



Department of
Social Policy and
Social Work

'Openness and transparency' in family courts: what the experience of other countries tells us about reform in England and Wales

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Introduction

There is a long history to the debate about who should attend family court hearings in England and Wales, and how such hearings should be reported to a wider audience. Since 2006, the government has issued two consultation papers on the subject (DCA, 2006; 2007b), posing questions about whether family courts should be open to the press and general public as both criminal and other civil courts are. In December 2008 it announced what it was intending to do (Mo, 2008) and this has been confirmed by recently published guidelines. Since late April 2009 family courts have discretion to admit the press on a case by case basis.

The issue arises partly because there have been some allegations both about levels of public confidence in family courts and the legitimacy accorded to court decisions in both private and public law cases, as well as concerns about some court users' understanding of court processes and decisions. Some argue that greater transparency and thus increased legitimacy would be achieved by admitting the press to hearings, providing more information about court procedures and relaxing rules on disclosure of information about cases.

This paper examines the issues surrounding public and press access to family hearings in England and Wales

and reviews the legislative experiences of other jurisdictions. It discusses the concept of transparency, that underlies debates on family courts and provides a summary of the consultation papers, highlighting how this issue arrived on the political agenda. It reviews the history and current position regarding press and public access to family courts in other, comparable, jurisdictions. It also explores how some jurisdictions have taken a more critical look at 'transparency' in family courts and have introduced innovative approaches to making the work of family courts more accessible to both the families involved and the wider community.

Private and Public Law in England and Wales

- 'Private' law proceedings are concerned with disputes between individuals arising from marriage, divorce and separation, civil partnerships, domestic violence along with issues of residence, contact and support of children, and property and financial obligations.
- 'Public' law proceedings focus on disputes between the state and parents/carers regarding ill-treatment of a child, applications about contact with a child looked-after by the state, emergency protection proceedings, adoption etc. (sometimes called Child Protection Courts).

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‘Transparency’

The issue of transparency in the family courts raises questions of what should be transparent, to whom and for what purpose and how this relates to “privacy” and confidentiality. There have been two broad aspects to discussion about “transparency” in the context of the family courts:

- Increased openness in allowing people into family courts would allow for greater public scrutiny of court processes and decision making
- More information coming out of family courts for those taking part in proceedings and others.

Both dimensions aim to improve the perceived legitimacy of the courts rendering them less subject to the charge of “secrecy” and suggestions that unfair decisions are being made behind closed doors.

Openness in allowing the press in

It is argued that allowing the press access to court hearings to act as ‘witness to proceedings’, reporting on the process but not revealing intimate details about a child or parent’s life will improve press understanding of how difficult cases are decided and therefore improve reporting on the courts. This will enable people to feel more confident about why courts reach the decisions they do.

Openness in getting information out

It is argued that providing written information on family court processes for those involved in proceedings will improve their understanding of what to expect during proceedings.

Providing more written judgments [rather than leaving lawyers to summarise oral judgments] will, it is claimed, help participants better understand why the court reached the decision that it did in their case. Providing more anonymous judgments that can tell the wider public about what issues were at stake in cases will help reassure those who feel that court secretiveness is a mask for bias or bad decision making.

Issues

Any move towards greater openness of the family courts needs to examine questions like,

- Will allowing press access to family court hearings facilitate informed public scrutiny of their work?
- Will the information provided inform and educate the general public about the process and decision-making?
- Is press publication of information about individual cases in the public interest?
- Will increased openness improve confidence in the work of family courts?
- Will individuals’ privacy be compromised by greater press/public access to hearings and case information?

This briefing paper explores these issues as they have been experienced in other jurisdictions when they opened up some of their family court hearings.

Access to family courts in England and Wales

The current debate about press access to family hearings is fuelled by several factors; some are new, others recurrent over many years, some arise from what are termed ‘public’ law proceedings, others from ‘private’ law cases (see box on page 1).

Who can attend which family court in England and Wales?

The current rules about who may attend ‘family proceedings’ are complex and vary according to the court hearing a case. Five tiers of court hear family cases but most cases are dealt with in the first three: the Magistrates’ Family Proceedings Court, the County Court and (to a lesser extent), the High Court. All these courts hear private and public law cases. Cases concerning children have mostly been heard in private: only the parties, their lawyers and those immediately involved in proceedings were permitted in court. However, the rules in 2008 allowed the press to observe some hearings, for example they could attend the Magistrates’ Family Proceedings Court in cases concerning children (unless excluded for a particular reason). They could not, however, attend adoption proceedings.

In the County Court and the High Court the rules governing who may attend a hearing depended on the type of application. For example, judges have discretion to permit the press and the public to attend when hearing applications relating to financial disputes and disputes over children. In practice, most cases were held in private but some proceedings (contested divorce cases, judicial separation and nullity cases) are heard in open court. And in the High Court some judgments are given in open court if the judge considers a case addresses an issue of public interest.

Hearings in the Court of Appeal are usually open to both press and public – but this court hears appeals against decisions of lower courts, it is not a ‘trial’ court and does not hear parties or witnesses.

What information can be reported from a case in England and Wales?

Historically, the privacy of family/children courts has been based on the view that, unlike the criminal courts, these courts deal with family and personal matters which are private to the individuals involved. There are therefore many more reporting restrictions than in criminal justice cases. Where children are the focus of proceedings, issues of health, safety, protection and welfare are central. But the law on what information

Background to consultations in England and Wales

2005 Constitutional Affairs Select Committee reported on the operation of the family courts. It recommended:

- The press and public should be allowed into family courts under appropriate reporting restrictions, subject to the court's discretion to exclude the public
- Anonymised judgments should normally be delivered in court unless the court makes an order to the contrary.
- The press continue to be restricted to publishing only those matters made public by the court.

2006 Publication of *Confidence and Confidentiality – improving transparency and privacy in family courts* (DCA, 2006). The proposals for consultation included:

- The press be allowed to attend court proceedings “on behalf of and for the benefit of the public” though the court could exclude them and direct reporting restrictions
- Others to be allowed to attend on application
- A new criminal offence be created for breach of reporting restrictions
- Reporting restrictions should ensure the anonymity of children and adults but restrictions could be relaxed/increased as the court determines
- Rules about attendance and reporting should be made consistent across all family proceedings.

2007 March The responses to the 2006 consultation were published (DCA, 2007a); it was clear there was considerable disquiet about some of the proposals, particularly from organisations and people representing or working with children.

2007 June A second consultation paper *Confidence and Confidentiality: openness in family courts – a new approach* was published (DCA, 2007b). It reversed the proposal to allow press access to courts ‘as of right’, instead proposing a new approach stating ‘information coming out of courts, not attendance at court will be the best interests of children and the wider public’.

The stated rationale for this change of direction was in a large part based on the hostile reaction of children and children's organisations along with evidence from research in other jurisdictions. This change in approach was based on ‘a key overriding principle that **children must come first**’ (emphasis added).

The crucial change of direction emphasised that better information would be provided

- In cases involving children and adults involved in proceedings
- To a wider public about decisions in cases where there was an element of public interest
- By piloting provision of information to parents and others about decisions in their case
- By providing a new online information source about family courts

In addition it proposed to

- Change the rules on disclosure to make them less restrictive
- Protect the identity of children beyond proceedings
- Provide for the press to be able to apply to attend hearings on a case-by-case basis
- Make family court reporting arrangements consistent
- Change the law on whom may attend adoption proceedings

2008 December *Family Justice in View* was published (MoJ, 2008). This was based on a re-assessment of responses to the second consultation (DCA, 2007b) and outlined what the government under a new Secretary of State for Justice proposed. The overriding principle of the second consultation paper of ‘**children come first**’ had been replaced by three key principles, which the paper argued had to be taken together. These were to:

- Improve alleged failing confidence in family courts
- Protect the interests of children and vulnerable adults
- Enable more lay support for adults in court.

It proposed to achieve these aims by:

- Changing the law to allow the press into family courts unless the court decides otherwise in the interests of children or the safety and protection of adults
- Increasing public information about court procedures
- Piloting the placing of anonymised judgments online so the public can see how decisions are reached
- Piloting giving parties a copy of any judgment made so they have a record of what was decided by the court and why
- Providing a consistent set of reporting restrictions to ensure children and families are protected and clarifying what information cannot be published without court permission
- Making provision for the protection of children's identities beyond the close of a case
- Permitting case information to be disclosed by parties for purposes of advice/support, mediation and investigation of a complaint, and then ‘onward disclosure’ (to other people) with the permission of the party making the initial disclosure
- Amending disclosure rules so that anonymised information may be used in training and research

The Ministry of Justice in explaining this radical change of approach stated the consultation had revealed very little support for the views that the press either should always or never be allowed to attend a court, but 85% had agreed with the questions ‘Do you think the court should be able to exclude the press from family courts if appropriate?’

The changes proposed aimed to increase information and allow the press to observe hearings on the basis that ‘family justice can be seen’.

2009 – New guidelines took effect on 27th April; sanctions for breaches of reporting restrictions requires primary legislation, there is no timetable for this yet.

can be published about proceedings depends on the type of proceedings and tier of court hearing a case and breaches are a mixture of the law on contempt and statutory criminal offences. Certain proceedings between adults (e.g. those dealing with the dissolution of marriage/civil partnerships, nullity and failure to maintain) already allow for the publication of the names, addresses, occupations of parties and witnesses and the grounds for an application. Publications can include submissions on points of law and court decisions.

In proceedings under the Children Act 1989 where questions of a child's welfare and future are being decided, the law is very clear about the need to protect the privacy of children from media/public gaze. It is an offence to publish material allowing a child to be identified to any section of the public. Up to 2005 it was potentially a contempt of court to release information about the substance of a case concerning a child and heard in private. However, transcripts of certain cases involving children heard in the Court of Appeal and the High Court are anonymised and reproduced in Law Reports; some are also published on the HMCS website and the British and Irish Legal Information Institute (BAILLI) website.

Why do some people want press attendance and reporting rights?

Various claims are made about the benefits of press access to and reporting of family hearings.

Other people are far more sceptical about these claims. They point out that the press would be more interested in the sensational aspects of cases which sell newspapers and so are likely to infringe people's privacy rights, especially those of children, subjecting them to further harm and risk through public exposure.

Some contributors to this debate argued this type of reporting would not give a balanced view of how family courts work or how decisions are made and would not therefore increase transparency or legitimacy. Sensationalist reporting could undermine public confidence in family courts. Responses to the first consultation paper (DCA, 2007a) identified substantial concerns about press access to hearings from many organisations representing children and vulnerable families.

Claims expressing concern about press access to family courts

- **Family courts are not 'secret' but necessarily private**

Organisations argued family courts are not 'secret' but necessarily private to protect children and ensure their identities and those of vulnerable adults are not revealed.

- **Identification of children and parents in local communities**

Despite reporting restrictions children and families can be, and sometimes are, identified – this is especially likely in some rural and minority ethnic communities but also inner city communities.

- **Existing powers of courts to admit non-parties**

Courts already have powers to admit the press/others where it considers there are public interest issues to be disclosed.

- **Impact on parties and the work of courts of press presence**

Restricting the publication of identifying details and limiting the attendance rights of the press assist the court in obtaining full and frank disclosure from parties. Changes that inhibit this may reduce the capacity of family and child protection courts to achieve an early-negotiated settlement.

- **Domestic violence and forced marriages**

In cases of domestic violence and forced marriages women may be reluctant to seek the protection of the court if the press is allowed to observe hearings in which painful and difficult information has to be shared. This may put them and their families at risk.

Human rights issues, privacy and open family courts

Some of those taking part in debates about press/public access to family courts cite Human Rights considerations in their arguments.

But few rights under the Convention are absolute, most are qualified and, as the Box indicates, the three Articles often cited have to be balanced against circumstances that would justify interference with a right. Judges are thus expected to balance Convention Rights, claims according to domestic law, the facts in individual cases and decisions of the European Court of Human Rights to determine final decisions. Where cases concern children, their rights and welfare usually take precedence.

European Convention of Human Rights (ECHR)

- **Article 6 (1)** provides for a fair and public hearing within a reasonable time and for public pronouncement of judgments – but rights to a public hearing are qualified. It allows for the exclusion of the press/public from all or part of a trial ‘in the interest of morals, public order or national security ... where the interests of juveniles or the protection of the private life of the parties so require’.
- **Article 8** provides a right to respect for private and family life but this is a qualified right; interference is permissible in accordance with domestic law but it must be justified (e.g. to protect a child), it must be proportionate, and wherever possible, temporary.
- **Article 10** provides the right to freedom of expression. This includes the freedom to hold opinions and to receive and impart information without public interference – but subject to certain restrictions that are ‘in accordance with the law’ and ‘necessary in a democratic society’

Why is ‘openness and transparency’ now an issue in family courts: what are the problems and who are the critics?

There are several reasons why issues of ‘openness and transparency’ in family proceedings are on the political agenda, and why press/public access to hearings is seen by some commentators as providing a solution. Some of those who demand automatic rights of access for the press believe that family courts are biased and press access would reveal this.

These cases also fuelled an existing debate about ‘onward’ disclosure of court papers without permission of the court – for example to MPs or government ministers. It was in part brought to a head by a case in which a solicitor was found in contempt of court and heavily fined for disclosing papers to a government minister without the permission of the court and who then disclosed the papers further. It was argued by some proponents that parents should be allowed to discuss their case with others such as their MP, a local council member and journalists. However journalists and others linked the question of onward disclosure to the broader issue of press access to family courts. Some of those arguing for automatic rights of access for the press argued that taken together, these issues indicate there is a ‘crisis of confidence’ in family courts.

This situation was not helped by the lack of independent evidence about the actual numbers of people who complain about family court decisions to their MP, or control data to enable an assessment to be made of the validity of any individual complaint, and little contemporary research on bias in decisions concerning children in private law proceedings.

Allegations about private law proceedings

- Some parents – predominantly fathers – have been dissatisfied with decisions about residence and contact orders for children; they argue courts are biased in favour of mother.
- Allegations of bias against fathers is not new but some, including some of the direct action father’s rights groups, have linked this claim with allegations that family courts are ‘secret’ and thus able to hide bias in decision-making.
- A further complaint from women’s groups has been that courts have been too ready to make contact orders in cases where there are allegations or a history of domestic violence, and that this has resulted in a number of children being killed by violent fathers.

Allegations about public law proceedings

- Some complaints about courts and local authorities arise from vulnerable parents whose children have been removed on grounds of actual or likely ill treatment. These complaints are not new but some recent cases have fuelled the debate about ‘openness’:
- Other cases gave rise to concerns about the evidence of expert witnesses. In criminal proceedings following unexplained child deaths, the conviction of two mothers was reversed and a further mother was acquitted. One mother also then complained to the General Medical Council about the evidence of a paediatrician. These cases brought public law proceedings and expert evidence into the debate about press access to family proceedings.

Why did press/public access to family courts become an issue in other jurisdictions?

There is some evidence from other jurisdictions such as Australia, parts of Canada, New Zealand and Scotland which is highly relevant to debates and recent changes in England and Wales. Below we give information on how each of these jurisdictions have handled the issue of press access to family and child protection courts, whether courts give reasons or written judgments, and make anonymised versions of judgments more publicly available than is currently the case in England and Wales.

Press and public access to family courts has been an issue in each of these jurisdictions. Some factors underlying demands for wider access were common to all jurisdictions – but some were country specific. For example, in Australia, Canada and New Zealand there have been concerns, some of which remain, about the role of family courts as a legacy of colonial rule and thus concerns about the imposition of inherited systems

of law and courts on indigenous and minority ethnic communities. Australia, New Zealand and Canada give special attention to the position of Aboriginal, First Nations and minority ethnic communities in reviews of law and courts. For example, in Australia a National Inquiry (1995) into the forced removal of children from Aboriginal and Torres Strait Islanders revealed many Australians were unaware of this practice; realisation resulted in some mistrust of legal institutions. It did not however result in press or public access to all (state/territory) child protection courts. Similarly a review of all courts and tribunals in New Zealand revealed minority communities were not always well served by legal systems, did not know their rights or the services available to them - or the values the system upholds (e.g. NZ-LC 2002a, 2002b).

Most debate about press/public access to family courts in these countries has arisen as a result of private law proceedings. In all jurisdictions a relatively small but tenacious group of father's rights campaigners argued family courts were biased, unable to address the alleged intransigence of some mothers, and were unaccountable. In each jurisdiction, similar arguments were mounted by campaigners as to the role of the press as a mechanism to reveal any bias in decision-making. In some of these countries, reviews of press/public access to hearings were also undertaken sometimes as part of a much wider root-and-branch review of courts and tribunals.

Exceptions to the rule of open courts

In all the jurisdictions explored, government reviews started with a declaration of the importance of the general principle that, in liberal democracies, courts are open to the public so that justice can be seen-to-be-done. However, all reviews of family courts also acknowledged that children and their welfare is of special interest and requires the protection of the court. Such children are highly vulnerable and the effects of publicity about maltreatment or family breakdown can be especially harmful, leading to stigma, bullying, damage to longer-term mental health, confidence, self-esteem and well-being.

Reviews of family courts in all jurisdictions therefore accepted that family proceedings required a different approach and court environment to criminal proceedings if they were to protect children, enable full and frank disclosure by parties, support the court in facilitating early settlements and support a person's right to be protected against arbitrary interference with their privacy, family or reputation (Art 12, UDHR). Balancing these concerns with those raised in debate about press access to courts is not simply a concern in England and Wales but a theme in all these jurisdictions.

Systems of government and law making in other jurisdictions

The first issue to appreciate in exploring systems of family and child care law and governance in other jurisdictions, is that in some countries (e.g. Australia and Canada) certain laws are determined by a federal government while other laws and courts are determined by the government of a particular state, province or territory.

This division of government and law making means that for certain issues – primarily child care law and juvenile justice matters – the rules on press and public access differ. In other countries with a unified system of law and government (such as Scotland, New Zealand and indeed England and Wales) the same legislation (in family, child care and juvenile justice matters) governs all areas. Broadly, the states, territories and provinces of Australia and Canada retained powers to legislate in matters of child protection and juvenile justice while federal parliaments determine legislation governing family law matters (e.g. divorce, care of children, property, maintenance etc.). Therefore the rules on who may attend and report court hearings can vary between and within these countries depending on the type of proceedings but also the state in which an application is made. We look first at press access to and attendance at courts and subsequently what may be published.

Press and public access to family/children courts in other jurisdictions

The legal 'rights' of the press/public to attend family/children court hearings in other jurisdictions are, in fact, less 'liberal' and comprehensive than is often understood. In **Australia** in the 1960s and early 1970s at state/territory level, unrestricted press access to family hearings led to much salacious and sensationalist reporting of cases. The Family Law Act of 1975 reversed that situation making family hearings private. However, this Act was amended in 1983; it now permits the press and public to attend hearings in the Federal Family Court – but these are not absolute rights; they are subject to some restrictions.

With regard to children/juvenile justice courts in **Australia**, the legislation in some states/territories specifically excludes the press and the public from children's hearings. In other states while press attendance is permitted it is subject to wide discretionary powers of courts to exclude people from the court and to hear cases in private.

Canada's complex system of federal and state government (and common law and French civil

code) also means that the authority to legislate on law and court rules is divided between a federal government and legislators in the respective provinces' territories. In practice, family law is an area of divided jurisdiction with federal and local government sharing responsibilities. Like Australia, each province/territory has its own legislation regarding child protection. However, a movement toward unified family courts in

certain provinces means that these courts can now hear a wide range of family, child protection and juvenile justice issues. Legislation governing press and public access to hearings can thus vary depending on the type of application. But for example, where legislation, in principle, permits press and public attendance at hearings, it also instructs the court to consider the impact on children and sometimes on witnesses in

Press/public access to the courts in other jurisdictions

AUSTRALIA

The Federal Family Court of Australia:

- The Family Law Act (s 97 as amended, 1983) starts from the principle that proceedings in the Family Court '...shall be heard in open court'.
- But section 97 also allows for hearings by a judge/magistrates sitting in chambers and allocates wide discretionary powers to courts to determine who can attend court hearings.
- The court of its own volition *or at the request of a party* [emphasis added] can order that part or all of a hearing is closed.

Children/Juvenile Courts in the states/territories of Australia:

- Legislation in some states/territories (e.g. Australian Capital Territory, Queensland, South Australia) specifically excludes the press and the public from children's hearings.
- In others (e.g. New South Wales, Victoria, Western Australia) legislation, in principle, permits press and other attendance but allocates wide discretionary powers to courts to hear cases in private.

CANADA

Nova Scotia

Hearings under the Family Law Act 1990 in the Family Court

- Public and press access to proceedings are governed by the Civil Procedure Rules which state proceedings shall be held in public except where the court is satisfied that,
 - (a) The presence of the public could cause emotional harm to a child who is a witness or participant or is the subject of the hearing; or
 - (b) In the interest of the proper administration of justice, the court may exclude any or all members of the public from all or any part of the proceeding.

Hearings under the Child and Family Services Act 1990

Proceeding shall be held in public except where the court is satisfied,

- (a) The presence of the public could cause emotional harm to a child involved in proceedings, or
- (b) It is necessary to obtain a full and candid witness testimony, or
- (c) It would otherwise be in the interest of the proper administration of justice to exclude any/all members of the public from all/part of a hearing.

NEW ZEALAND

Hearings under the Care of Children Act 2004

- Members of the general public are not able to attend (unless given permission by the Judge)
- Accredited news media reporters are entitled to attend but right of attendance is *qualified*:
 - (a) The judge is given wide discretionary powers to exclude the reporter during a hearing
 - (b) The court also has a general power to hear proceedings in private and to exclude any person from the Court
 - (c) A party may request the admittance of a support person(s).

Hearings in the Family Court

- Following passage of the Family Court Matters Bill in September 2008, accredited press and support persons will, in principle, be permitted to attend hearings in the Family Court of New Zealand. However, as with provisions under the Care of Children Act 2004 above, legislation allocates wide discretionary powers to the court to determine attendance in each case.

SCOTLAND

Hearings under The Children (Scotland) Act 1995 (Children's Hearing System)

- Children's Hearing shall be conducted in private, and only people necessary for the case being heard, or whose presence is permitted by the chairman, shall be present.
- The chairman shall take all reasonable steps to ensure that the number of persons present at any one time is kept to a minimum.
- The following persons have the right to attend a children's hearing:
 - (a) a member of the Council on Tribunals, or of the Scottish Committee of that Council, and
 - (b) a bona fide representative of a newspaper or news agency unless the decision is taken to exclude them
- A children's hearing may exclude [a reporter] from any part or parts of a hearing where, and for so long as, they are satisfied that:
 - (a) it is necessary to do so, in the interests of the child, in order to obtain the child's views in relation to the case
 - (b) the presence of that person is causing, or is likely to cause, significant distress to the child.

determining whether access is permitted in each case – Nova Scotia’s Unified Family Court illustrates this

New Zealand recently passed legislation permitting press access to certain courts after extensive consultation and a review of family law, and courts and tribunal systems by the Law Commission. The Commission in fact concluded that the Australian system had failed to meet its public information and education agenda and had not eliminated complaints of gender bias in federal courts. Indeed it reported that there was evidence that complaints had in fact increased since the press had been admitted into hearings.

In reviewing its systems **Scotland** (a unified jurisdiction in terms of law and government) also started from the general principle that courts administer justice in public, but like other jurisdictions it accepted that this principle is subject to certain exceptions; these include adoption proceedings, parental responsibility applications and decrees in undefended divorce

or separation actions. While the Scottish system is different to others jurisdictions reviewed here (e.g. in its use of a Children’s Hearing System – a tribunal), the press has no right of access to these hearings unless permitted by the Chairman.

What can be published about proceedings in other jurisdictions?

In all the jurisdictions increased access to certain hearings runs parallel with measures to protect privacy rights of parties in family court hearings. The media may publish an account of proceedings but this must not allow a party or others associated with the case to be identified. In Australia, the Family Law Act 1975 sets out in unambiguous detail information that must not be published. Similar provisions exist in Canada, New Zealand and Scotland, as the Box below illustrates:

Publication of information in other jurisdictions

AUSTRALIA

Case heard under the Family Law Act 1975

- Strict rules prohibit the publication of information that might allow for the identification of a person involved in proceedings.
- In addition to names and addresses of home and work places, legislation prohibits coverage of occupations, physical description, styles of dress, leisure activities and political, philosophical or religious beliefs.

Cases heard in children and juvenile courts – states/territories legislation

- In those states/territories where, subject to judicial discretion, the press may attend, legislation prohibits publication of any information allowing for the identification of a child and others in proceedings (unless directed by the court).
- Legislation can be highly prescriptive, prohibiting any reporting of a case, a party or a court venue. It can also prohibit publication of anything about the case until a child reaches 25 years or dies (e.g. in New South Wales).
- State legislation may also contain an extensive list of factors, which if published, are deemed likely to lead to identification of a child and other parties (e.g. in Victoria).

CANADA

Nova Scotia

Cases heard under the Child and Family Services Act 1990

- Legislation prohibits anyone publishing or making public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding under the Act, or a parent or guardian, a foster parent or a relative of the child.

- Moreover, where the court is satisfied that the publication of a report of a hearing or proceedings would cause emotional harm to a child, the court may prohibit publication of all or any part of a hearing or proceedings.

NEW ZEALAND

Cases heard under the Care of Children Act 2004

- This Act provides stringent provisions to protect the privacy rights of people involved.
- The media or indeed any person may publish any reports of proceedings that do not include identifying particulars.
- The presiding judge retains discretionary powers to lift reporting restrictions.

Cases heard in the Family Courts

- Following passage of the Family Court Matters Bill (September 2008) it is anticipated similar rules to those applied under the Care of Children Act 2004 will apply.

SCOTLAND

Cases under the Children (Scotland) Act 1995

- Prohibits publication of any matter which is intended to, or is likely to, identify any child concerned in the proceedings or appeal; or an address or school as being that of any such child.
- There is provision for dispensing with these restrictions where this is considered to be in the interests of justice.

Cases under the Family Law Act (Scotland) 2006

- Reporting restrictions apply to cases heard under this Act (which addresses issues of marriage, civil partnership, occupancy of matrimonial home, financial provision, cohabitation, etc). Overall, four separate statutes set out restrictions on what may be published.

Sanctions for breaches of confidentiality

AUSTRALIA

Cases heard under the Family Law Act 1975

- People who publish an account or cause one to be published which identifies a party to a proceeding are guilty of an offence punishable on conviction by imprisonment for a period of one year.
- Media organisations as well as individuals can be prosecuted.
- Proceedings are undertaken by/with the consent of the Director of Public Prosecutions. There are few prosecutions but whether this is because there are few breaches or there is an unwillingness to prosecute is unclear.

Cases heard in Children/Juvenile Courts in states/territories

- It is a criminal offence in all states and territories to publish information likely to identify a child subject to proceedings and sometimes others involved in cases – without permission of the court.
- Levels of fine vary: in some states legislation contains higher fines for corporate bodies.
- Terms of imprisonment for breach vary across states from one, to four years.

CANADA

Cases heard in the Unified Family Court of Nova Scotia

The Child and Family Services Act 1990, allows that anyone who contravenes reporting restrictions is guilty of an offence and is liable to a fine not exceeding \$10,000 or to imprisonment for two years, or both.

NEW ZEALAND

Cases heard under the Care of Children Act 2004

This Act also imposes fines or imprisonment for breaches of the rules on confidentiality. An individual is liable to a term of imprisonment not exceeding three months or a fine not exceeding \$2,000. A corporate body is liable to a fine not exceeding \$10,000.

SCOTLAND

Cases under the Children (Scotland) Act 1995

Restrictions apply to the publication of identifying information regarding children cases whether heard in the Sheriff Court or the Children's Hearing system. Any person found guilty is liable to a fine not exceeding level 4 on [a] standard scale. In 2000 this was £2,500.

Summary: press access and reporting on children and family court hearings

Contrary to 'received wisdom', and claims often made, the rules governing press and public access to family and children hearings in other jurisdictions are not completely different from those in England and Wales, nor indeed are things necessarily settled or working well. Specifically, where wider press/public access is permitted, press rights of access are not absolute and typically legislation contains three features:

- ▶ Wide discretionary powers to judges to determine press/public admission on a case-by-case basis, and in some instances provision to allow parties to request a closed hearing.
- ▶ Where the press may attend, there are extensive publication restrictions in place to protect the privacy rights of children, parents and *others* involved in proceedings.
- ▶ Reporting restrictions are accompanied by criminal sanctions for breach of the restrictions.

How is press access working – and for whom?

There is little research evidence about how these provisions are working in practice, especially with regard to the views and experiences of children and parents. Equally, despite a wide-ranging debate there is no evidence to date of monitoring by any government. This review has revealed substantial and ongoing tensions in other jurisdictions. In some areas there is evidence that things are far from settled with continued demands by the press for the right to publish more identifying information than legislation currently permits. At the same time there is little evidence that there has been an increased press attendance in court and a corresponding increase in reporting on and understanding of how the family justice system works.

Research in Canada has been limited to the civil justice system and research in New Zealand on the relatively new Act has been limited to judicial views and a review of press coverage. These studies however, identify gaps between expectations of how the press may work to improve public knowledge of, and confidence in, the family courts, and what happens in practice.

Research evidence

NEW ZEALAND

Views of judges and press coverage of cases following provisions in the Care of Children Act 2004

One independent study (Cheer et al 2007) found:

- Almost all judges had been in favour of press access but were deeply disappointed by the very low attendance by reporters.
- The vast majority of press coverage of cases has not been based on a journalist having been present in court.
- Judges were also disappointed by the failure of the press to check facts before reporting information from disgruntled parties.
- The press continued to use sensational headlines and inaccurate information.
- Despite new provisions permitting press access, there are still allegations that family courts are 'secret.'
- The researchers conclude that the failure of the press to utilize their access and to check facts before publishing was consistent with experiences in Australia.

CANADA

The role of the media in reporting cases and informing people

Two studies within the Canadian civil justice project addressed this issue. Stratton and Lowe (2006) found:

- The press plays a distorting role and is not a useful source of accurate information about the court system;
- While the policy objective is that the press should educate people about the system, in practice there is widespread public mistrust of the press.
- The press is driven to provide marketable entertaining content. Few civil justice cases fit into that category; those that do get into the papers provide a distorted view of the system.
- Some members of the press argue that it is not their role to educate the public, that the system presents obstacles in getting facts to convey, and there are time constraints and a need for 'headliners' that sell newspapers.

Lowe, Schmoltd and Stratton (2006) found:

- The public continue to get information about court processes from TV dramas (mostly North American).
- There is public apathy about getting to know about law and courts unless there is a 'need to know' (a view also found in Australian surveys).
- People involved in court proceedings did not find the information they needed from newspapers.
- However, despite public apathy, stakeholder groups involved in the project argued the civil justice system should itself produce better information, along with statistics on incidence and outcomes in cases.

Helping the media: resources to support the work of the press in family courts

As well as allowing for press attendance at family hearings some jurisdictions have invested considerable resources to help journalists understand the family court system. Facilities include dedicated media websites, a manager to assist with press enquiries and in-court IT with access to decisions by email along with desk facilities in courts. Providing and maintaining these facilities is expensive, but there is no published information on set-up or ongoing costs.

Family court resources for the press

- **Australia:** the media website of the Federal Magistrates' Court provides information on the location of family courts, court etiquette, legislation and any reporting restrictions. The Family Court of Australia has a media centre with a media officer available to handle press enquires and liaise between the press and the judiciary. It offers similar services to the Magistrates' Court with links to fact sheets on topical issues, relevant judgments, press releases, judicial speeches and biographies of senior staff in the Family Court of Australia.
- **New Zealand:** has similar facilities with links to comments by judges on controversial cases and published decisions.

Accreditation, codes of ethics and accountability for the Press

Some jurisdictions (e.g. Nova Scotia and New Zealand) have allocated considerable time and resources to questions of accreditation of the press and to issues of ethical practice and complaints procedures.

Press accreditation for family/children hearings

Canada, Nova Scotia: The Media Liaison Committee (2006) set out an accreditation system covering qualifications, application processes, guidelines for breaches of conduct and a Breaches Advisory Committee. It also stated:

- Accreditation should be a fixed term, senior judges should reserve rights to deny or withdraw accreditation where guidelines are breached.
- Reporters must wear a 'PRESS/MEDIA' tag clearly visible at ALL times.
- Accreditation gives priority in media areas in courts, and to notification of applications for publication bans, sealing orders, in-camera hearings, and court decisions by email.

Press accreditation for family/children hearings (continued)

New Zealand

Accreditation criteria mean certain media might normally be excluded from hearings (e.g. organisations who publish newsletters, independent documentary film-makers).

Applicants must be subject to a code of ethics and a procedure for addressing complaints about inaccurate/unbalanced reporting.

Helping families and the wider public: improving information about family courts

All the jurisdictions examined, whatever their rules on press/public attendance, are also addressing the question of how to help those taking part in family proceedings better understand the system. Responses to the first consultation paper (DCA, 2007a) revealed that people felt that improving general information about how the family courts work, and giving more written information to families involved in proceedings, were far more likely to address questions of knowledge and confidence in the system than press access to hearings per se.

The second consultation paper (DCA, 2007b) therefore placed more emphasis on this aspect, noting that providing more information is central to improving 'openness' in family courts. However, the considerable resource implications of this were only briefly noted; since many judgments are given orally [see below] there would be considerable costs in allowing judges time to write such judgments and, where necessary, anonymise them for a wider audience. This approach is more in keeping with what 'transparency' in adjudication implies, that is, ensuring that parties and the general public, have easier access to better information about how the system works, and how decisions are reached.

It is therefore timely to look at how other jurisdictions address these issues. For example, New Zealand and Australia have developed extensive websites to provide information both for family court users and wider communities giving information about how the family court system works, and what users might anticipate so that they can be better prepared for the process. There is a wide range of on-line information and although the quality and accessibility of some information may vary it is freely available if people are literate and have access to the Internet; some leaflets are available and some websites are especially user-friendly in design and language.

Website information and assistance for family and children court users

Family, and child protection law

This explains in accessible language what the law says and the legal terms and concepts used (e.g. see 'Court-Talk Explained' website, Family Court of New Zealand).

Principles on which law and practice are based

This explains the principles underscoring family and child protection law and legal processes, for example explaining 'problem solving', non-adversarial approaches, prioritising the welfare of children, the safety of adults etc. and demonstrates how these principles inform court objectives and practices.

The issues and problems addressed by modern family courts

This gives the range of issues on which family courts can help (e.g. relationship breakdown, property and maintenance, care and protection of children, civil partnerships, and in some jurisdictions, welfare of the elderly).

Information to help families

This explains what happens in court, when and why, where to sit, when to speak, what to call the judge etc. Some jurisdictions also offer on-line virtual tours of family courtrooms.

Information may also cover who will be in court explaining the powers of judges to exclude observers and to control what can be published. Australia and New Zealand Family Court Websites offer a leaflet on 'Privacy' in family cases.

Decision-making

Some websites provide information on how decisions are made; some give links to a "Decisions" website and recommend viewers read judgments for themselves as a source of accurate information about how difficult decisions in family and children cases are made. Types of court orders available to judges are also explained.

Reading materials about Family Courts

Some websites also provide a wide range of brochures, fact sheets, videos (some interactive); information sessions are available from some sites.

Diverse and indigenous communities

Materials are available in a large range of minority and first languages; rights to interpreters are also explained (for non-English speakers and for those using signers), along with court facilities.

Dedicated information for young court users

Guides and brochures are for children and young people explaining family breakdown, their rights in the process, how to handle the 'transition', plus sources of help and support (e.g. the 'Families Change' portal in British Columbia, the FLIC Project in Nova Scotia).

Facilities and information for the wider community

British Columbia

Has a Public Education Committee (made up of thirteen judges and a legal officer).

Nova Scotia

A Community Liaison Committee aims to increase judicial understanding of communities by exploring whether courts are viewed as fair, what might be improved, what judges might need to understand about the special needs of people in a community and what groups can do to help. A newsletter, 'From the Bench', provides information on selected topics in a simplified language.

An archive site holds written lectures, court decisions, comments on controversial cases and issues of interest to the public/press.

New Zealand

Has similar resources with website links to a 'Resources Website' and to 'Important/controversial Judgments' and research papers and articles by judges.

South Australia

Runs a 'Courts Consulting the Community Project', which has undertaken two opinion surveys exploring trust and confidence in courts in general.

Family Court of Australia

The National Cultural Diversity Committee conducts a range of activities to develop relationships with other agencies and diverse communities.

Open days/outreach work

Some jurisdictions hold days where people can visit the court and discuss issues with family judges and staff. The Community Educational Programme in Australia takes judges out to rural and local communities to discuss the work of family courts.

Educational portals

Most jurisdictions have facilities and extensive materials for schools, college and university students and teachers.

Party access to any written reasons/judgment in England and Wales

In thinking about what 'transparency' might be for and what it might achieve – a key element has to be to ensure that participants understand the reasons for any court decision in their own case. In addition, there are indications that providing more anonymised judgments where these contain issues thought to be of wider public interest, could be important in providing the wider public with more information about how decisions are made. This aspect of 'access to judgments' was not raised in the England and Wales consultations until the second consultation paper (DCA, 2007b). Yet it

is arguably the one that could have a significant impact both on participants, and those making allegations of bias, secrecy and lack of accountability in cases. It is also the change that would require most resources.

In England and Wales the position on reasons/judgments is complex but changing; it should be remembered that in most cases there is unlikely to be a final 'judgment' as such, since in line with a non-adversarial problem solving ethos, most cases concerning children are not ultimately contested at a final hearing. Rather, parties reach an agreement, and in those circumstances, there is no 'judgment' to be delivered. However where a dispute cannot be resolved, a contested hearing will ensue. Whether a written judgment results from that hearing can depend on a number of factors including the tier of court hearing the case, the issue in dispute and local judicial practice.

Written judgments take time and resources and where the volume of cases is high certain decisions are more likely to be given *ex tempore*. Also, a 'hearing' can be based on written submissions only (with no-one attending court); that can be followed by an oral or written judgment depending on the issue/view of the judge. Whichever approach is taken, lawyers will then go through the reasons with the parties.

Access to a judgment/reasons – contested hearings in England and Wales

Magistrates' Family Proceedings Court (private and public law)

Parties will receive a copy of the magistrates' written reasons for any decision.

County Court

Access to a judgment can depend on a number of factors/types of dispute, for example if there is a 'fact finding' hearing, there would normally be a written judgment (in part because it may be necessary for the next stage of the case).

A judge can follow two options after a contested hearing: an *ex tempore* ('at the time') oral judgment may be delivered, this to be given at or soon after the hearing.

This may or may not be followed by a written judgment but because of the volume of cases in county courts, a written judgment may be less likely.

Where it is delivered '*ex tempore*', the lawyers will take down the oral judgment and explain it to parties at the end of the hearing.

High Court

Practices in the High Court are complex and can depend on the matter disputed but a similar approach may be followed: a written judgment may be made available perhaps if the case is ongoing, but parties can also ask for a written transcription, the cost to be shared between the parties.

Party access to any written reasons/ judgment in other jurisdictions

Access to judgments in other jurisdictions varies between jurisdictions, types of proceedings and tiers of court. Most jurisdictions have gone further than England and Wales as the boxes show but it is important to note that practices are in flux. There is little specific information on court websites, for example, on the availability of any judgment for parties to proceedings and the proportion of cases that contain or conclude with a contested hearing (and thus the possibility of a written reason or judgment).

As indicated in the Box some Family/Children Court

websites in other jurisdictions contain links to a database of published judgments. In some instances decisions are written and posted on the site at the discretion of the presiding judge, while in others such as The Supreme Court of Canada (the apex of a four-tier court structure) all decisions are published and all parties receive a copy. However, in most jurisdictions reviewed including England and Wales, the vast majority of cases are not completed in higher courts. The issue of access to judgments is thus complicated but also controversial because it has very large cost and time implications. Even though some jurisdictions state publishing more/most family decisions is a longer-term objective it will be hard to achieve without further resources.

Access to judgments

Canada

British Columbia

- In cases heard in the Supreme Court of British Columbia indications are that all parties receive a copy of any written judgment.
- Wider communities can access published judgments via the Court's website or they may apply to the court for a copy (paying costs) unless there is a sealing order on a particular file.
- Only those cases which have been anonymised appear on the website of the Supreme Court of British Columbia
- The Judgment Database for The Provincial Court of British Columbia is currently the only free public online source of Provincial Court judgments.
- Most current entries on the database are judgments posted at the discretion of the presiding Judge.
- Many of the Court's judgments are however delivered orally and are not on the website.
- The website states a longer-term objective of publishing greater numbers of both oral and written decisions.

Unified Family Court of Nova Scotia

- Selected decisions are usually posted on the court's website and are available on the Court's searchable database.
- A 'Decisions Database Committee' monitors decisions subject to a publications ban or deemed unsuitable for publication for reasons of individual privacy; these are not placed on the site.
- The stated long-term aim is to make the database as comprehensive as possible.
- There is no published information about the availability of judgments for the parties.

New Zealand

- There is no information on the Family Court website about party access to any judgment; enquiries indicate parties generally do not get any written reasons.
- Judgments published on the website are selected by the presiding judge but the site is by no means comprehensive.

- The website contains a link to a 'Decisions' database; a drop-down menu allows anyone to search judgments by type of case (e.g. child protection, contact, domestic violence etc).
- Each Judgment carries a bold head-note stating any publication ban within the law/rules under which the application was made.
- Judgments refer to children or young people and parents by initial only; they do not give the location of the court or family.

Australia

The Federal Family Court of Australia

- Published information about availability of written judgments for parties is not available; enquiries indicate Federal Family Court judgments are provided to parties at no cost in those cases where a judgment is written.
- The Family Court aims to publish all judgments but judges retain the power to ban publication (although parties may still receive a copy).
- Historically, the Court has published appeal decisions of the Full Court; from January 2007 it aims to publish a majority of first instance judgments in anonymised form.
- Recent full Court and available first instance judgments are published briefly on the Family Court website and then are permanently available on the Australian Legal Information Institute website (AustLII).
- From 2007, judgments published on the Australian Family Court web site have been anonymised using pseudonyms to protect identities (previously done by initials).
- 'Judgments Publication Office' (JPC) manages the anonymisation and publication process of judgments.

Federal Magistrates Court

- Most judgments are given orally and are not written down unless a party requests this or the magistrate reserves judgment in order to give written reasons.
- Where there is a reserved written judgment, publication is a matter for the author.
- The magistrate decides whether the judgment should be stored internally only, or published on the Federal Magistrates Court website and AustLII.

Conclusions

In debates in England and Wales other jurisdictions have been held up as examples of the benefits of press access. However, closer examination of what is permissible, both in press access to and press reporting of individual cases and the safeguards each jurisdiction puts in place to protect children and family privacy reveals a more complex picture with less press and public access than is commonly claimed. It provides some likely answers to questions families, politicians and a wider public in England and Wales might want to ask.

Will press attendance improve transparency and legitimacy?

Press access to family and child care courts in England and Wales and reporting of cases is advocated so that decisions and processes will be more transparent to a wider public, improving public knowledge. It is argued this will in turn increase legitimacy and public approval of a system sometimes accused of ‘secrecy’ and bias.

The experience of other jurisdictions does not support this. Following recent changes to admit the press, independent research in New Zealand found press coverage based on unsubstantiated allegations by litigants continued, written by reporters who were not in court and did not check facts with a judge. Allegations of ‘secrecy’ and bias continue in Australia despite the Federal Family Court having been open to both press and public for over twenty years. It seems that if the press cannot report the details of cases they are unlikely to attend courts and report on how the system works, how evidence is used and decisions reached.

Will newspaper reporting “educate” the British public about family courts?

Anecdotal evidence from other jurisdictions indicates that reporters seldom attend family hearings. Reporters argue it is not their job to educate the public and the need to sell newspapers drives headlines and story lines; researchers argue this commercial imperative leads to a distorted picture of legal processes in newspapers. Some reporters also argue reporting restrictions in family cases limit press coverage and governments have been pressured to relax the rules. Allowing press access and reporting of family court cases is therefore unlikely to satisfy demands or end debate about family courts.

Surveys indicate people do not get their information about how courts work from newspapers; they may read daily newspapers but they do not necessarily believe what they read – and they do not

think newspapers tell the truth. Educational materials and programmes from courts themselves are far more likely to meet information needs and do this accurately.

Helping families and wider communities understand the court system

Faced with a failure of routine reporting on family courts and a public no better informed, other jurisdictions have gone beyond reliance on the press to inform people about family courts. They have invested considerable resources developing websites with detailed, accessible information for court users and a wider public, and providing leaflets and court open days. Such resources are likely to be necessary in England and Wales.

Balancing open courts with privacy claims and sanctions for breach

Other jurisdictions introduced stringent rules restricting publication of anything that allows children and some adults to be identified, and criminal sanctions apply to reporters and organisations that breach rules. Press and campaigning groups have expressed anger at reporting restrictions; this debate is therefore unlikely to go away.

Families using courts in England and Wales will need assurance that reporters are subject to accreditation and that they can easily be identified in court. Criteria for accreditation will need to ensure certain people/organisations (e.g. those producing membership newsletters) would be excluded from hearings. Proposals to monitor and arrangements for breaches will need to be clear and in place in England and Wales to ensure adequate protection for children and parents and others.

The need for wide judicial discretion to protect vulnerable parties

In jurisdictions with discretion to admit the press, governments allocated wide powers to courts to determine press attendance in cases. In some instances, in the exercise of that discretion the court is specifically directed to consider the interests, views and impact on children.

In some proceedings adult parties may also request a closed hearing. Permitting press access to family and children hearings in England and Wales needs to be accompanied by similar powers to enable courts to safeguard children and others.

In public law cases vulnerable parties are a serious

concern, so, in some jurisdictions, these cases remain closed. Many mothers are highly vulnerable; they may have learning disabilities or lack capacity to instruct a solicitor or have significant mental health and addiction problems. Many have suffered long-term domestic violence, and lead chaotic lifestyles. Many have troubled histories and have been ‘in care’ themselves. Courts elsewhere can, if necessary, restrict disclosure and reporting of a case during the lifetime of a child. In England and Wales, the rules will need to look beyond what can be published/disclosed at the time of proceedings to enable courts to consider longer-term implications and purpose of any public disclosure. In other jurisdictions, adoption proceedings remain closed; plans to open these hearings present a substantial challenge to notions of privacy.

Listening to children’s view about “opening up the courts”

In England when young people were asked about this issue, many said they simply did not want the press in court listening to personal, intimate and distressing details of their family life. While these views were instrumental in changing the Government’s position in 2007, they have subsequently not been addressed. In other jurisdictions children were not consulted about whether to give press access. But in some jurisdictions judges are directed to consider the welfare of and impact on children when deciding whether to admit the press to courts.

However, the development of dedicated child-friendly portals and educational resources for young people are important and impressive moves in the empowerment of young people. Safeguards will be necessary for children/young people in England and Wales. Under human rights legislation children arguably have a right to be consulted about press attendance throughout proceedings.

Wider access to judgments/reasons in cases

Other jurisdictions show that access to judgments is a better way for people to learn how difficult decisions are made because they are not limited to ‘highlights’, ‘entertaining’ factors or one side of a story. Judgments set out the issues and demonstrate how these were assessed in coming to a decision. Most jurisdictions publish more judgments than England and Wales; this does however require time and resources.

In summary, press access is no substitute for good information about family courts and the way decisions

are reached. This is needed both to help the parties and the general public to understand the legal processes and decision making and also to provide research based evidence. What was often acknowledged as missing in jurisdictions was independent research able to answer contemporary questions about trends and practices in a way press reporting of individual cases simply cannot provide.

Selected reading/references

Consultation papers

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- Scotland** – Report of the Inquiry into the Removal of Children from Orkney in February, 1991. Clyde J. J. (1992), (Scottish Office).

Family Court websites

- Australia** – Federal Family Court – www.familycourt.gov.au
South Australia Courts Administration www.courts.sa.gov.au
- New Zealand** – unified family courts www.justice.govt.nz/family/home.asp
- Canada** – The courts of Nova Scotia, www.courts.ns.ca/Family/index_fam.htm
Provincial (Family) Court of British Columbia – www.provincialcourt.bc.ca/aboutthecourt
www.familylaw.lss.bc.ca/guides/initialorder
www.ag.gov.bc.ca/family-justice

Child protection courts

In federal systems, where websites exist for the Child Protection and Juvenile Justice courts, these are under the states/territories/provinces in which courts are located; websites tend to be less extensive, interactive and user friendly compared with those of federal family courts.

The Nuffield Foundation

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The views expressed in this policy briefing are those of the authors and not necessarily those of OXPLAP or the Department of Social Policy and Social Work.

Family Policy Briefing 5 continues the tradition of independent, research-based commentary on family policy issues initiated under the Family Policy Studies Centre which closed in 2001. FPSC published 17 Family Briefing Papers between 1996 and 2000 which are available on www.fpsc.org.uk Family Policy Briefings are now based in the Oxford Centre for Family Law and Policy (OXFLAP) in the Department of Social Policy and Social Work. Family Policy Briefings are available for £5 from the Department or may be downloaded from the Department's website.