] are responsible for, amongst other things, inspection of family proceedings in magistrates' courts and county courts and CAFCASS[34] (but not, of course, the conduct of the judiciary or quality of judicial decisions). HMICA do not have an automatic right to enter the family courts, but must first seek the permission of the court to attend. This is because special arrangements apply to proceedings heard in private.

Similarly, CSCI[35] inspectors, who are responsible for the inspection of local authority children's services, have no automatic right to observe family proceedings. So, for example, they would need to make an application to the court to be able to observe social workers in a court setting. The application would be necessary even though they may be looking at the performance and delivery of their employing local authority in relation to the services delivered for children at risk of harm.

We are aware that the inspection regimes for both HMICA and CSCI may well change as a consequence of legislation currently before Parliament.[36] But, the issue of attendance as of right, or attendance by application in the course of carrying out their responsibilities (as is currently the case) is one we wish to consider further and we would welcome views. It is of course the case that those responsibilities do not include the monitoring of judicial conduct or the quality of judicial decisions.

### Improving understanding of the decisions which courts make

As well as general understanding by the public of the work of the family courts, there is a need for greater understanding by those involved in decisions in particular cases. Protecting the welfare and best interests of children is a key role of the family courts, and this will always remain the case. Any movement towards improved openness made at the expense of the best interests of a child is a move that should not be made. However, although children and young people rarely attend family proceedings, they need to know the reasons why important decisions are taken, such as, where they live, who they live with and who they see. While this may be explained to them as children in an 'age appropriate' way, their needs as adults are likely to change and they may then want more detailed and objective information about those earlier decisions.

The information available to children as adults is largely dictated by whether the proceedings are public or private. In public law, the local authority file will contain

[33] Her Majesty's Inspectorate of Court Administration.

[34] Children and Family Court Advisory and Support Service.

[35] Commission for Social Care Inspection.

[36] Police and Justice Bill; Education and Inspections Bill.

information such as the welfare report and the 'life story'. 'Life story work' has long been a key element of good social work practice with children who are to be placed, either long-term or permanently, with carers outside their birth families. Life story work involves direct work with the child to build up a record of their life, by using for example documents, pictures, photos and special toys. The intention is to furnish the child with an account of their lives, so that they are able to understand what has happened to them, in terms of changes that have taken place and the reasons for these changes. Of course, this work has to take place in a way that fits the age and level of understanding of the child. So, it can become more sophisticated as children mature and develop. The carrying out of this work means that children are not left, as they grow older, with unexplained 'gaps' in their lives. However, 'life story work' will rarely include the sort of detailed information about care and related proceedings that would be found in a transcript of a court judgment.

Access to other documents naming third parties may be restricted by the Data Protection Act. There is unlikely to be a transcript of the judgment. As parties to the proceedings, they will also be able to apply to see court files (though they may be difficult to trace without specific information about the court involved or local authority).

In private law, unless CAFCASS have been involved at some stage, it will be entirely for those with parental responsibility to tell children about the outcome of proceedings. They may actually choose not to tell them that proceedings have taken place at all. As subjects of, rather than party to, proceedings, children have no right to a court file though they may apply (assuming they know it exists). In cases where arrangements are reached by consent (for example, in relation to contact and residence) there will not usually be a judgment (though there may be an order). Where CAFCASS have been involved in more than a short court based conciliation meeting, it is their policy to see all children. Whilst this would also involve direct feedback to the child as to the outcome in all public law cases, this is not generally so in private law proceedings.

There are very precise arrangements in place for adopted children once they reach the age of 18, though the decision as to whether to access this information is personal to them.

Section 60 of the Adoption and Children Act 2002 provides for the disclosure of information to an adopted adult. The adopted person has the right, at his request, to receive from the appropriate adoption agency – (a) any information which would enable him to obtain a certified copy of the records of his birth, unless the High Court orders otherwise, and (b) any prescribed information disclosed to the adopters by the agency by virtue of section 54.

Section 54 provides a power to require adoption agencies to disclose prescribed information in prescribed circumstances in accordance with regulations. The Adoption Agencies Regulations 2005 prescribe information disclosed to adopters.

Section 60(4) provides that the adopted person also has the right, at his request, to receive from the court which made the adoption order a copy of any prescribed document or prescribed order relating to the adoption. Rule 84 of the Family Procedure (Adoption) Rules 2005 expands on this and provides that an adopted person "has the right, at his request, to receive from the court which made the adoption order a copy of the following – (a) an application form for an adoption order (but not the documents attached to that form); (b) the adoption order and any other orders relating to the adoption proceedings; (c) orders allowing any person contact with the child after the adoption order was made; and (d) any other document or order referred to in the relevant practice direction.

The relevant practice direction provides that the adopted adult is also entitled to receive – "(a) any transcript or written reasons of the court's decision; and (b) a report made to the court by- (i) a children's guardian, reporting officer or children and family reporter; (ii) a local authority; or (iii) an adoption agency". This rule only applies to an adopted person over the age of 18 – i.e. an adult wanting to find out more about adoption proceedings when he was a child. Protected information is removed before sending this information to the adopted adult.

There is a case for providing information for all children as adults, but this would need further examination to look at the type of information that would be best provided, and the mechanics of both producing and retaining it. In private law, particularly, where children are not usually parties, this would provide additional issues about their rights to documents in those proceedings.

We know that children want objective information available to them later in life, but we also want to establish how best to meet this need, and whether the needs vary depending on the types of proceedings. Of course, some people would choose not to access the information, but the challenge is ensuring that it is available for those who do. Providing transcripts of judgments may be one solution, but there may be other equally valid methods of providing the information sought. For example, by producing a short summary of a judgment or providing copies of orders. In due course, there may be other solutions as the courts further develop their IT capabilities.

Some of the information, by virtue of the type of proceedings, would cause distress, and there may need to be support available for those concerned when they receive that information. We would welcome views on both the idea of providing information to children when they are adults, and of the sorts of information that might be provided.

### Protecting the privacy of families, especially children

We want to make family courts more open – but at the same time, we also want to improve people's right to privacy. We believe we can achieve both. The two principles of ensuring public confidence through opening up the courts to scrutiny, and protecting the confidentiality and privacy of the families are both achievable. It would not be in anyone's interest if the result of improving the openness of the courts was to reduce public confidence in the system as a whole.

Concerns over press attendance are in part about what information the press may choose to report. The press attending as a 'witness' to proceedings should be about seeing the process at work – not about reporting or passing on very intimate details about a family's life. People involved in family proceedings should still feel able to talk about sensitive and personal matters and not feel intimidated so that they are not open and honest with the court. They must not feel their safety is being compromised, and most importantly, they must not be deterred from using the courts because of concerns that details may be made public.

In cases involving domestic violence, any consideration of others attending court (apart from those directly concerned in a case) must consider keeping a victim safe and free from reprisals from a perpetrator and/or other people. Victims must feel able to give evidence in court without fear of intimidation – and importantly, not be deterred from taking legal action in order to protect themselves from further harm. That said, there are some people who would like to tell their story, would like the public to witness their court experience and know what happened to them, and allow the falsely accused to have a public witness.

Other adults are vulnerable too, for example because of mental health problems or learning difficulties. Similar concerns apply, such as whether their identities should be exposed to the public gaze, or whether someone's ability to cope with the court process is made even more stressful because of the added possibility of the hearing being open to others not directly involved in proceedings, including the press.

A blanket ban regarding anonymity may not prevent jigsaw identification. This refers to the independent publication of details about a case which if read on their own would not identify a person as involved in proceedings but if read together could piece together the identity of that person. This might be likely when there is a concurrent prosecution following child abuse (that is where there are criminal proceedings at the same time as family proceedings). A local paper might publish the name of the accused and a national paper might publish the details of the alleged offence – for example, a parent is suspected of abusing his child in such and such a town.

We already know that it is possible to improve openness and accountability and also protect the anonymity of the family. Mr Justice McFarlane illustrated this in his recent judgment about a case in which he found an Emergency Protection Order

(EPO) should not have been made.[37] The EPO removed a child from her mother to foster care, where she remained for 14 months.

> *"In the course of the hearing I investigated how such a Draconian order came to be… As a result of that investigation I have found significant flaws in the manner in which the system operated by the social services and the family justice system itself impacted upon this family. There is in my view a public interest in wide publicity being given to what took place in this case in the hope that lessons may be learned to ensure what befell this family is not repeated elsewhere.*
>
> *In order to maintain the focus upon the circumstances surrounding the EPO, and in order to preserve the confidentiality of the family's circumstances, the full judgment in the case, which runs to over 300 paragraphs, is not being released for publication or law reporting. I therefore propose to do no more than summarise the factual background in very short terms.*
>
> *The facts of this case have led me to produce a judgment which is highly critical of the social workers and the social services department who became involved with this family. I wish to record at the outset that failures of this degree are rare indeed."*

Depending on how members of the media are defined, the criminal courts have a long established system of ensuring that press attendance applies only to legitimate members of the press. There is a strong argument that the same system should apply to members of the press if attending family cases.

In all the above examples, judicial discretion to exclude those not directly involved in proceedings could be exercised in the interests of the administration of justice.

### Adoption

There is the anomaly that the magistrates' courts are barred by statute from allowing anyone into an adoption hearing, whereas the county courts and High Court have discretion. This means that the magistrates' court cannot consider applications for others to attend proceedings, even where the parties agree to it.

In relation to family proceedings under the Adoption and Children Act 2002 heard in a magistrates' court, only officers of the court, parties to the case, their legal representatives and other persons directly concerned with the case are entitled to attend court. Magistrates' courts do not have the power to allow any other person into court. Representatives of newspapers or news agencies are not entitled to attend a magistrates' court hearing family proceedings under the Adoption and Children Act 2002.[38]

[37] *Re X: Emergency Protection Orders* [2006] EWHC 510 (Fam).

[38] section 69(3) of the Magistrates' Courts Act 1980.

Adoption proceedings held under the Adoption and Children Act 2002 in the High Court or a county court may be heard in private[39] or in public as these courts have discretion (as in other family proceedings) to allow members of the press or general public to attend.

We think that all courts should be able to decide who may attend adoption proceedings, and so want to remove the absolute ban on outsiders attending adoption proceedings in the magistrates' courts.

We want to continue to encourage prospective adopters to come forward to adopt children. In care proceedings the parties are there because they are compelled to be there. In adoption proceedings, the new adoptive family is there by choice. Those proceedings often deal with quite sensitive information regarding the prospective adopters such as their identity, background and their capacity to parent the child. If this information entered the public domain, then this could lead to the adoption placement being disrupted or might discourage prospective adopters from going through the adoption process.

There will often have been previous court proceedings before the application for an adoption order is made and there is a strong public interest in these previous proceedings.

Of the 4,800 adoption applications in 2004, 1,100 were made by step-parents. The majority of the remaining 3,700 applications were made by local authorities.[40]

So before these children were adopted it is likely that the court will have already dealt with an application for a care order. During the course of these proceedings, the Local Authority will be thinking about the child's long term future and if adoption is considered to be the best option for the child, the Local Authority will make an application for an order placing the child for adoption (placement order). These are some of the most difficult decisions the family courts ever make, and the fact that these decisions are in private contribute to the public's concerns about 'secret courts'.

Safeguards have been necessary in adoption proceedings for some time. The new court rules made under the Adoption and Children Act 2002 have maintained these, most importantly providing for the use of a 'serial number' to protect the identity of prospective adopters where this is their wish. This has been brought forward from the previous adoption legislation.

If a serial number is assigned to the case, the court ensures that documents show only the serial number and do not reveal any identifying details about the prospective adopters to any other party (which will include the child's birth parents) who is not already aware of them. Proceedings in court are conducted so as to ensure the applicants are not seen by or made known to any party, except with their consent. The courts use a variety of methods to achieve this, depending on

39 section 101 of the Adoption and Children Act 2002.

40 Judicial Statistics 2004.

the facilities available. For example, they may designate separate rooms for the adopters and the child's birth parents, using audio or video links to the courtroom, whilst their representatives are in court with the judge. In exceptional cases, the court may 'split' the final hearing so that birth and adoptive parents attend at different times or on different days.

Many prospective adopters consider that contact from the child's birth family after adoption would pose an unacceptable risk to their family life and to the safety and stability of the placement. In 2005, approximately 80 per cent of people applying to county courts for an adoption order asked for a serial number to be assigned to their case. Inability to protect their identity may result in fewer applicants coming forward.

There is, however, a strong public interest in the care cases which result in the eventual adoption of a child.

We believe that there is a need to ensure that there is transparency in the process, up until the placement order is made (that is, the decision to place a child for adoption). Beyond that, where the adoption process starts, we want to maintain the privacy for those involved in the adoption proceedings themselves (that is, the child and the new adoptive family), and so the subsequent hearings would remain private.

### Ensuring that there are strong sanctions and rigorous enforcement where privacy is breached

We need to ensure that we have tough penalties for those who overstep the mark. There need to be clear and effective penalties for those who breach anonymity.

We will not allow there to be a situation where confidence in the family courts rises as it allows its work to be seen, only to have that confidence collapse through children or parents suffering the anguish of being identified – either directly or indirectly.

Information, once out in the public domain, cannot be reclaimed. Damage done to a child or vulnerable adult identified through the press cannot be undone by apology. There needs to be clear understanding and agreement about what information it is acceptable to publish, and what is not, with tough penalties for any breach.

The existing law is a mixture of criminal offences and criminal contempt. The provisions apply to different types of proceedings and courts and have different levels of penalty.

New legislation could provide an opportunity to provide for one single statutory offence covering all family proceedings for breach of the blanket anonymity provision. Alongside this would remain the powers the courts already have to deal with contempt where any additional reporting restrictions have been imposed by

the court. As stated there have been no recorded prosecutions under section 97(2) of the Children Act 1989. However, given the lack of reporting of substantive details involving children it might be said that section 97(2) has operated effectively.

Scrutinising the legal process is not the same as scrutinising private family lives. There are already provisions for retaining the anonymity of children in family proceedings. We believe adults should also be afforded the same rights. There should not be a choice to be made between pursuing justice through the courts, and exposing their very private lives for the interest of the general public.

### Arrangements that are simple, easily understood, consistent and workable

We want to achieve a position in which the law and practice of openness across the family justice system is simple to understand and consistently applied. Current law and practice is complicated, confusing and inconsistently applied. It is dependent upon the tier of court, type of family proceeding and how a judge exercises his or her discretion. That makes the system difficult to understand and effectively 'closed' to many, other than those with some legal knowledge or training. The harmonisation of the family procedure rules offers an opportunity to apply consistency across the family proceedings courts, the county courts and the High Court.

There are some practical considerations that would need to be borne in mind in moving to greater openness. Arguably, as arrangements stand, family magistrates would be the least affected by changes. More concern rests with the county courts where accommodation is often not suitable or large enough to admit those other than the people directly involved. Accommodation in some District Judges' courts is very restricted indeed. For those cases in which significant press was expected, it might be possible to make special arrangements. But usually there would be a limit - determined by the accommodation - on the space available for others to attend. Criminal courts sometimes have similar problems and have managed to develop systems over many years to deal with these situations when they arise.

There are also security issues. Greater numbers attending may well mean the need for greater security provision. We will need to undertake detailed risk-assessments of court premises before we could be sure of the level of any cost implications of changes to the current arrangements. There is an assessment of the issues in the Partial Regulatory Impact Assessment.

The courts must also ensure that there is no unnecessary delay in resolving children cases. Dealing with applications to attend, or requests for the proceedings to be heard in private, could contribute to delay in the system, as well as increasing legal aid costs. It is difficult to determine how frequent applications would be, but an estimate is given in the Partial Regulatory Impact Assessment, based on the current pattern of attendance at the family proceedings courts and the High Court.

## 7. Proposals for change

The proposals set out below seek to achieve both the privacy necessary to protect the identity of the family (including children); and removal of the "secrecy" which makes the family justice system difficult to scrutinise and damages public confidence.

This consultation makes proposals for improving openness in the first three tiers of court (family proceedings courts, county courts and the High Court), in all types of family proceedings and all parts of all hearings (with different arrangements for adoption proceedings). We want to increase the openness of family proceedings, *and, at the same time*, extend the principle of anonymity afforded to children involved in proceedings, to adults too.

Collectively, these proposals signal a major change in the way family courts conduct their business, and the experiences of all those using the family courts. They would go some way towards ensuring both confidence and confidentiality.

In short, we propose to:

- Make changes to 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 on 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

In addition to proposals we want to consider:

- Whether we should make special provisions for HMICA and CSCI inspectors and specified other groups
- Options on the further provision of information

### Make changes to attendance and reporting restrictions consistent across all family proceedings

The changes proposed to attendance arrangements and reporting restrictions would apply to family proceedings courts, county courts and the High Court and would be applied in all family proceedings. This would provide a simple and consistent approach that is both easy to understand and administer.

The exception to this would be adoption proceedings, but even then, we propose to change current arrangements so that they too are applied consistently across the family courts.

- Do you agree that attendance arrangements and reporting restrictions should apply consistently across all family proceedings?
- Would you exclude any types of family proceedings from the attendance and reporting restrictions proposed?

### 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 evidence

We want to change the rules to open up the family courts so that the media, in their role as a proxy for the public, can attend all family courts as a matter of right, subject to the court's power to exclude if appropriate. Admitting the public in general to family proceedings would change the nature of those proceedings and could well influence vulnerable individuals not to pursue matters through the courts, when they should. We want the media to be able to attend on behalf of the public, and for the benefit of the public.

We believe that the fact that the media would be able to attend family proceedings on behalf of the public will help reassure people that the courts are more open, and more transparent. We believe that the opportunity for the media to attend family proceedings on behalf of the public will also help act as an important part of the necessary checks and balances to ensure that the system is fair and effective. We believe that the ability for the media, acting as a proxy for the public and for the benefit of the public, to attend all family courts as of right, subject to the court's power to exclude if appropriate, will mark a major step forward in helping to ensure public confidence in the family courts.

- Do you agree that the media should be able to attend family courts as of right?
- Do you think that the court should be able to exclude the media from family courts if appropriate?
- Should exclusion depend on the type of family proceedings and/or certain parts of hearings and/or some other reason?

**Allow attendance by others on application to the court, or on the court's own motion.**

We also want others to be able to apply to attend, and the courts to decide to admit others when they feel it is appropriate. It is important that we demonstrate our trust in the courts to make these decisions. After all, each case will be different and only they will be in a position to judge what may be appropriate in any given case.

- Do you think any others should be able to attend family courts (with or without needing to apply) and if so, whom?

**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.**

This would allow the media to publish (and the public to scrutinise and debate), important legal arguments and decisions (from family proceedings courts, county courts and the High Court), but in a format that would not identify the individuals concerned. The proposed prohibition would be binding on third parties not involved in the court process. Arrangements in the Court of Appeal and House of Lords would remain the same so that reporting restrictions are made at judicial discretion and the decision to anonymise judgments is made on a case by case basis.

There may be cases where a blanket ban is not appropriate. We would give courts a power to review a blanket ban regarding anonymity, which is also an important part of our ECHR obligations. The Strasbourg court in *B v United Kingdom* [2001] 2 FLR 261 held that the restrictions imposed by section 97(2) are Convention compliant but added that they "must always be subject to the Court's control". There may be occasions when losing this prohibition is necessary. For example, a court may dispense with section 97(2) if the welfare of the child requires it. This has often been done to help trace a child following child abduction.

- Do you agree that the current restrictions which prevent publication of information intended, or likely, to identify a child being involved in family proceedings should be extended to prevent the identification of adults involved in proceedings?
- Do you agree that the court should have the power to lift and review the ban? If so, in what circumstances?

Secondly, we would introduce primary legislation so that family proceedings courts and county courts have the same power as the High Court to impose additional reporting restrictions when necessary to ensure the anonymity of parties and children involved in the proceedings.

To help them decide, we would expect them to consider matters, such as:

- The interests of any child or vulnerable adult
- The safety of parties and witnesses
- The interests of the administration of justice
- Where evidence is of an intimate, sexual or violent nature
- Where confidential information is involved and others attending would damage that confidentiality

- Do you agree that, together, the blanket ban and power to impose additional reporting restrictions would provide the courts with adequate power to ensure anonymity?
- Do you think that courts should consider the matters listed in deciding what additional reporting restrictions to impose? Would you add or remove any other matters on that list?

### Introduce a new criminal offence for breaches of reporting restrictions

If we are to open the courts to the press and media, we need to ensure that there are adequate sanctions where the law on anonymity is broken. We cannot have a system that results in more confidence to the public at the expense of those involved in proceedings. Family courts are there to protect the young and the vulnerable and to make decisions on their behalf. We want people to seek justice through the courts when they need to, and this right to justice should not be at the expense of a right to privacy.

We propose to introduce primary legislation to create a criminal offence prohibiting publication of information intended, or likely, to identify a child or an adult party as being involved in family proceedings. Alongside this would remain the powers the

courts already have to deal with contempt where any additional reporting restrictions have been imposed by the court.

We have already changed the law so that the limitation against publishing identifying material is limited to the public at large or a section of the public. Section 97(2) of the Children Act 1989 was restricted in this way by section 62 of the Children Act 2004. The purpose of this change was to allow individuals involved in proceedings concerning children to tell others, such as MPs, doctors and the police that their children are involved in proceedings without having to seek the permission of the court to do so. There is obvious merit in this. We propose, therefore, that this limitation should be extended to any new legislation about reporting restrictions.

- Do you agree that publication restrictions should apply only to the public at large? (i.e. individuals involved in proceedings concerning children can tell specified others in specified circumstances).

### 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

Of all family proceedings, adoption is the most sensitive. In some cases, the birth family will be supportive of the decision to place a child in a new family, but in other cases, and for a variety of reasons, the adoption will take place against the birth family's wishes. We want to ensure that the proceedings, which lead to the decision to place a child for adoption are open and can be subject to proper scrutiny.

The decision to remove a child from its birth family irrevocably is the most difficult and life-changing decision a court can make and we want to be sure that this process and the reasons for those decisions can be understood and scrutinised. But beyond that, we intend to retain complete privacy, including privacy for any application for an order made during the period the child is placed with the prospective adopters. This is important both from a security view of the new adoptive family (particularly where the court is acting against the birth family's wishes) and for the children involved.

The Adoption and Children Act 2002 has changed the way adoption is viewed, and an important part of this change is being open with children about the fact they have been adopted. But that information is for the benefit of the child concerned – and whether they choose to tell others is a decision for them. Making proceedings anything other than a private matter would remove that decision from them. We therefore propose to exclude the adoption process – but not the proceedings leading to the decisions to place for adoption – from any proposed changes to family proceedings.

- Generally, do you agree that adoption proceedings should be treated differently from other family proceedings?
- Specifically, do you agree that, once a placement order has been made, the remainder of the adoption proceedings should be in private?

In addition to the proposals, we also want to consider:

**Whether we should make special provisions for HMICA and CSCI inspectors and specified other groups**

We want to encourage MPs and other elected officials to see for themselves how the system works in practice, so they can both scrutinise the system, and be able to deal with their constituents' concerns and questions more confidently. Currently, MPs, Lead Members and Inspectors must apply to be able to attend family proceedings. This means that their attendance is dependent upon judicial discretion, which will take into account the views of all those in court (although, in a magistrates' court, permission may not be withheld from a person who appears to the court to have adequate grounds for attending). There is an argument that they should be able to attend as of right (so not need to apply) in order to fulfil their roles. We wonder whether the need to apply should be removed so that they can attend as of right.

- Currently, HMICA and CSCI Inspectors, MPs and Lead Members for local authority Children's Services must apply to attend family proceedings. Do you think the need to apply should be removed so that they are able to attend as of right?

## Options on the further provision of information

We know that adults who have been involved in family proceedings as children want objective information. We want to establish how best to meet this need, and whether the needs vary depending on the types of proceedings. Of course, some people would choose not to access the information. The challenge is ensuring that it is there for those who do choose to access it, with appropriate support available at the time that (often emotionally charged) information is received. Providing transcripts of judgments may be one solution, but there may be other equally valid methods of providing the information sought. For example, by producing a short summary of a judgment, or providing copies of orders. In due course, there may be other solutions as the courts further develop their IT capabilities.

We would welcome views on both the idea of providing information to children when they are adults, and of the sorts of information that might be provided.

- What information do you think an adult who has been involved in family proceedings as a child would find helpful (as an adult) about those proceedings?
- What type of information would be most helpful?
(An accessible recording held on court file, copy of orders, summary of judgment, full transcript of judgment…)

### Practical considerations

We have set out some practical considerations that would arise from implementing proposals to allow the media as of right, and others on application, to attend family courts.

- If proposals are implemented there will be implications for court resources, in terms of increasing security, changing listing procedures, the time taken for dealing with applications re attendance and reporting and any objections. Are there any other practical considerations that you think should be taken into account?

# 8. Conclusion

Balancing the needs for confidence and confidentiality is a key challenge for the family justice system. This set of proposals signifies a major change to the operation of our family courts, and will impact on everyone who comes into contact with them. They will also help to alleviate concerns about family courts, and allow more open debate about them. Allowing access by the press as of right, and trusting courts to consider applications from others who may wish to attend, will encourage openness and allow for public debate.

We propose to go further than that, by ensuring that all those involved in family proceedings enjoy the same rights of anonymity as children involved in proceedings. If opening the courts is about allowing scrutiny of the system itself, then publishing details about individuals adds nothing either to seeing the process, or to the legal arguments which are so important.

We want a family justice system which is both open to scrutiny, and respects the privacy of those who find themselves involved in proceedings. We want a family justice system in which the public and the participants can have confidence, and at the same time which ensures the right degree of confidentiality in cases which are often highly sensitive and which often involve people at their most vulnerable. We believe that the proposals we are putting forward mark a major change in the family court system, and a major move towards our dual objective for the family courts of confidence and confidentiality.

# Questionnaire

**We would welcome responses to the following questions.**

**1) Make changes to attendance and reporting restrictions consistent across all family proceedings**

1.1) In principle, do you agree that attendance and reporting arrangements should apply consistently across all family proceedings?

Yes ☐ No ☐

If not, why not?

1.2) Would you exclude any types of family proceedings from the attendance and reporting restrictions proposed?

Yes ☐ No ☐

If yes, which proceedings?

Additional comments:

2) **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**

2.1) Do you agree that the media should be able to attend family courts as of right?

Yes ☐ No ☐

If not, why not?

2.2) Do you think that the court should be able to exclude the media from family courts if appropriate?

Yes ☐ No ☐

2.3) Should exclusion depend on:

the type of family proceedings?

Yes ☐ No ☐

If yes, which types of proceedings?

and/or certain parts of hearings?

Yes ☐ No ☐

If yes, which parts?

and/or some other reason?

Yes ☐ No ☐

If yes, then what reasons?

Additional comments on this area of the consultation (please state the question number to which your comments refer):

**3) Allow attendance by others on application to the court, or on the court's own motion.**

3.1) Do you think any others should be able to attend family courts (with or without needing to apply)?

Yes ☐ No ☐

3.2) If so, whom?

| | Attend as of right? | Need to Apply? |
|---|---|---|
| …………………..……………………………… | ☐ | ☐ |
| …………………..……………………………… | ☐ | ☐ |
| …………………..……………………………… | ☐ | ☐ |
| …………………..……………………………… | ☐ | ☐ |

Additional comments on this area of the consultation (please state the question number to which your comments refer):

**4) 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.**

4.1) Do you agree that the current restrictions which prevent publication of information intended, or likely, to identify a child being involved in family proceedings should be extended to prevent the identification of adults involved in proceedings?

Yes ☐ No ☐

If no, then why not?

Additional comments:

4.2) Do you agree that the court should have the power to lift and review the ban?

Yes ☐ No ☐

If so, in what circumstances?

Additional comments

4.3) Do you agree that, together, the blanket ban and power to impose additional reporting restrictions would provide the courts with adequate power to ensure anonymity?

Yes ☐ No ☐

Additional comments:

4.4) Do you think that courts should consider the matters listed in deciding what additional reporting restrictions to impose?

- The interests of any child or vulnerable adult

  Yes ☐ No ☐

- The safety of parties and witnesses

  Yes ☐ No ☐

- The interests of the administration of justice

  Yes ☐ No ☐

- Where evidence is of an intimate, sexual or violent nature

  Yes ☐ No ☐

- Where confidential information is involved and others attending would damage their confidentiality

  Yes ☐ No ☐

4.5) Would you add any other matters to that list?

Yes ☐ No ☐

| If yes, which matters? |
| --- |

| Additional comments: |
| --- |

**5) Introduce a new criminal offence for breaches of reporting restrictions.**

5.1) Do you agree that publication restrictions should apply only to the public at large? i.e. individuals involved in proceedings concerning children can tell specified others in specified circumstances?

Yes ☐ No ☐

| Additional comments: |
| --- |

**6) 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**

6.1) Generally, do you agree that adoption proceedings should be treated differently from other family proceedings?

Yes ☐ No ☐

Additional comments:

6.2) Specifically, do you agree that, once a placement order has been made, the remainder of the adoption proceedings should be in private?

Yes ☐ No ☐

Additional comments:

**In addition to the proposals, we also want to consider:**

**7) Whether we should make special provisions for HMICA and CSCI inspectors and specified other groups**

7.1) Currently, HMICA and CSCI Inspectors, MPs and Lead Members for local authority Children's Services must apply to attend family proceedings. Do you think the need to apply should be removed so that they are able to attend as of right?

Yes ☐ No ☐

Additional comments:

**8) Options on the further provision of information.**

8.1) We know that adults who have been involved in family proceedings as children want objective information. What information do you think an adult who has been involved in family proceedings as a child would find helpful?

8.2) What type of information would be most helpful?

| | | |
|---|---|---|
| An accessible recording held on court file | Yes ☐ | No ☐ |
| Copy of orders | Yes ☐ | No ☐ |
| Summary of judgment | Yes ☐ | No ☐ |
| Full transcript of judgment | Yes ☐ | No ☐ |

8.3) Please list any other types of information:

Additional comments:

## 9) Practical considerations

9.1) If proposals are implemented there will be implications for court resources, in terms of increasing security, changing listing procedures, the time taken for dealing with applications re attendance and reporting and any objections.

Are there any other practical considerations that you think should be taken into account?

**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<br>(eg. member of the public etc.) | |
| **Have you personal experience of family proceedings?** | Yes ☐ No ☐ |
| **Are you under 18?** | Yes ☐ No ☐ |
| **Date** | |
| **Company name/organisation** (if applicable): | |
| **Address** | |
| **Postcode** | |
| **If you would like us to acknowledge receipt of your response, please tick this box** | ☐<br>(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.

# How to respond

Please send your response by **30 October 2006** to:

**Marie Del Pino**
**Department for Constitutional Affairs**
**Family Justice Division**
**Post Point 9A, 4th Floor**
**Selborne House**
**54-60 Victoria Street**
**London**
**SW1E 6QW**

**Tel: 020 7210 8601**
**Fax: 020 7201 8681**
**Email: family.consultation@hmcourts-service.gsi.gov.uk**

**Online discussion forum:** There is on-line discussion forum. You can view or join in the discussion by logging onto www.familycourtsforum.net.

A young people's on-line consultation site, based on an interactive cartoon storyboard, will run from 1 September to 30 October 2006. You can take part by logging onto www.ofcf.net.

## Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at http://www.dca.gov.uk/index.htm

## Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on-line at http://www.dca.gov.uk/index.htm

## 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: Improving transparency and privacy in family courts.

## Purpose and intended effect of measures

### (i) Objective

2. The overall aim is to implement a simple and consistent approach to attendance at, and reporting of, proceedings in the family courts in England & Wales that includes extending attendance to the press and others on application in family proceedings courts, county courts and High Court. This may also have an impact on the Court of Appeal and House of Lords. We also want to provide the same level of anonymity to adults involved in family proceedings as afforded to children in family proceedings.

3. The proposals aim to:

   - Ensure public confidence in the family justice through public scrutiny
   - Improve understanding of the decisions that the courts make
   - Protect the privacy of families, especially children
   - Ensure that there are strong sanctions and rigorous enforcement where privacy is breached
   - Provide arrangements that are simple, easily understood, consistent and workable.

### (ii) Background

4. 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 impacts not only on their childhood, but can continue to have repercussions into adulthood. People are concerned that those decisions are made on a sound basis.

5. Recent high profile cases have given rise to concerns about the possibility of miscarriages of justice in the family justice system, particularly in relation to care cases. There are also concerns about private law children cases, and allegations on the one hand of bias in the system against non-resident parents, and, on the other, that contact may be taking place when it is not safe. The current access and reporting arrangements make it difficult to see

what is really happening and this is contributing to a lack of confidence in the family justice system. There is a raft of legislation governing attendance at and reporting of family proceedings. These are complicated and depend upon both the level of court and type of family proceedings.

**(iii) Rationale for government intervention**

6. The full benefits to be derived from the unified administration of the courts are most likely to be realised by a single and comprehensive set of rules to cover magistrates' courts, county courts and the High Court. 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 harmonisation of these procedural rules of court for family proceedings provides us with the opportunity to look again at ways of making the courts more open and to introduce consistency across 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 both simple and simply expressed.

7. 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. Recent 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. We want to ensure that those involved in family proceedings are assured anonymity. We also want to explore the need for better information for adults who were the subject to proceedings as children.

8. In 2005 the Constitutional Affairs Select 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; and

- The press should continue to be restricted to publishing those matters which have been made public by the court.

9. 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 Nicholas Crichton. As a result, a follow up report was published on 11 June 2006, which commented that the committee looked forward to the forthcoming consultation.

## Consultation

### Within government

10. 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
    - Legal Services Commission
    - Department for Trade and Industry
    - Department for Culture Media and Sports
    - Crown Prosecution Service
    - Northern Ireland Court Service
    - Children's Commissioner for England
    - Children's Commissioner for Wales
    - CAFCASS
    - Welsh Assembly

### Pre-consultation stakeholder meetings

11. A large number of pre-consultation stage stakeholder meetings have taken place to help inform policy development. Stakeholders met 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.

### Buddying Questionnaire

12. Court staff were approached to assist in developing policy options. Their input was provided by responses to a questionnaire concerning operational and resource issues. Over twenty volunteers from a wide range of courts came forward.

### Round Table Discussion – Improving Transparency in the Family Courts

13. The round table meeting discussed the issue with practitioners and academics with significant experience of the court process and issues affecting parties to family proceedings. The main terms of reference were the CASC recommendations, and a paper from the Transparency and Accountability branch of the Family Justice Division.

### Family Justice Council

14. The Family Justice Council established a working group to feed in their views and suggestions.

### Young People's Panel

15. A group of young people jointly sponsored by the Family Justice Council and CAFCASS, have met to discuss these issues. They will be continuing to work with HMCS on this area.
16. The comments and ideas of those consulted have been considered in and taken fully into account in developing proposals. We have talked to those directly involved in the legal system as well as those with a specific interest in children's welfare – such as the Children's Commissioners, the voluntary sector and others involved with looked after children.

## Options

17. The following options are available:

**Option 1:** Do Nothing

**Option 2:** Changing the rules about who may attend family courts.

**Option 3:** 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.

**Option 4:** Make any hearing to determine an application for a placement order within adoption proceedings but do not include any other aspect of adoption proceedings.

**Option 1: Do Nothing**

18. The present system would remain unchanged. The family courts will continue to be criticised for lacking openness and operating in secret.

19. Doing nothing would prove unsustainable as the Family Proceedings Procedure Rules are in the process of being harmonised. The harmonisation of the Family Procedure Rules provides us with an opportunity to look again at simplifying the rules on attendance across the family proceedings courts, county courts and the High Court. A consultation paper on the harmonisation of the Family Procedure Rules is due to be published soon by the DCA.

**Option 2: Changing the rules about who may attend court**

20. We need to ensure confidence and confidentiality in the family courts. That means both maintaining the privacy necessary to protect families and allowing public scrutiny of the family courts to ensure public confidence, and to allow general concerns to be talked about and debated openly.

21. We want to change the rules to open up the family courts so that the press can attend all family courts as of right but with judicial discretion to exclude in exceptional circumstances. We also want others to be able to apply to attend, subject to judicial discretion. Admitting the general public to family proceedings would change the nature of those proceedings and could well influence vulnerable individuals not to pursue matters through the courts and/or inhibit the giving of evidence.

22. It is important that those who have representative interests in or are accountable for the operation of the family courts and associated services – MPs, Ministers, Lead Members in local authorities for Children's Services – are allowed access so that they can give a proper account to the public of the way in which family justice works. We want to seek views on whether the current arrangements adequately allow for them to fulfil their roles, or whether they should be allowed to attend as of right. We also want to seek views on whether the same issues apply to the relevant inspectorates.

**Option 3: 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**

23. The introduction of primary legislation would create a new single criminal offence prohibiting publication of information intended, or likely, to identify a child or a party as being involved in family proceedings. This would provide a simple and consistent approach so that it was both easy to understand and administer.

24. This would have the effect of ensuring everyone involved in family proceedings – adults and children alike – will be subject to the same principle of anonymity which would prevent their identification in the press or media.

This would still allow the media to publish (and the public to scrutinise and debate) important legal arguments and decisions – but in a format that would not identify the individuals concerned. The proposed prohibition will be binding on third parties not involved in the court process or proceedings.

25. Secondly, the introduction of primary legislation would provide the magistrates' courts and county courts with the same powers as the High Court so that they can impose additional reporting restrictions when necessary to ensure the anonymity of parties and children involved in the proceedings. This additional power would be required to deal with the problem of jigsaw identification. The proposed prohibition will be binding on third parties not involved in the court process.

26. We have already changed the law so that the limitation against publishing identifying material is limited to the public at large or a section of the public. Section 97(2) of the Children Act was restricted in this way by section 62 of the Children Act 2004. The purpose of this change was to allow individuals involved in proceedings concerning children to tell others – MP's, doctors and the police that their children are involved in proceedings without having to seek the permission of the court to do so. There is obvious merit in this. We propose, therefore, that this limitation should be extended to any new legislation about reporting restrictions.

**Option 4: 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.**

27. Of all family proceedings, adoption is the most sensitive. In some cases, the birth family will be supportive of the decision to place a child in a new family, but in other cases, and for a variety of reasons, the adoption will take place against the birth family's wishes. We want to ensure that the proceedings, which lead to the final decision to place a child for adoption are open and can be subject to proper scrutiny. The decision to remove a child from its birth family irrevocably is one of the most difficult and life-changing decisions a court can make and we want to be sure that this process and the reasons for those decisions can be understood and scrutinised. But beyond that, we intend to retain complete privacy. This is important both for the security of the new adoptive family (particularly where the birth family contests the adoption) and for the children involved.

28. The Adoption and Children Act 2002 has changed the way adoption is viewed, and an important part of this change is being open with children about the fact they have been adopted. But that information is for the benefit of the child concerned – and whether they choose to tell others is a decision for them. Making proceedings anything other than a private matter would remove that decision from them. We therefore propose to exclude the adoption process – but not the process leading to the decisions to place for adoption – from any proposed changes to family proceedings.

## Cost and Benefits

**Sectors and groups affected – The proposed changes will affect:**

- **Family law firms and legal advice sector** – The usual way to address new issues is through their required programme of continuing professional development. For fee earners, there may be additional income where a directions hearing is required.
- **Judiciary** – Changes will have an impact on the judiciary, who will need to consider on a case by case basis whether additional reporting restrictions should apply to ensure anonymity. Additional judicial time may be needed for directions hearings and within substantive hearings where parties can apply for proceedings to be in private or for reporting restrictions. There is a risk that improved openness would increase delay in the family justice system.
- **Children who are subject of, or party to, family proceedings** – For children and young people, there are concerns about maintaining anonymity and privacy, particularly in small communities where, despite reporting restrictions preventing identification, they will still be identified through other (reportable) information. We also want to consider the information which should be available to them as adults.
- **Adults who are a party family proceedings** – In domestic violence cases, the victim's safety is a prime concern. Any consideration of others attending court (apart from those directly concerned in a case) must be balanced by keeping a victim safe and free from reprisals from a perpetrator and/or other people. Victims must feel able to give evidence in court without fear of intimidation – and importantly, not deterred from taking legal action in order to protect themselves from further harm. That said, there are people who would like to tell their story, where they would like other individuals to witness their court experience and know what happened to them, and allow the falsely accused to have a witness.
- **Other vulnerable adults**, such as those with mental health problems or learning difficulties also need to be protected. There may be concerns over whether, for example, their medical history, or their ability to cope with the court process should be exposed to the public gaze. We will need to ensure that the courts continue to offer adequate protection.
- **Press** – If the press are allowed to attend family proceedings it will be important to ensure that they fully understand the reporting restrictions and the consequences of breaching them.
- **Security** – Courts may need additional security measures.

- **Courts: Court buildings** – Concern, especially with the county courts where accommodation is often not suitable or large enough to admit others than those people directly involved in proceedings. Arrangements must be flexible enough to allow limits to be put on those attending if necessary.
- **Equity and fairness** – The proposals included in the consultation paper are intended to make the family courts more transparent. The proposals will not have any disproportionate effect on any one business sector or group or individual. The proposals in the consultation paper will not undermine the safety issues of vulnerable people and will continue to protect the anonymity of the child. This will be ensured by section 97(2) Children Act 1989, which protects the identity of the child who is involved in any family proceedings. We have spoken to representatives from ethnic minority groups about the issue of greater openness in family courts as well as representatives from women's, men's , parents' and children's groups. The proposals will affect every court user but will not disproportionately affect any particular group.

## Benefits

### Option 1: Do Nothing

29. Family proceedings will continue to be conducted under the existing range of legislation. No additional costs will be incurred.

*Economic*

Not applicable

*Environmental*

Not applicable

*Social*

30. Growing concerns that the family courts should be more open, but little agreement as to how this should be achieved, therefore any change risks public criticisms.

### Option 2: Changing the rules about who may attend court

31. Press attendance would allow closer public scrutiny of the operation of the family courts and it would also allow the falsely accused to have a public witness. Press attendance would also allow scrutiny of and improve public knowledge about how decisions are reached by judges in family cases. This could help remove the perception of secret courts.

32. Attendance by others, on application, would allow greater access to, for example other members of the family, elected representatives and those responsible for the development of policy.

*Economic*

Not applicable

*Environmental*

Not applicable

*Social*

33. We think that the public should be able to scrutinise the operation of the family courts and the press has an important role to play in that. But there needs to be a distinction between what the public is interested in, and what is in the public interest. We do not think that making family courts more open should mean publishing information that is very private or intimate. Instead, we think it should be information that helps the public understand how the family justice system operates, and how and why decisions are made, so it can help people scrutinise and discuss the concerns they have about the family courts. Opening the courts to the press is largely seen as a benefit to the public at large, to improve understanding, and act as a proxy for attendance by the general public.

**Option 3: 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.**

In addition to the balance of openness being addressed, there is also an opportunity to redress the balance towards the privacy of individuals. While there is an interest in scrutinising the court process, this does not need to compromise people's privacy.

34. Unnecessarily breaching the confidentiality and privacy of the families involved would reduce public confidence in the system as a whole.

35. Concerns over press attendance are in part about what information the press may choose to report. The press attending as a 'witness' to proceedings should be about seeing the process at work – not about reporting or passing on very intimate details about a family's life. And people involved in family proceedings should still feel able to talk about sensitive and personal matters and not feel intimidated so that they are not open and honest with the court. They must not feel their safety is being compromised, and most importantly, they must not be deterred from using the courts because of concerns that details may be made public.

**Option 4: 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.**

36. Safety issues have long had a high profile in adoption proceedings. The new court rules made under the Adoption and Children Act 2002 provide a number of security measures, most importantly the use of a 'serial number' where the prospective adopters wish their identity to be protected. This provision has been brought forward from the previous adoption legislation.

37. Many prospective adopters consider contact from the child's birth family after adoption would pose an unacceptable risk to their family life and to the safety and stability of the placement. In 2005, approximately 80 per cent of applicants for an adoption order asked for a serial number to be assigned to their case. Inability to protect their identity may result in fewer applicants coming forward.

38 We want to continue to encourage prospective adopters to come forward. Maintaining privacy in adoption proceedings could support this aim.

## Costs

### Option 1: Do nothing

39. The concerns about public confidence in the family justice system are contributing to the public perception that the family courts are 'secret' and 'biased'. The judiciary, public and MPs will continue to call for greater openness. The danger of the Government not responding to change will further reinforce people's views of 'secret' family courts.

### Option 2: Changing the rules about who may attend court

*Cost to Government*

40. These fall to DCA and HMCS.

41. For DCA and HMCS, the costs would lie in the changes to extending the attendance by the public, and particularly the cost of court time in additional substantive hearings and potentially lengthier direction hearings. All of the identified proposals are currently unfunded. Subject to the outcome of the consultation, 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 DCA and HMCS, as and when priorities and resources allow. These proposals would take some time to come into effect since they will require a change in the law, when parliamentary time allows.

*Court Time*

42. Extra court time may be needed to consider applications, for example; for attendance of others with an interest in the proceedings; whether proceedings should be held in private; and whether reporting restrictions should be imposed.

43. Research previously undertaken by the Economics and Statistics Division at the DCA 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 240,000 cases having a further hearing (for objections) there will be around 144,000 extra minutes (2,400 hours) for hearings in a year.

*Legal Aid Impact on increased press and public attendance*

44. We simply do not know how often objections to the press or others attending may be raised. We do know, though, that when similar procedures changed in Australia and New Zealand, there was an initial flurry of activity which quickly died away. The assumptions are therefore based on a similar pattern of behaviour emerging for England and Wales, and using a figure of only 1% of family proceedings resulting in any objections. Of course, this might turn out to be an underestimate so there is a real risk that legal aid costs in particular could be significantly higher.

45. 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.

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

    - DCA Economics & Statistics Division have estimated the Legal Aid costs of a directions hearing in a care case at approximately £250 and a cost to HMCS of £81 (accommodation, judiciary, administration etc) based on data from HMCS and LSC.
    - We have assumed that the average legal aid cost of a directions hearing across all family cases will be £125 as care cases make up a small proportion of all cases and will have a higher number of parties in receipt of legal aid. We have no comparator for how frequently objections are likely to be raised. We do know that the press attends rarely in family proceedings 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 figures from Judicial Statistics 2004 and cover all three tiers of courts (family proceedings courts, county courts and High Court) and covers 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 records of orders from 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 £300,000 and a cost to HMCS of £195,000.
- Some courts (particularly county courts) may need to review security arrangements and also place a limit on the number of press attending due to size of court accommodation (e.g District Judges' chambers).

*Economic*

Not applicable

*Environmental*

Not applicable

*Social*

Not applicable

*Court security*

47. There may also be an impact on security costs for courts. We know that the level of security varies between courts and locations. While admitting the press may not appear to raise concerns unduly, we know that, in New Zealand, for example, they have had to review security in courts and incurred additional costs as a result.

48. In order to provide an accurate estimate of any potential costs, HMCS estates will need to undertake relevant risk assessments. This would need to include assessments of court sites, and further joint work to look at the additional costs. They estimate that such a review would take a minimum of six months.

49. As mentioned earlier, we are unable to provide costing implications at this stage. Court security is currently funded through local HMCS Area budgets. The cost per security guard, whether contracted or directly employed, is between £18,000 and £25,000 p.a.

50. Security costs may also include other measures that are implemented to ensure the physical security of staff and users. These could include additional costs for installing panic alarms, secure routes of exit for judges, archway metal detectors and wands, as well as the incidental costs of providing training and authorisation for the extra compliment of guards, and the recruitment of a greater number of ushers.

*Court Buildings Strategy*

51. Current provision particularly in District Judges' (DJ) chambers is often not sufficiently spacious to allow for public entrance. Expansion of these facilities will be in some cases impossible, in others expensive. Specification of new courts can be developed to include larger DJ chambers – at an increased cost to the build. All of this is currently uncosted, and detailed costing will need to be developed to understand its viability.

**Option 3: 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.**

52. The main cost will be the additional court time taken to consider whether appropriate reporting restrictions are in place where necessary. There may be an additional cost to the courts for enforcing breach of reporting restrictions.

### Compensatory simplification measures

53. If legislation is introduced it will provide simple and consistent arrangements for attendance at and reporting of family proceedings, covering all three tiers of courts (family proceedings courts, county courts and High Court). This will replace the current raft of different and complex legislation which deals with attendance and reporting restrictions.

### Consultation with small business: the Small Firms' Impact Test

54. 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. We have discussed this with representatives of the Small Business Service who accept this approach.

### Competition assessment

55. The only competition envisaged is between security companies to provide security for courts, if it is assessed to be required.

### Enforcement and sanctions

56. If we are to open the courts to the press and media, we need to ensure that there are adequate sanctions where the law on anonymity is broken. We cannot have a system that results in more confidence to the public at the expense of those involved in proceedings. Family courts are there to protect the young and the vulnerable adult and to make decisions on their behalf. We want people to seek justice through the courts when they need to, and this

right to justice should not be at the expense of a right to privacy.

57. We propose to introduce primary legislation to create a criminal offence prohibiting publication of information intended, or likely, to identify a child or an adult party as being involved in family proceedings. Alongside this would remain the powers the courts already have to deal with contempt where any additional reporting restrictions have been imposed by the court.

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

## Summary and recommendation

59. No specific recommendations on the 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.

### Sections 9-12

Sections 9-12 will be completed after consultation and included in the full RIA.

### Implementation and delivery plan

### Post-implementation review

*Summary costs and benefits table*

| Option | Total benefit per annum: economic, environmental, social | Total cost per annum:<br>• economic, environmental, social<br>• policy and administrative |
|---|---|---|
| 1 | | |
| 2 | | |
| 3 | | |
| 4 | | |

## Declaration and publication

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

**Signed ..................................................................**

**The Rt Hon Harriet Harman QC MP**

Minister of State
Department for Constitutional Affairs

**Date**

**Contact point**

Erika Maass
Transparency & Accountability Branch
Family Justice Division
4th Floor, Selborne House
54-60 Victoria Street
London
SW1E 6QW

## 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 Department for Constitutional Affairs Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at consultation@dca.gsi.gov.uk

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

**Laurence Fiddler**
**Consultation Co-ordinator**
**Department for Constitutional Affairs**
**5th Floor Selborne House**
**54-60 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 60.

# Annex A – Definition of family proceedings

**Types of family proceedings include: (Following list not exhaustive)**

a) matrimonial - divorce, nullity of marriage or judicial separation - includes financial applications ancillary to these;

b) legitimacy;

c) matters relating to minors including the maintenance of minors and any proceedings under the Children Act 1989. This includes contact and residence.

d) adoption;

e) non-contentious probate business [common form business includes the obtaining of grants of probate and letters of administration. Non-contentious probate business might be the advancement of capital from a settlement in favour of a minor.]

f) applications for consent to the marriage of a minor

g) appeal in cases of contempt of court;

h) Declarations as to status. [This includes declarations as to marital status]

i) Declarations and consents relating to civil partnership - This includes declarations as to civil partnership status.

j) Family homes and domestic violence applications;

k) Child abduction applications;

l) Parental orders in favour of gamete donors

m) Jurisdiction, recognition and enforcement of judgments in matrimonial and parental responsibility matters;

n) Provisions regarding pensions. They provide for the creation of pension credits and debits in both the private and state sector. This is a way of valuing third party interests in pensions. [Relating to a debit or credit under section 29 (1) or 49 (1) of the Welfare Reform and Pensions Act 1999]

o) Child Support Act 1991;

p) Sections 6 and 8 of Gender Recognition Act 2004. These provisions provide the Secretary of State with a power to apply to court or the Gender Recognition Panel to correct an error in a gender recognition certificate and allow appeals to be made by an individual to the High Court following a refusal to issue a gender recognition certificate.

# Annex B – Current reporting restriction arrangements

| Reporting Restrictions – provision | Content | Penalty | Court to which restrictions apply | Proceedings to which restrictions apply |
|---|---|---|---|---|
| **1. section 97(2) of the Children Act 1989** | No person shall publish to the public at large or a section of the public any material which is intended, or likely, to identify –<br>(a) any child as being involved in any proceedings before a court in which any power under the CA may be exercised;<br>(b) an address or school as being that of a child involved in any such proceedings. | Section 97(6) – offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale (£2,500). | Fpc[1], cc[2] and the HC[3] | Applies to proceedings in which any power under the CA 89 may be exercised. |
| **2. section 12 of the Administration of Justice Act 1960** | The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say –<br>Where the proceedings<br>(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;<br>(ii) are brought under the Children Act 1989; or<br>(iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor. | Criminal contempt is punishable by –<br>1. Imprisonment (up to 2 years in superior court);<br>2. a fine – there is no statutory limit to the amount of a fine which a superior court can impose.<br>3. an injunction to restrain repetition of the act of contempt;<br>4. cost order (in addition to other punishment);<br>5. a hospital order or guardianship order, or an interim hospital order if the person committing the contempt is suffering from a mental illness or severe mental impairment – superior court has the same power as a crown court would have in the case of a person convicted of an offence. | Cc and the HC – if within (i) to (iii).<br>If matter heard in private then fpc – starting point for fpc is restricted access – section 12 will not apply – but the magistrates can in certain circumstances opt to hear the matter in private – section 12 might apply if within (ii) or (iii). | Exact scope is unclear because it applies to proceedings which otherwise relate wholly or mainly to the maintenance or upbringing of a minor – this will depend on facts of a particular case. |

1 Family proceedings court.

2 County Court.

3 the High Court.

| Reporting Restrictions – provision | Content | Penalty | Court to which restrictions apply | Proceedings to which restrictions apply |
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| **3. Section 1(1)(a) and (b) of the Judicial Proceedings (Regulation of Reports) Act 1926** | It shall not be lawful to print or publish, or cause or procure to be printed or published –<br><br>(a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matter or details the publication of which would be calculated to injure public morals;<br><br>(b) in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, or for the dissolution or annulment of a civil partnership or for the separation of civil partners, any particulars other than the following, that is to say:<br><br>(i) the names, addresses and occupations of the parties and witnesses;<br><br>(ii) a concise statement of the charges, defences and countercharges in support of which evidence has been given;<br><br>(iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;<br><br>(iv) the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment. | Offence – liable on summary conviction to imprisonment for a term not exceeding four months, or to a fine not exceeding level 5 on the standard scale (£5,000), or to both such imprisonment and fine – (Attorney General must sanction prosecution). | (b) The HC and ccs. | Divorce, nullity and judicial separation. Dissolution, nullity and separation orders under the Civil Partnership Act 2004. |

| Reporting Restrictions – provision | Content | Penalty | Court to which restrictions apply | Proceedings to which restrictions apply |
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| **4. Section 39(1) of the Children and Young Persons Act 1933** | In relation to any proceedings in any court… the court may direct that –<br><br>(a) no newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person [by or against] or in respect of whom the proceedings are taken, or as being a witness therein; no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings; except in so far (if at all) as may be permitted by the direction of the court. | Any person who publishes any matter in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine not exceeding level 5 on the standard scale (£5,000). | In any court. | In any proceedings in which a child is concerned. |

| Reporting Restrictions – provision | Content | Penalty | Court to which restrictions apply | Proceedings to which restrictions apply |
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| 5. Section 2 of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 | The following provisions of this section shall have effect with a view to preventing or restricting publicity for-<br><br>(i) proceedings under section 22 of that Act (which relates to proceedings by a wife against her husband for maintenance), including any proceedings begun before the said commencement and carried out under that section and any proceedings for the discharge or variation of an order made or deemed to have been made under that section or for the temporary suspension of any provision of any such order of the revival of the operation of any provision so suspended;<br><br>(ii) proceedings under section 27 of the Matrimonial Causes Act 1973 (which relates to proceedings by a wife against her husband, or by a husband against his wife, for financial provision) and any proceedings for the discharge or variation of any order made under that section or for the temporary suspension of any provision of any such order or the revival of the operation of any provision so suspended;<br><br>(iii) proceedings under Part III of the FLA 1986 (declarations regarding status);<br><br>(iv) proceedings under Part 9 of Schedule 5 to the Civil Partnership Act 2004;<br><br>(v) proceedings under section 58 of the 2004 Act.<br><br>Section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 applied to proceedings listed above. | See box 3. | Fpc, cc and the HC – applications regarding declaration of parentage may be made to fpc (as well as cc and the HC); other proceedings listed cc and HC. | Proceedings listed in provision. |

| Reporting Restrictions – provision | Content | Penalty | Court to which restrictions apply | Proceedings to which restrictions apply |
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| **6. Section 71 of the Magistrates' Courts Act 1980** | In the case of family proceedings in a magistrates' court it shall not be lawful for a person-<br><br>(a) to print or publish, or cause or procure to be printed or published, in a newspaper or periodical, or<br><br>(b) to include, or cause or procure to be included, in a programme in programme service<br><br>any particulars of the proceedings other than such particulars as are mentioned in subsection (1A) below.<br><br>(1A) The particulars are-<br><br>(a) the names, addresses and occupations of the parties and witnesses;<br><br>(b) the grounds of the application, and a concise statement of the charges, defences and counter-charges in support of which evidence has been given;<br><br>(c) submissions on any point of law arising in the course of the proceedings and the decision of the court, and any observations made by the court in giving it. [subject to section 97(2) CA 89; also more restrictive for adoption] | Offence –liable on summary conviction to a fine not exceeding level 4 on the standard scale (£2,500). Consent of Attorney General required for prosecution. | fpc | Family proceedings as defined in section 65 of the Magistrates' Courts Act 1980. |
| **7. Section 50 of the Child Support Act 1991** | This makes it an offence for any person who is, or has been, employed in employment to which the section applies (subsection 5) to disclose information acquired during course of employment relating to a particular person with lawful authority. | Offence – on indictment liable to imprisonment for a term not exceeding two years or a fine or both; or<br><br>On summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both. | N/A | N/A |

| Reporting Restrictions – provision | Content | Penalty | Court to which restrictions apply | Proceedings to which restrictions apply |
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| **8. Article 8** | Where no statutory provisions apply it is possible to apply for a reporting restriction based on Article 8 alone.[33] | Contempt of court – 2 years imprisonment, no limit on fine. | The High Court. | All proceedings |
| **9. Section 41 of the Criminal Justice Act 1925** | No person shall –<br>(a) take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge of the court or a juror or a witness in or a party to any proceedings before the court, whether civil or criminal; or<br>(b) publish any photograph, portrait or sketch taken or made in contravention of the foregoing provisions of this section or any reproduction thereof;<br>and if any person acts in contravention of this section he shall, on summary conviction, be liable in respect of each offence to a fine not exceeding level 3 on the standard scale. | Fine – level 3 on the standard scale (£1,000). | All courts. | Civil or criminal proceedings |
| **10. Section 9 of the Contempt of Court Act 1981** | It is a contempt of court –<br>(a) to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the permission of the court; or<br>(b) to publish a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public or any section of the public, or to dispose of it or any recording so derived, with a view to such publication. | See box 2. [If enforceable in mags then 1 month limit for imprisonment and £2,500 limit for fine]. | All courts. | All proceedings. |

[33] See President's Direction – Applications for Reporting Restrictions Orders – [2005] Fam Law 398.

| Reporting Restrictions – provision | Content | Penalty | Court to which restrictions apply | Proceedings to which restrictions apply |
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| **11. Data Protection Act 1998 – Schedule 1 to the Act sets out the principles which must be applied to the processing of personal data.** | This Act imposes requirements on "data controllers" – a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data[34] are, or are to, processed. This could be a newspaper editor for example. Schedule 1 to the Act sets out the principles which must be applied to the processing of personal data. For example, the first principle requires that personal data shall be processed fairly and lawfully and only provided that certain conditions are met. In the case of all data one of the conditions set out in Schedule 2 must be met eg. The data subject has given his consent to the processing of the personal data. In the case of sensitive personal data[35] one of the conditions in Schedule 3 must also be met. Schedule 3 begins with the condition that "the data subject has given his explicit consent to the processing of the personal data" | Compensation.<br><br>Section 13 entitles, in specified circumstances, an individual who suffers damage or distress by reason of contravention of the Act to recover compensation.<br><br>There is, however, an exemption in section 32 of the Act –<br><br>(1) Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if-(a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material, (b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.[36] | Only a county court and the High Court have jurisdiction to hear applications under section 13. | Applies to a data controller in respect of any data only if (1) the data controller is established in the UK and the data is processed in the context of that establishment; or (2) the data controller is established neither in the UK nor in any other EEA state but uses equipment in the UK for processing the data otherwise than for the purposes of transit through the UK. |

[34] Personal data means data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

[35] Sensitive personal data means personal data consisting of information as to (a) the racial or ethnic origin of the data subject, (b) his political opinions, (c) his religious beliefs or other beliefs of a similar nature, (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992), (e) his physical or mental health or condition, (f) his sexual life, (g) the commission or alleged commission by him of any offence, or (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings".

[36] Special purposes defined in section 3 – purposes of journalism, artistic purposes, literary purposes.

| Reporting Restrictions – provision | Content | Penalty | Court to which restrictions apply | Proceedings to which restrictions apply |
|---|---|---|---|---|
| **12. Rule 10.20A of the Family Proceedings Rules 1991 and rule 23A of the Family Proceedings Courts (Children Act 1989) Rules 1991** | Court may give permission to disclose information relating to proceedings in private –<br>Under the Children Act 1989;<br>Under the inherent jurisdiction of the High Court relating to a minor;<br>Otherwise relate wholly or mainly to the maintenance or upbringing of a minor. | This rule in itself is not a restriction – but if an order is not complied with then this may be a contempt.<br>See box 2. | Fpc, cc and the HC. | Same as section 12 of the Administration of Justice Act 1960. |
| **13. Duty of confidentiality** | Almost every aspect of private life may be covered by obligations of confidence, provided that the basic requirements for protection are present and no rules of law or public policy are infringed. The basic requirements for protection are that the information is of limited availability and is of a specific character (ie possible to point to a definite source).<br>A duty of confidence arises whenever the party subject to the duty is in a situation where he either knew or ought to have known that the other person could reasonably expect his privacy to be protected. There is no requirement for a prior relationship to exist between the parties. The Court of Appeal have said that this tort would be better described as the misuse of private information rather than the breach of confidential information. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private. Third parties who acquire by underhand, dishonest or improper means information which they know or ought to know is subject to protected confidence may also be sued (eg a newspaper). | There are a number of remedies available – including interim and final injunctions restraining disclosure of information, damages, and orders for delivery up and destruction of documents. | All courts. | Can apply to information disclosed in court proceedings – depends on the extent of the disclosure and the private nature of the information. Could apply to information disclosed in family proceedings if held in private. |

| Reporting Restrictions – provision | Content | Penalty | Court to which restrictions apply | Proceedings to which restrictions apply |
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| **14. Common law – contempt [wider than section 1 of Contempt of Court Act 1981 – below and therefore still relevant]** | Contempt for publications to interfere with the administration of justice.<br>Distinction with section 1 of Contempt of Court Act below:<br>1. Applies to publications which intend to interfere with administration of justice; and<br>2. may still amount to contempt at common law on the basis that publication may interfere with the administration of justice as a continuing process rather than in particular proceedings – eg trial by newspaper before outcome of case caught by the common law – not necessarily by section 1.<br>3. publications which put pressure on parties to proceedings to persuade them to abandon the proceedings, settle upon certain terms or otherwise act in a particular way in relation to the proceedings – may be a contempt (AG v Hislop[37]).<br>NB – The general principle in common law is that there is immunity from contempt for fair and accurate reports, published contemporaneously and in good faith, of proceedings heard in open court. | Punishable by imprisonment for a term not exceeding two years; or a fine (no statutory limit for superior court); £2,500 for inferior court<br>Order to give security for good behaviour;<br>Injunction against repetition of the act of contempt. | All courts. | All proceedings. |

[37] [1991] 1 QB 514.

| Reporting Restrictions – provision | Content | Penalty | Court to which restrictions apply | Proceedings to which restrictions apply |
|---|---|---|---|---|
| **15. Section 1 of the Contempt of Court Act 1981** | Conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.<br><br>Section 2(1) – limits section 1 to publications addressed to the public at large or any section of the public.<br><br>Section 2(2) – publications can only constitute a contempt under the strict liability rule if they create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.<br><br>Section 2(3) – section 1 only applies to a publication if the proceedings in question are active.<br><br>Section 6(c) – restricts section 1 to unintentional contempts (these are still covered by the common law);<br><br>Section 5 qualifies section 1 – a publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court… if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion. | Punishable by imprisonment for a term not exceeding two years; or a fine (no statutory limit for superior court); £2,500 for inferior court<br><br>Superior court has the power to make a hospital order or guardianship order in the case of a person suffering from mental illness who could otherwise be committed prison for contempt. | All courts | Only applies to proceedings which are "active". |

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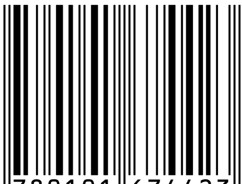
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