

# **Transparency and The Family Court: What goes on Behind Closed Doors?**

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**Professor Jo Delahunty QC**

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## This lecture will explore

- Who does the child's story in the family court belong to? The child, the family or society?
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- What do the public know about the way family courts make their decisions?
- Where and how do we draw the line between confidentiality & accessibility?
- Are we deaf to the howls of outrage about "secret courts' and injustice' that bleed into public consciousness?
- Does the Family Justice System risk falling into disrespect if it doesn't constructively engage with the public and press?







# Legal Aid Sentencing and Punishment of Offenders Act 2012



“

*The reality is that our clients are heavily influenced by what they read on social media, in newspapers, in what they are told by friends or supporters and in their Facebook feeds.*

*When we give advice to clients we are one voice competing on a trading floor – and almost every other voice is offering a more immediately compelling narrative than ours*

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Lucy Reed

Co-founder of ‘The Transparency Project



## **‘Secrecy or Privacy’ whose story is it?**

- Family courts hear in ‘chambers’ i.e. in the presence of the parties alone.
- The public are not admitted.
- Since 2009 Accredited Press have been admitted but what they can read about the case and what they can report about it is highly circumscribed.

**Why is this the case?**

The starting point is **the welfare of the child**.

The court would be failing in its duty to that child if, in the process of trying to determine if they had suffered harm, the **court process itself and its aftermath caused the child harm**.

We trespass into the most **intimate details of a families life**

How much we put at risk if we do not think through the **tension between competing demands of secrecy and confidentiality** properly ?



## Examples of evidence heard behind closed doors

*Mr X sexually abused G and B for a period of years up to July 2013 in the case of G and February 2014.*

*In the case of B the abuse occurred in the home and at Mr C's workplaces.*

*It escalated from touching the children's private parts, to making them touch his private parts, to fellating B and forcing B to fellate him, to attempted rape and rape of G and attempted buggery of B, and finally to making the children perform sex acts on each other.*

*The children were forced to take part in these activities and were reduced to silence by Mr C's threats about the consequences of speaking out.*



*PH sexually assaulted C and raped her when some of her siblings were in the home.*

*On an occasion he used a knife to cut her clothes off.  
Tied her to the bed.*

*The mother returned home during this event.  
C told her mother after the event and her mother did not believe her or take any steps in response.*





# Does transparency mean the same thing to everyone?

When we talk about the public's 'right' to know what is going on in the family court how often does that demand engage with the **child's right** not be become the subject of titillation and gossip ?



As a barrister I inherit grotesque histories .....

What of the child who has experienced it?





## What does transparency mean?

*Transparency is about seeing and understanding how things work. ....*

- *Whether hearings and court documents should be public or private*
- *Whether court cases should be reported in the media or on social media*
- *How law and procedure is made clear for the people whose lives might be affected by it*
- *How are families helped to understanding how and why a decision has been made in their own case?*
- *What information is available about how the system works: judgments, statistics, complaints data etc*

The transparency

Project

## What does transparency mean to the public?

It means being able to be present in court.

It means listening to the evidence and being able to discuss it outside court.

It means having the press in court as their eyes and ears ...and reporting it





# Confidential Contempt Outrage





- The ECHR protects, under article 8, the right to respect for family life and privacy, and this has to be balanced against the right to freedom of expression under article 10. UN Convention on the Rights of the Child (article 16).
- Family appeals in the Court of Appeal are usually heard in public, sometimes with reporting restrictions but they are not the court of first instance receiving evidence.
- Hearings in the Family Division of the High Court, the county court and magistrate's court are generally heard in private because the case involves children and the nature of the proceedings is confidential and it would defeat their purpose, or harm the interests of those involved, to hold them in public.
- Family appeals in lower courts are not usually heard in public, but there is power to adopt the same approach as the Court of Appeal where appropriate.



## Who can attend?

- Where any court is sitting in private (or “**in chambers**”) the public and media are usually excluded; only the **parties and their lawyers** may attend.
- Under the Family Procedure Rules **accredited media reporters** are entitled to attend most private hearings in the Family Court or the Family Division of the High Court, subject to a power to exclude them where necessary in the interests of justice.
- The right of accredited media representatives to attend private hearings in the Family Court **does not include the right to report them.**

## What can a non-party read?

- A media representative will need to apply to the judge to see documents referred to during proceedings.
- balancing exercise, considering on the one hand the right of the litigants to privacy and a fair trial, and on the other the right of the media to be able to follow and to report the proceedings fairly and accurately.
- Under the Family Procedure Rules a party may only disclose information from family proceedings to certain other persons for specific purposes only.
- The rules do not permit the communication of information (or disclosure of documents) from family proceedings to the press or give the press any right to see documents.



**CONFIDENTIAL**

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*Family Reporting Guidance: paras 31 – 38, FPR  
Rule 12.73 and Practice Direction 12G –  
Communication of information*



## What can be reported?

- Only certain basic facts can be reported unless the Judge orders otherwise, even after proceedings end; and the **child must not be identified** while they are subject to ongoing proceedings and that protection may be extended beyond them.
- What is contained in a **judgment** is the best starting point to know what has been permitted to go into the public domain.
- Media rarely provide the link to the judgment even if reporting on the case that has led to its publication.



## Do we have a balance between privacy and transparency?

*“I am determined to take steps to improve access to and reporting of family proceedings. I am determined that the new Family Court should not be saddled, as the family courts are at present, with the charge that we are a system of secret and unaccountable justice.”*

April 2013, Sir James Munby, President of the family Division



*"At present too few judgments are made available to the public, which has a legitimate Interest in being able to read what is being done by the judges in its name. The Guidance will have the effect of increasing the number of judgments available for Publication (even if they will often need to be published in appropriately anonymised Form)."*



As a result of Munby P's determination for greater transparency, he produced *Guidance "Transparency in the Family Courts and Publication of Judgments in 2014* explaining:

## Transparency in the Family Courts and Publication of Judgments – Guidance

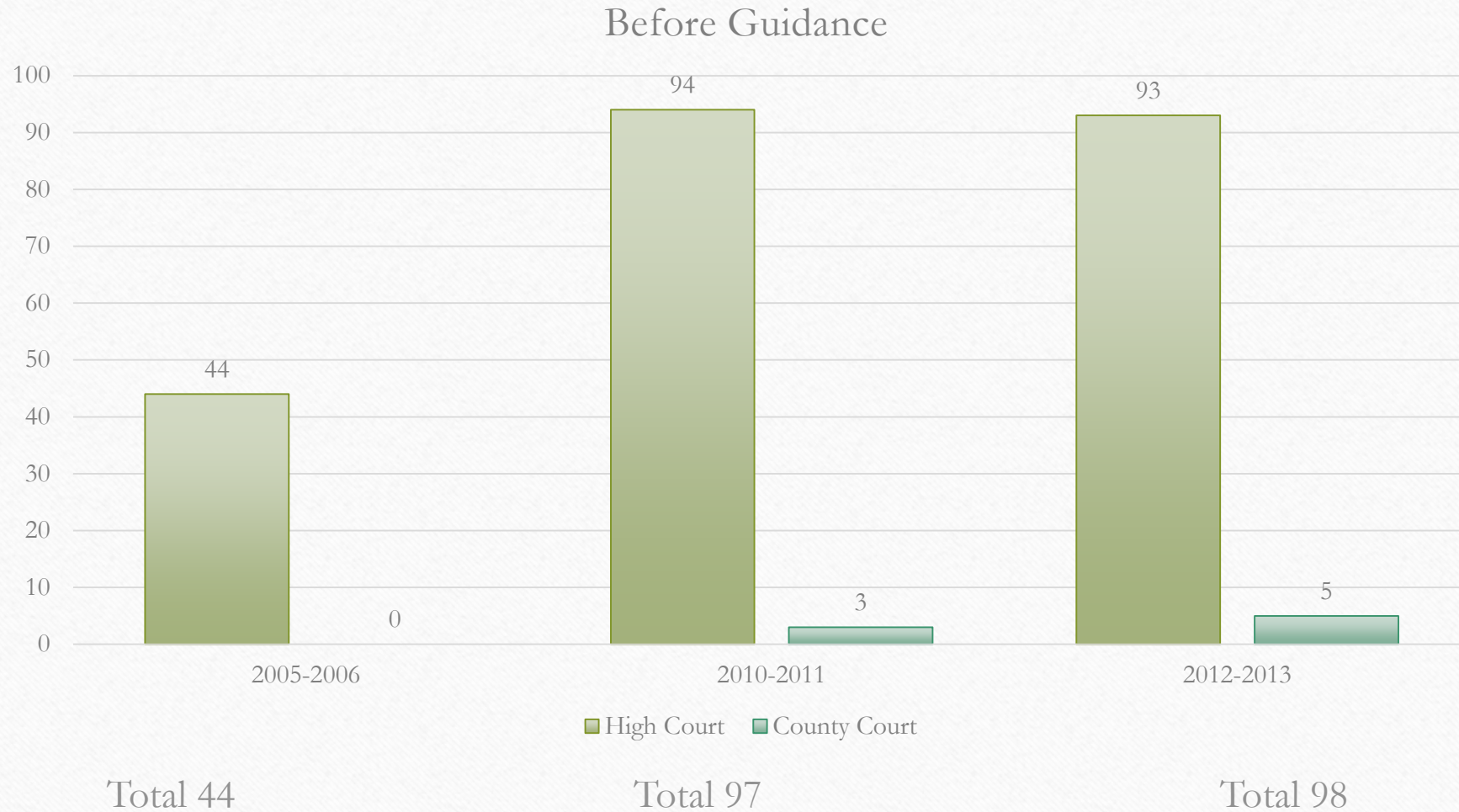
He boldly included cases of the upmost gravity and sensitivity including judgments arising from:

- (i) fact-finding hearing : serious allegations, significant physical, emotional or sexual harm, have been determined;
- (ii) final care order or supervision order or any order for the discharge of any such order,
- (iii) The making or refusal of a placement order or adoption
- (iv) Deprivation of liberty cases, including an order for a secure accommodation order
- (v) Any application for an order involving the giving or withholding of serious medical treatment;
- (vi) Any application for an order involving a restraint on publication of information relating to the proceedings.



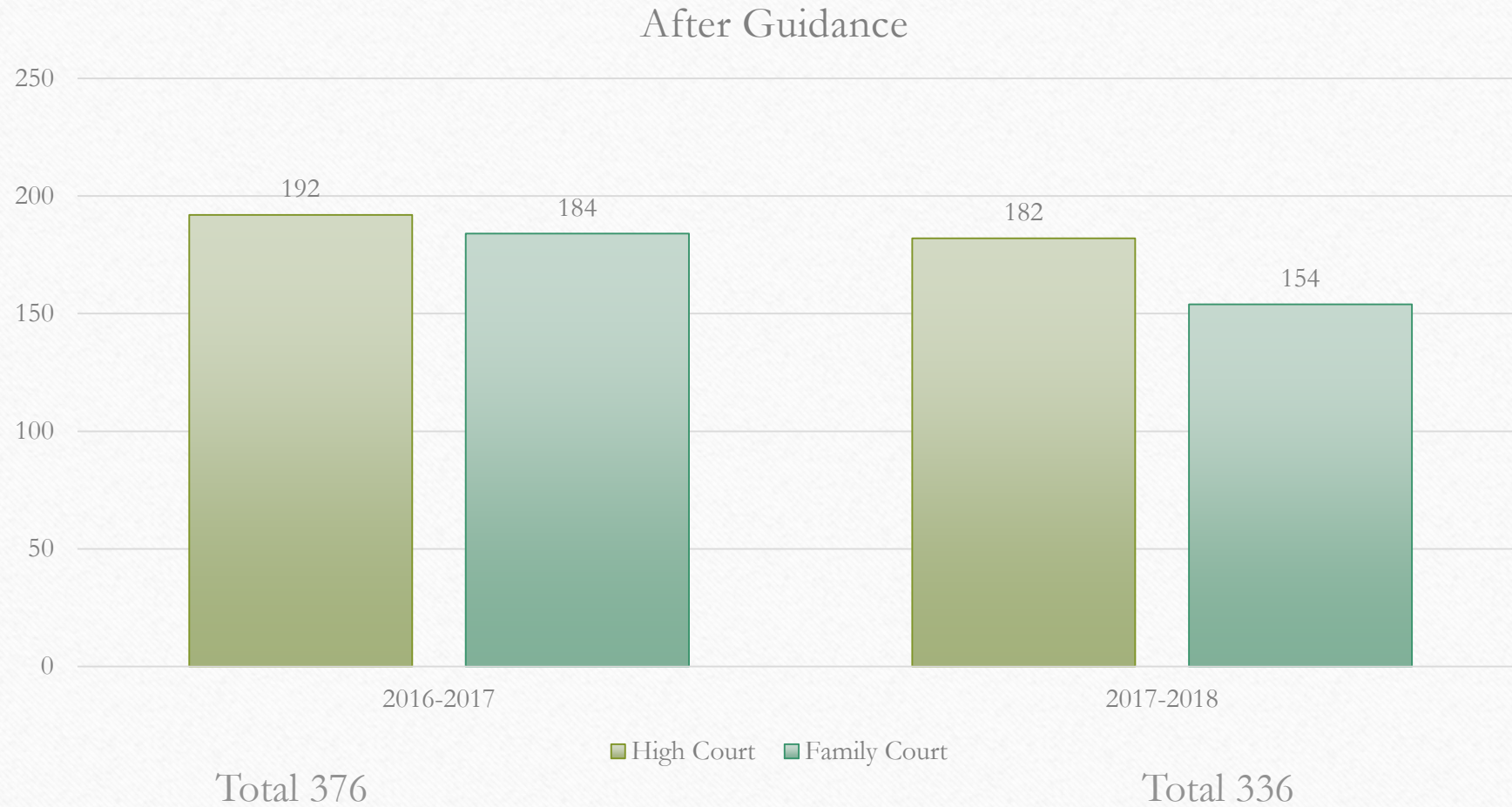
Munby P also decided that anonymity in the judgment should not normally extend beyond protecting the privacy of the children and adults who were the subject of the proceedings and other members of their families, unless there are compelling reasons to do so.

# Has the implementation of the guidance been effective?





# Has the implementation of the guidance been effective?



- If there is a criminal investigation the judgment won't be published in advance of the jury returning a verdict so as not to interfere with the defendant's right to fair trial.
- Judgments may not be published if they could lead to 'jigsaw identification'. If they are published they are likely to come with a warning indicating the need to preserve the anonymity of the children and members of their family must be strictly preserved.
- In addition, laudable though this attempt at transparency was, few members of the public are aware of it, the search facility is difficult to navigate unless you have a good idea what you are looking for and it is utilized less often than it could be by the press.



The decision making of the **magistrates court** is entirely invisible and yet they also deal with matters of enormous importance of a family, including contested care proceedings and the making of adoption orders.

*‘ Because the lay justices, it varies enormously from area to area, but very roughly they deal with something between 80 and 90 or more private law cases. They deal with something around, again it varies, 25 percent to 35 percent of public law cases, a much smaller amount of that would-be adoption cases, but we simply could not cope is the reality. — Keehan J*



## *‘Transparency through publication of family court judgments’*

Research by **Julie Doughty** and others published in 2017

Wide variations in practice from court to court and on the geographical area.

Analysis of the press coverage over the same period showed that allegations of secrecy in family cases had reduced, but there was still evidence of cherry picking facts and misleading headlines.

They felt that the 2014 guidance should be reviewed so as to pilot a scheme requiring publication of a representative range of cases from every judge and every court, supported by adequate training and administrative assistance in safe anonymization, removal of identifying details and focusing on issues of genuine public interest.



## Statutory prohibitions

**Administration of Justice Act (AJA) 1960, section 12** prohibits publication (at any time) of information about proceedings in private which affect a family and especially a child . The AJA 1960 prohibits any dissemination of what went on in front of the judge and the documents filed for the proceedings, including written evidence, reports and submissions of the advocates – although it does not prohibit reporting of who is involved in the case, the time and location of the hearings, and the nature of the dispute, or anything unrelated to the court proceedings or that could have been reported if those proceedings had never taken place.

**The Children Act 1989 (CA), section 97** makes it a criminal offence to publish material which identifies or could identify a child involved in proceedings in which any power under the Children Act itself or under the Adoption and Children Act 2002 may be exercised.

**The Children and Young Persons Act 1933, section 39** enables any court in any type of proceedings (except criminal) to make an order preventing the identification of a child concerned in the proceedings, whether as a party, subject or witness.



## Effect of statutory prohibitions

Section 12 AJA and s 98 CA while do not entirely prohibit reporting of anything to do with the case, in practice it will be difficult to report anything of interest without risking breaching one or other of these sections.

Journalists are not interested in walking around the family courts in the off chance of finding a case that will be significant enough to overtake and outwit the barriers to public interest.

The Family Justice System does little, in reality, to welcome the press into court and the rarity of their presence marks the occasional appearance of some in court as the exception rather than the rule.





Despite the efforts of Sir James Munby to introduce transparency into the workings of the family court system through permitting press access to its courts and the product of it work through the reporting of judgments, there has been, I believe, little change in practice.

## *‘Safeguarding , privacy and Respect for children and Young People and Next Steps in media access to the Family’*

Dr Julia Brophy coordinated and published a study commissioned by the ALC and NYAS in 2014

*‘Article 12 of the UNCRC states all children have the right to a voice, which is both heard and taken seriously, in all decisions about them and their lives. Article 16 is crystal clear: all children have an inalienable, undeniable right to have their privacy protected, unless there are things happening in their lives that place them in danger. If we take this international treaty seriously, and if children tell us they do not want their private lives made public, we have **a clear mandate: to ensure their dignity is guaranteed by not exposing their private troubles to the public gaze.**’*



## The Commissioners View

*'These young people raise credible doubts about the ability of the media to respect their privacy or to meet the public education agenda it claims to defend when it pleads for increased access. As research identifies issues of public confidence in family courts can and should be addressed in ways that do not put already vulnerable children at risk. It is sad that we are having this discussion yet again, despite awareness over many years that there are other ways to let the public know how family courts work'*

They concluded

*'We need to look again at the wisdom and justice in a real sense, of opening up the family courts to the media'.*

*‘...it’s hard enough telling even your closest friends that you are in care, you don’t need everyone knowing your story and knowing you are in care. When I was younger and people found out I was in care I was bullied quite a lot because of it and if people had known what had actually happened – why I was put in care – that would have made it ten times worse. So I don’t think its right - without permission - to put things out there, especially pictures...’*



*Children suffer a lot of ‘crap’ in their lives – they don’t need more; [they] are already [struggling] ...because they have crappy parents...’ [Female, 18 years]*

*‘I would hide myself in a room’ [Female, 18 years]*

*‘Some children do feel guilty about what their parents have done [to them] ...they start feeling it’s all their fault’  
[Female, aged 16]*

- They said accusations that family courts are ‘secret courts’ are disingenuous: they are private, and for good reason. They said such accusations are a justification for press access to information it would otherwise not achieve.
- They said all cases are serious for the child or they would not be in court: to make them ‘newsworthy’ the media will select the most intimate, ‘juicy’ details.
- Where change was necessary there are other avenues to achieve that.
- **They said the President should stop trying to please the media,**



# However...

This was a **small** sample study: the results were drawn from just 11 children aged between 16 and 25 who were prepared for the consultation by being told the background to the issues, the themes to be addressed and the reasons why their views were being sought were set out .

They were speculating on risk of harm, none was actually known about or identified by the researchers from the cases reviewed. They were tasked with reading a number of anonymised court judgments that had appeared on BAILII, and checking them for risks of identification, either through too much detail in the judgments themselves, or through jigsaw identification.



**It is difficult to know if the concerns expressed by these 11 young persons were reflective of children who come before the family court system as a whole: but their powerful words should be remembered by those who shout out ‘secret courts should be shamed’ before they write their placards or go to war on that crusade on social media.**



## ***Judicial Guidance on Anonymization and Avoidance of the Identification of Children and The Treatment of Explicit Descriptions of the Sexual Abuse of Children in Judgments intended for the Public Arena***

Dr Brophy was asked to draft judicial guidance which was published in 2016

**BUT** the President clarified in October 2016 that whilst

*‘This is a valuable piece of academic research and analysis, funded by the Nuffield Foundation, whose publication and wide dissemination I fully supported. However, it is important to appreciate that it is only that. It has no official status. It has not been approved or issued as Guidance by me or the judges. It is therefore not judicial guidance in the sense in which many would understand that phrase.’*

On **13<sup>th</sup> March 2018 Louise Tickle** delivered the **Second Bridget Lindley Annual Memorial Lecture** “*How Information Technology and Modern Communication Systems Are Affecting Journalism and Family Law*”

*“My firm belief that there has to be more transparency in family law is a push directly against the powerlessness that is imposed by the state when someone is not allowed to speak.*

*I have yet to come across any function of the state that works better in secret. The law that prevents reporting of what goes on in family courts is meant to protect individual children’s interests but I think it is now working conveniently to hide bad and sometimes even unlawful practice.”*



In the debate that followed, involving Sir James Munby, Keehan J and Dr John Simmonds; Keehan J expressed the mood of the moment shared by many lawyers.

*There have been changes in improvements. One of the most important ones was permitting journalists to attend, accredited press representatives to attend court hearings and to observe and that I think has played a very powerful role in changing the way that the family proceedings are reported. Is that the end gain? Should we not move further? My own view is that there are steps we can take to open it up further and assist the journalists in understanding what the issues in the case are and what's the evidence. But thirdly what has not yet been mentioned are the children and if it's a gloves off approach, abolishing the Administration of Justice Act 1960, people can say what they want, the aggrieved parent rightly or wrongly can tell their story unfettered on social media and journalists can publish it, fine. Where do the children stand and how is that is going to affect the children who may not be going back to their parents for very, very good reasons and whose parents' campaign can very adversely affect them?*





On 28<sup>th</sup> June 2012 **Sir Nicholas Wall** delivered the **Gray's Inn Reading at Gresham College**, entitled ***'Privacy and Publicity in Family Law: Their Eternal Tension'***.

*"I make it clear at once – if I have not already done so - that Family Lawyers are divided on this issue. On the one side are those who take the view that any publicity involving the affairs of disadvantaged children and adults is unwarranted; that the media are unashamedly sensationalist (quite apart from being anti-judge) and that children and families are entitled to privacy when forced to litigate about the intimate detail of their lives.*

*At the other extreme are those weary of the constant refrain that the family court practices "secret" justice and the equally constant refrain that children can be removed from their parents at whim unless there is media scrutiny. The consequence of this "secret" justice, it is argued by those who use the phrase, is that social workers, judges and all engaged in the Family Justice System are both unprincipled and autocratic, as well as riding roughshod over parents' ECHR article 8 rights."*



Lady Hale: President of The Supreme Court delivered **The Sir Nicholas Wall Memorial Lecture 2018, Gray's Inn, London** on 10 May 2018. It was titled '*Openness and Privacy in Family Proceedings*'

*First, neither article has as such precedence over the other.*

*Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this **the ultimate balancing test**.*

*However, while thinking about the balance between privacy and publicity, we should not forget that article 8 is not the only privacy-protecting game in town. There is also the General Data Protection Regulations (GDPR), with the accompanying Data Protection Bill, due to come into force on 25 May*



**Lord Justice McFarlane's Bridget Lindley Memorial Lecture in 2017 heralded a move towards a greater frankness in conversations between the bench and the public the public perception of family courts.**

*'From what I have been told from a range of sources, and from my own exposure on a daily basis to litigants in person seeking to appeal child care decisions, there is a significant and growing distrust shown by some parents in child care lawyers and judges. This is deeply worrying and needs to be addressed if it is not to lead to yet more parents disengaging from working with professionals and the process in a way which can, in my view, only damage their interests rather than enhance them.'*

This theme was continued very recently as illustrated in a foreword written by Lord Justice McFarlane to ***‘Transparency in the Family Courts: Publicity and Privacy in Practice’***

*Affording due transparency to family proceedings has turned out to be, as Sherlock Holmes might say, ‘a two-pipe problem’ which has, at its core, two entirely conflicting policy drivers: the need for the public to know what goes on in their name in the Family Court and, conversely, the need to protect the privacy of individuals at the centre of any particular case. Whilst it may not have delivered a solution, the title of the 2006 Government consultation paper issued by Lord Falconer, who was then Lord Chancellor, was spot on target – ‘Confidence and Confidentiality’ – in highlighting the conflicting needs of public confidence and private confidentiality.*





“  
*Transparency is so much more than just allowing passive public scrutiny of processes and outcomes: we must generate a far greater understanding amongst the public about what is behind the decisions made. This becomes an increasingly urgent project as distrust between professionals and parents apparently hardens and increases*”

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Sarah Phillimore's article '*Transparency- not just opening doors but inviting people in*'

11 young people

We can't make children the products of adult experiments with their futures.

There is a need for a larger piece of research with an agreed base line and control groups of participants to understand the range of opinions amongst the children whose futures the courts are deciding.



*Change must happen because the danger of ill-informed and hostile public opinion infecting the work of the family courts cannot be ignored.*

*Action has to be taken by those who are prepared to participate in respectfully in a constructive dialogue between court users before the debate is ambushed by those who are fuelled by anger rather than reason as their motivation to act.*





**We cannot afford to allow the family court  
to turn into a war zone**



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**Louise Tickle**, award-winning freelance who writes for the Guardian on education, social affairs and family law  
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**St John's Chambers, Bristol** @familoo

*www.transparencyproject.org.uk*

<http://www.thejusticegap.com/2017/03/transparency-family-courts-evaluated-better/>

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