

British Association for Adoption & Fostering

Head Office Saffron House, 6 – 10 Kirby Street, London EC1N 8TS

Tel 020 7421 2600 **Fax** 020 7421 2601

Email mail@baaf.org.uk **Website** www.baaf.org.uk



Miss Erika Maass
Ministry of Justice
Family Justice Division
4th Floor
Selborne House
54 Victoria Street
London SW1E 6QW

2 October 2007

Dear Erika

Confidence and Confidentiality: Openness in Family Courts - a new approach

BAAF welcomes the Government's decision, in the light of the responses to its earlier consultation, to amend its proposals for openness in family court proceedings. We appreciate that there is a difficult balance to be struck, but agree that the protection of children's interests must be the first consideration.

Clearly there is much further work to be done on identifying the best ways of making information available in the forms of judgments, summaries or written reasons, without compromising confidentiality or incurring disproportionate expense. As has been pointed out, 'anonymising' a judgment is not a simple process. Even if names are removed, other facts such as location, or the identity of a professional witness, may be sufficient, at least for those with some local knowledge, to identify the child and family concerned.

Further debate will also be needed on the balance to be struck between the right for the public to know the identity of professional witnesses in family proceedings, and the risk that this exposure may make witnesses unwilling to be involved, which would of course ultimately be to the disadvantage of children.

We attach the Questionnaire circulated with the consultation paper of 20 June, with some brief comments on the issues raised.

Yours sincerely

Deborah Cullen
Secretary of the Legal Group

British Association for Adoption & Fostering
Saffron House, 6-10 Kirby Street, London EC1 8TS

Confidence and Confidentiality: Openness in family courts – a new approach

Questionnaire

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

Strongly agree Agree Unsure Disagree Strongly disagree

Although the current rules are complex, this is because the issues they deal with are complex. Some amendment is clearly needed, but further consideration is needed of the degree to which the court can and should continue to exercise control where necessary, without creating difficulties for parties genuinely needing to access support and advice. There are particular difficulties about court documents, which may include highly sensitive reports on one or more of the parties; ordinary rules of confidentiality outside the court process would mean that, say, a health professional submitting such a report would expect the report to be treated in confidence and only disclosed to those who need to see it for the immediate purpose for which it was written. It would be a matter of concern if any relaxation of the court rules were to be seen as overriding the normal rules of confidentiality.

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

Strongly agree Agree Unsure Disagree Strongly disagree

Although the purpose of the disclosure is relevant, so is the identity – and trustworthiness – of the individual to whom the disclosure is made.

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

Strongly agree Agree Unsure Disagree Strongly disagree

The difficulty of this approach is twofold. First, the longer the 'chain' of further disclosures, the greater the risk that the confidentiality of the information or documents will not be respected. Secondly, there is the possibility that the recipient of the information may interpret the purpose for which the disclosure was made in a different way from the person who gave him or her the information in the first place. To give an example, one of the purposes for which a party might legitimately disclose information could be a disclosure to a close family member for the purposes of support; that family member, however, may be sufficiently indignant that he or she wishes to make a further disclosure to, say, an MP, since he may interpret the need of his partner or relative for 'support' as necessitating the intervention of the MP.

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

Strongly agree Agree Unsure Disagree Strongly disagree

We would certainly welcome an amendment that would have the effect of reversing the Court of Appeal decision on this point in *Clayton v Clayton*. However, great care will be needed about the precise wording of any amending legislation. In *Clayton* the Court of Appeal was clear that there must be a restrictive interpretation of any restriction on Article 10 rights if this provision is to be ECHR compliant. Furthermore, there is an argument to be had about whether the wording of section 97(2) prohibiting publication of material identifying any child 'as being involved in' proceedings' does provide the necessary protection. It has been successfully argued by the press that this still permits them to publish material about a child who **is** involved in proceedings if the article concerned doesn't actually refer to the fact that the child 'is involved in' proceedings.

For further information or clarification please contact Deborah Cullen

Deborah.cullen@baaf.org.uk

Telephone 020 7421 2641

1 October 2007