THE TRANSPARENCY PROJECT
RESPONSE TO THE PRESIDENT OF THE FAMILY DIVISION'S CONSULTATION ON TRANSPARENCY IN FAMILY PROCEEDINGS

This response will be published on our website with comments enabled. The consultation document we are responding to can be found on the Judiciary website (http://www.judiciary.gov.uk/wp-content/uploads/2014/08/transparency-the-next-steps-consultation-paper.pdf).

WHO WE ARE

1. The Transparency Project was launched in August 2014, and the project website can be found at http://www.transparencyproject.org.uk .

2. It is currently comprised of a group of legal practitioners, legal academics, legal bloggers and legal publishers. We are :

    a. Lucy Reed, barrister at St John's Chambers, Bristol, and legal blogger at Pink Tape (http://pinktape.co.uk);
    b. Sarah Phillimore, barrister at St John's Chambers, Bristol and site administrator of Child Protection Resource website (http://childprotectionresource.org.uk)
    c. Jacqui Gilliat, barrister at 4 Brick Court, and legal blogger at Bloody Relations (http://www.bloodyrelations.blogspot.co.uk)
    d. Andrew Pack, Local Authority Childcare Solicitor at Brighton & Hove, and legal blogger at Suesspicious Minds (http://suesspiciousminds.com)
    e. Julie Doughty, lecturer in Family law & Media law at Cardiff University.
    f. Lucy Series, Court of Protection researcher at Cardiff University
    g. Lucy Crompton, senior lecturer in Family Law at Manchester Metropolitan University
    h. Paul Magrath, Incorporated Council of Law Reporters (http://www.iclr.co.uk)

3. The aims of the project are to promote transparency of the family courts through the provision of better information to the public. More information about the project and the sorts of work it is contemplating can be found on the project website and specifically in the originating blog post here: http://www.pinktape.co.uk/rants/proto-manifesto/ .

4. The Group is currently in a first phase, and is refining its aims, parameters and immediate objectives and talking through projects it wishes to

develop in the short to medium term, as well as planning for the longer term.

5. The Group's "Mission Statement" is still under consideration, but as currently articulated is as follows:

    I. *The Transparency Project aims to promote the transparency of Family Court proceedings in England and Wales through providing straightforward, accurate and accessible information for litigants and the wider public.*
    II. *The Transparency Project does not seek to promote a particular perspective on the Family Justice System but through its work aims to facilitate and engage with evidence based and properly informed public debate.*
    III. *The Transparency Project aims to contribute to and promote debate about Transparency and the Family Justice System by exploring non-traditional methods of stimulating informed debate and of delivering public legal information.*
    IV. *The individual participants in the project hold different personal views about issues in these fields and the project neither adopts those views nor seeks to prohibit its members from expressing them. The participants' shared belief is that there is a pressing public need for the provision of good quality information to be presented to the public in accessible form in order for public debate and opinion to be informed, and that the reporting of cases via the mainstream media is currently insufficient to achieve this aim fully.*
    V. *The Transparency Project aims in due course to involve "non-professionals" in the organisation and running of the project, once it has established itself as an organisation.*
    VI. *The Transparency Project will identify a series of projects through which it will promote the identified goals.*
    VII. *The Transparency Project aims to comment on judgments in cases which (a) arouse public or media attention and require to be explained or clarified to avoid misunderstanding; (b) are of interest to family law professionals; or (c) provide useful examples of how the family justice system works.*

6. We hope in due course to formalize the structure of the project, to secure funding and to broaden the range of participants.

7. The participants in the project do so in their individual capacities, and as such hold a range of different views about the best mechanisms through which transparency can be appropriately advanced. The focus of the

group's work so far has been in signposting, interpreting and making accessible information that is already in the public domain rather than upon the difficult questions posed in the consultation which deal with the tension between greater openness and reduced privacy.

8. Whilst we are therefore not able as a group to offer responses to some of the specific questions posed in the consultation we would like to contribute this response so that any decisions taken or recommendations made take into account the work that we are doing and which we hope to do.

CURRENT WORK

9. We are still working on our core documents, and defining short, medium and long term goals.

10. We are considering how we should structure and govern ourselves and how we should involve "stakeholders" and interested persons.

11. We are considering what funding streams may be available to us in order to move beyond the concept stage and to ensure that the work of the project is sustainable.

12. We are blogging regularly about transparency issues, and providing accessible information and explanation about cases which have received media attention, based upon publicly available information, to which we signpost readers. In this way we hope that interested readers who have read something in a newspaper will be able to locate the source material and form their own informed view.

13. We have begun to compile a list of resources to assist members of the public in understanding the law and procedure in this area.

14. We have begun to write a dictionary explaining commonly used legal terms like "threshold".

15. We are considering the feasibility of a court-based data collection project which attempted to track patterns and correlations not currently identifiable from official statistics.

16. We are discussing a project that might seek to identify good practice in accessible judgment writing and which might seek to identify examples of good and less good practice. We might investigate with non-lawyers what

works and what does not and road-test a number of judgments to see how much they are able to learn.

FUTURE WORK

17. We are considering whether in due course we will be able to develop a court reporting project using accredited volunteer reporters. Our aim would then be to use standardized formats for reporting cases so that the project website can become a reliable and respected source of clear explanation of notorious cases, published judgments and of more routine cases that are neither reported nor published. We would like the site to be a resource for those trying to track what publicly available information on a particular case is out there.

SOME VIEWS ABOUT TRANSPARENCY GENERALLY

18. Alongside the questions raised by this consultation, which relate to the quite discrete issue of disclosure of documents to members of the press in order to aid accurate and informative reporting by them, and the possible holding of public hearings, we would suggest that there are a range of other measures which have significant potential for making family proceedings more accessible and more understandable (i.e. transparent) than simply putting more information in the hands of the press. We consider that transparency can be best enhanced by the facilitation of other channels of information, such as legal blogging, *in addition to* the accredited media. We consider that a healthy and constructive public debate will be facilitated and stimulated through plurality of sources of information and modes of delivery, and in particular we consider that confining disclosure of information and access to courts to solely the mainstream media will hamper the effectiveness of any transparency agenda by virtue of the commercial imperatives under which the mainstream media operate.

19. While we acknowledge the excellent contribution made by BAILII (http://BAILII.org) to public access to court judgments, we believe that this is only partially successful as a transparency exercise, given that judgments are not always written with the wider public in mind. The lack of signposting, for example as to which are binding precedent, can be confusing for the lay reader. As noted in the evaluation of the Family Court Information Pilot, BAILII can be difficult to navigate. With the growing number of litigants in person, we anticipate an increasing rate of non-professionals attempting to analyse the relevance of reported cases.

20. We think it is important that any attempt to formulate a policy/response to issues around increased transparency in the process or greater

dissemination of information, must understand and reflect upon the amount of information that is already out there. The impact of public electronic communications networks has been rapid and immense. There are many internet groups routinely publishing information that identifies children in care proceedings by name and by image. We can't pretend this isn't happening or that it will be easy to stop or even contain. Further, we think that enforcement in respect of the publication of information arising from family proceedings is variable and inconsistent. In the experience of our members, the complex mish-mash of primary and secondary legislation and guidance may operate as a constraint on publication by legal bloggers and other professionals (because of their professional conduct obligations and/or lack of insurance or indemnity cover by an employer). However, this group may have a legitimate wish to publish information by way of correction, clarification or explanation of material that has been published by the media or by individuals or organisations. Often litigants and campaigners will ignore the "privacy" provisions and publish material, whereas professionals are unable to correct or explain as a result of their respect for the law and the need to be cautious about breaches of rules or unauthorized / inappropriate breaches of privacy.

21. The members of the project all share the view that there will be cases where for good reason there should be restrictions on reporting or naming of individuals (particularly children) involved in family cases. However, from the perspective of those familiar with electronic communications (blogs and social media) any idea that Family Court proceedings are "secret" (in the sense that information is not in the public domain about individual cases) except where specifically authorised – is far from the reality – from our perspective the Family Courts are rather more like a "leaky sieve" than a secret system of justice. Whether or not one approves of such commonplace publication of such intimate information as a "good idea", there is little evidence that we are aware of demonstrating specific harm to children arising from such breaches of the privacy rules, which self evidently involves a large number of children.

22. We do wonder whether or not ultimately it might be more productive to streamline and clarify the rules and provisions about privacy so that a more permissive position is adopted as "default", and to focus efforts upon the proper imposition of specific restrictions on publication of information in those cases were a specific justification or need exists.

23. One example of this is a case reported on the website of a major newspaper in Jun 2014 under the headline "*The loving grandparents forced to fight tooth and nail to stop social services giving away their*

grandchild". The report is still online. It names and shows photographs of the child and her grandparents and special guardians, whilst stating that the name of the mother (who is said to have mental health problems) has been changed for legal reasons. As it is the intention of the group to publish this response on the project website, a link is not provided here, but will be provided under separate cover. This case appears to be clearly identifiable as a case also reported on BAILII. There are a number of discrepancies between the newspaper report and judgment relating to the appeal which our legal blogging members wished to explore and point out, but as a result of a lack of clarity about what was permissible, they felt unable to do so. The judgment of the final disposal in favour of the grandparents about whom the article is written does not appear to have been published.

24. We also consider that the operation and interplay between s97 Children Act 1989 and s12 Administration of Justice Act 1960 is highly confusing and unclear (to both lawyers and non-lawyers), particularly where proceedings have concluded and s97 no longer applies, but where the press or litigants name a family as being the subject of proceedings. In the absence of a specific RRO (Reporting Restriction Order), enforceability of s12 or the rubric in any judgment is unclear and confusing, both preventing legal bloggers from risking comment, and enabling litigants to argue they reasonably thought they were permitted to publish.

25. Insofar as information is to be made available to accredited media we would ask whether it might be also given to certain other specified categories of individuals or accredited organisations (such as for example The Transparency Project or its volunteers once it is fully established).

26. The members of the project would welcome further consideration being given to the question of whether access to certain types of Family Court hearing should be granted to other specified categories of person broader than the current "accredited media representative" but without permitting the attendance of the public at large. For example, should practising family lawyers (subject to regulation by the relevant professional body) or practising lawyers in other fields, or legal academics be routinely permitted to attend family court hearings, subject to the court retaining the power to exclude them in appropriate cases? Would it be possible for the Transparency Project or some other body to devise an accreditation programme to permit other responsible legal commentators who are not "press" to attend court hearings? Some of the reasons we think this might be appropriate / practical are set out in the originating blog post and are not rehearsed here.

27. We would also welcome further consideration of whether a process could be devised whereby, following attendance at court by a member of the new category of person permitted into court, and in cases where publication of a judgment was unlikely, a draft of an anonymised proposed document for publication could be submitted to the court and all parties through a sort of "special procedure", and if unopposed permission could be dealt with on paper. This would enable projects like ours to publish short informative / illustrative accounts of the sorts of cases regularly dealt with in the Family Court but which are not visible through published judgments on BAILII because they contain no important point of law or practice.

THE SPECIFIC QUESTIONS

Which types of documents should be included in category (1) and which types of expert in category (2)?

28. We are unclear from the consultation document what use it is intended media representatives should be permitted to make of any documents disclosed to them, or what is meant by "appropriate restrictions and safeguards". We assume that the intention is that the press should not be permitted to report the contents of those documents without specific application under Family Procedure Rules 2010 r12 or otherwise, but are concerned that any move towards disclosure of documents to the press should be accompanied by absolute clarity as to what can and cannot be reported in the absence of a specific permissive order.

29. We consider that the list of documents prepared by advocates as set out in the consultation would be helpful to any person seeking to understand and accurately report or explain the proceedings. We are doubtful whether, if such documents are to be routinely disclosed, and bearing in mind the time pressure under which they are usually prepared by advocates (with no prospect for either specific client approval before submission or the obtaining of informed consent to disclosure of them), the consequence of the proposed routine disclosure might not be very anodyne documents which are of little help to reporters and of less help to the court than might otherwise be the case. We think that there are data protection and client instructions / consent issues as well as cost / funding implications of disclosure of documents and of any expectation that documents when prepared will need to be suitable for disclosure.

30. We are unclear as to whether the question is intended to refer to the "hard sciences" or a broader range of expert disciplines. We think it will rarely be appropriate for the contents of psychological or psychiatric

reports to be disclosed. We think that the provision of medical reports, such as those relating to mechanism of injury, are likely to be helpful in understanding hearings pertaining to suspected Non accidental injury.

31. If the sorts of documents contained in category (1) or (2) are to be disclosed we consider that they should also be disclosed to any extended categories of person permitted access to hearings as proposed above.

Should access to such documents be confined to those members of the accredited media who actually attend the hearing or extend to any member of the accredited media entitled to attend the hearing, whether or not they do attend?

32. We think it should be confined to persons present at the hearing or who have been present at the previous hearing.

What further restrictions and safeguards are desirable?

33. We think that a rubric should be attached to all such documents, or that a rule should provide that any such documents are to be treated as if the rubric applies.

What types of family case might initially be appropriate for hearing in public?

34. Members of the group have different views about this, but agree that the debate about transparency needs to be broadened beyond the current secret : open dichotomy. Neither fully open courts nor media reporting will achieve transparency. Courtrooms literally open to the public, without providing better quality information and better tools to interpret and understand what is happening, are unlikely to further the transparency agenda to any meaningful extent.

35. We consider that a broadening of the debate about how transparency can be achieved is likely to promote initiatives which are better able to promote transparency without compromising or risking the compromise of child privacy than the mere publication of judgments or holding of open hearings.

36. The consultation identifies a number of consequences of sitting in public in terms of subsequent use or publication of information arising. It is difficult to see how this issue could be resolved without either primary legislation or the making of injunctive orders in many cases that were held in public, as substitutes for the protection lost by sitting in public.

37. In our view s12 Administration of Justice Act 1960 is widely misunderstood or ignored. Significant amounts of information exist on the internet which appear to be in breach of that provision.

38. In addition, we would like to propose that consideration should be given to providing some mechanism or resource whereby responsible legal bloggers or projects like our own who wish to comment upon Family Court matters that are reported in the media, or to signpost to the applicable judgment on BA can check whether or not any RROs are in place and whether or not proceedings are ongoing (and therefore whether s97 CA 1989 applies). The Judicial College guidance on reporting restrictions in criminal proceedings (June 2014) (http://www.judiciary.gov.uk/wp-content/uploads/2014/06/Reporting-Restrictions-Guide-2014-FINAL.pdf) provide a helpful template which could be adapted to the Family Court proceedings to explain the status of particular proceedings. At present judgments pertaining to RROs are often published on BAILII but the orders themselves may not be published, and are not always published immediately. We think there might be an online list with restricted access or a central email address or telephone number that would enable the issue to be checked before publication of any potentially impermissible material. At present public debate and understanding cannot be promoted by linking news items which name or provide potentially identifying information about a family to a BAILII judgment.

39. We also wonder whether the standard rubric might be amended to provide that publication of the contents of a judgment is permitted on the condition that a link back to the BAILII judgment is provided (in the case of online publications) or neutral citation reference given (in the case of print publications).

OTHER MATTERS

The impact of the Practice Guidance to date

40. We think that there is certain breadth of judicial attitude and practice in response to the existing practice guidance, in part due to pressure on judicial time and court resource generally and on occasion for apparently more philosophical reasons.

41. There appear to be resource implications for advocates who frequently appear in certain courts being asked to type and agree a note of judgment to save the cost of obtaining a transcript (this is a phenomenon which also arises when there is a need to produce judgments speedily to be sent to the Legal Aid Agency in order to resolve or prevent funding disputes about matters such as expert evidence).

42. Several members of the group have direct experience of material being published where the anonymisation has been faulty and published judgments or orders have had to be recalled and further anonymised (LR has notified a judge on one occasion where a child appeared to be identifiable in error, the judge asked BAILLI to take the judgment down until it was edited, several legal bloggers contacted the Judicial Office twitter account to notify them that the annex to the order in the Pacchieri case had been inadvertently published, naming the parties (prior to the order giving permission for the mother to name herself)).

43. We are aware of one person whose name is in the public domain and who has been the un-anonymised subject of criticism from the Family Courts who has exercised her "right to be forgotten" in connection with blogposts concerning the published judgments. We consider it is probably a matter of time before an aggrieved litigant or individual so named attempts to exercise their "right to be forgotten" or right to object to processing of their data where it is causing damage or distress (s10 Data Protection Act 1998) by asking for removal of their name from a judgment or by removal of a judgment from BAILLI.

44. We welcome pilots. We do think that good data must be gathered in the course of any pilot and it must be properly and independently evaluated once gathered, and should include quantitative and qualitative data from a range of sources so that the full impact can be gleaned. We are not convinced that an ad-hoc pilot based upon a pooling of judicial impressions is necessarily sufficient. We are concerned that the process by which transparency is achieved ought itself to be demonstrably transparent.

The Transparency Project
October 2014