

Confidence and
confidentiality:
Improving transparency and
privacy in family courts

CONSULTATION RESPONSE

Please contact

Deborah Cullen
Secretary to the Legal Group
Saffron House
6-10 Kirby Street
London EC1N 8TS
Tel: 020 7421 2641
Email: deborah.cullen@baaf.org.uk

October 2006



1. **About BAAF**

The British Association for Adoption & Fostering (BAAF) is pleased to respond to this consultation. BAAF is the leading charity and membership organisation in fostering and adoption in the UK. We:

- promote the highest standards of child-centred policies and services
- speak out on behalf of looked-after children
- influence UK-wide policy and legislation
- provide much-needed information and advice
- promote greater public understanding of adoption and fostering
- support our members in their work

BAAF's main activities are the development, promotion and advocacy of best policy and practice; the provision of advice and information to our members and to the general public; training, consultancy and seminars; child placement services including the publication of our flagship monthly newspaper, *Be My Parent*. We also publish a quarterly professional journal, *Adoption and Fostering*, books and guides for professionals, academics, parents and carers and research studies. The main users of our services are our members comprising local authorities across the UK, voluntary adoption agencies, independent fostering agencies and also individual social work, legal and medical professionals and carers.

2. BAAF is a multi-disciplinary organisation and in formulating this response has been able to draw on input from its members in local authorities and voluntary and independent agencies, and its specialist advisory committees, including legal, medical, and social work practitioners, academics, and people with direct personal experience of adoption.
3. Although we append to this response the 'questionnaire' circulated with the consultation paper, that does not allow consideration of some of the underlying assumptions in the paper, which we believe to be based in many cases on inadequate evidence, and we therefore submit this response in addition to our answers to the questionnaire.
4. The paper argues for greater openness in the family courts 'in order that the public can have confidence in their work' (accompanying letter). Apart from the activities of certain pressure groups we are not aware of evidence (certainly any reliable evidence) that the public has lost confidence in the family court. None of the research on court users' views in recent years (Buchanan et al; Smart et al; Trinder et al; Brophy et al; Douglas et al) nor HMICA findings has reported that court users express dissatisfaction with the process or outcomes because of attendance and reporting restrictions. Rather than devote resources to amending the law on publicity, we suggest that issues identified by children and families in these research studies and inspection reports should be seriously considered as a priority.
5. While we welcome in principle the stated aim of protecting the privacy of the personal lives of those involved in family proceedings, particularly children, we consider that the difficulties of ensuring this have been underestimated.

There is a considerable body of case law on interpretation of existing legislative restriction which highlights some of the difficulties. Recent publicity given to the McCartney divorce (where there is a young child involved) provides a telling example of what can go wrong. Even if there is a breach of the law, once information is in the public domain little can be done to prevent its further dissemination. The paper's claim that increasing openness can be achieved without compromising privacy is somewhat undermined by the special case made for greater privacy in adoption proceedings (*'These proceedings often deal with quite sensitive information regarding the 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 adoptive placement being disrupted or might discourage prospective adopters from going through the adoption process'*. (page 41)) The implication seems to be that, despite proposals for preventing publication of identifying information, there remains a risk that individuals **will** be identified if the press is permitted to attend and report on cases. While greater privacy and security in adoption cases is welcome, 'sensitive information' will be a factor in many if not most other family disputes about children, both in private law and, particularly, in public law cases.

6. The consultation paper acknowledges that *'concerns over press attendance are in part about what information the press may choose to report'* (page 39). This is surely one of the key issues. Other than by excluding them altogether, the paper makes no suggestions as to how the press is to be deterred from publishing incomplete or partial reports of cases, or focussing on those with an element of the dramatic.
7. We are surprised by the suggestion that the exclusion of the public and press in itself leads to a risk that evidence will not be properly challenged. We would strongly refute such a suggestion. Surely the best way of ensuring that parties are able to challenge evidence where appropriate is the provision of high quality legal representation – and the availability of experts willing to be drawn into family proceedings, which, the paper acknowledges, is a problem that might perhaps be exacerbated by admitting the press and others to court hearings. In any case, this does not address the issue of what material would actually be available to the press. Much of the evidence in family proceedings, particularly expert evidence, is in the form of lengthy written reports, and given the moves towards jointly commissioned experts' reports, and the encouragement of the early identification of points of agreement, the press might well be disappointed in the great majority of cases at the lack of 'challenge' taking place at a final hearing.
8. It is disingenuous to suggest that parliamentarians cannot undertake their legislative task properly without being able to attend family courts to see for themselves how proceedings are conducted. The same could be said for a great many other matters on which MPs are asked to legislate! Fortunately, in the case of family law and family proceedings, there is in fact a considerable volume of research findings which could provide a far more representative picture of the state of affairs than attendance at one or two hearings in one or two courts. It is claimed that provision is needed to enable the HMICA to

attend family proceedings, but no evidence is produced that any requests by the inspectorate to do so under existing rules have been refused.

9. The chapter on 'international experience' adds little to the debate on this issue, although we note with little surprise the comments by Judge Bashier of New Zealand that 'the bother we continue to have with the media is in the cases where they don't go to court at all, but rather just rely on the report of a litigant that they have been badly treated.'
10. The suggestion that more information should be made available to children merits further discussion. We would point out, however, that where a children's guardian or family court reporter is involved in a case, he or she already has a duty under the court rules to explain the outcome to the child concerned. There are resource implications if any of the proposals on making judgments or summary judgments available to children once adult are pursued. In adoption, where adopted adults seek information about the background to their adoption, they are entitled to the provision of counselling to assist them with coming to terms with the information they receive. Similar provision should be made if a young adult is to be provided with a detailed judgment in, say, a case where allegations of physical and sexual abuse were made in the proceedings.
11. In the partial Regulatory Impact Assessment which accompanies the paper, only three options are listed, the second and third of which are clearly not mutually exclusive. Strangely no mention is made of the simplest option, which would not even require amending legislation, routine publication of anonymised judgments, with the possibility, canvassed by Wall LJ in *Re H (freeing orders: publicity)* [2006] 1 FLR 815, of publishing a short summary by the judge of his or her reasons, enabling journalists to meet copy deadlines without having to read and absorb every nuance of a long judgment. Such a course would surely be the best way of minimising the risks both of distorted or inaccurate reporting, and the inadvertent disclosure of information which might enable at least some readers to identify the people involved, as well sparing the parties the ordeal of having the press present in court during proceedings.
12. While we agree that there should be consistency of approach across all levels of court, this would be assisted if all courts were always required to give a written reasoned judgment. Although the Family Proceedings Court is required to give written reasons for its decision, in other courts, unless the judge is giving a reserved judgment which he or she has already written, the judgment will be recorded, but a transcript will not be made available except at the parties' own expense, unless otherwise ordered by the court. A consistent approach to the delivery of judgments, and a routine expectation that a transcript would be made available would assist here.
13. In conclusion, the paper says (page 36) '*Any movement towards improved openness made at the expense of the best interests of a child is a move that should not be made.*' We agree, and we consider that further extremely careful consideration of all the risks is needed. The consultation paper does

not provide sufficient evidence either on the alleged lack of confidence in the current system or of the advantages to those often vulnerable individuals whose interests are subject to family proceedings. We do think however, that there is considerable merit in resourcing an expansion of the numbers of anonymised judgments published, with consideration of an accompanying summary as suggested in *Re H (freeing orders: publicity)*. This may provide the most positive and safe solution to reassuring the public and other interested parties that the family courts are effective and efficient in the very complex tasks that they perform.