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# Transparency in the Family Court: What Goes on Behind Closed Doors?

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**Questions:**

- Who does the child's story belong to in the family court? The child, the family or society?
- What do the public know about the way family courts make their decisions?
- Where and how do we draw the line between confidentiality and press access to the litigation and publication about it?
- Is the balance right?
- If it is: how do we explain the howls of outrage about "secret courts' and injustice' that bleed into public consciousness through social media and some press headlines?
- Does the Family Justice System risk falling into disrespect if it does not constructively engage with the public and press?
- What next?

A History Lesson

I have practiced as a barrister for 32 years and been a child protection specialist for about 25 of them. That means I inherited a way of working that operated without mobiles, e-mail, twitter, Facebook etc. Social media (a term not in use) was more likely to mean picking up a scruffy paper in a pub over a pint than the mass explosion of information and views on matters great and small via the world-wide web that we have now.

If they got caught up in a child protection case, a parent's knowledge about what might happen in court as they walked through its doors for the first time would come from the lawyers who worked in the system or anecdote if family or friends had trod the same path before.

After the Judgment, a parents understanding about why a court had come to their decision would probably depend on the skill and kindness of the lawyers representing them because what was said in them was likely to sound like jabberwocky especially at a time of anxiety and distress.

Alongside this 'them and us' world where lawyers tried to bridge the gap between the client and the case detail, Judges presided over us all, and expected and commanded automatic respect given their role and status in society.

Compare the world I operate in now a quarter of a century on?

Social media has ripped through previously impregnable barriers by the public to information, news and views on our family justice system. There is now a climate of open challenge to the rightness of a judicial decision, whether through headlines such as 'Enemies of the People' or through social media campaigning conducted by enraged groups such as 'Alfie's Army'. When a parent gets involved in the child protection system they don't have to rely on their trained lawyers for guidance, they have millions of voices they can listen to at the click of a button on their mobiles: and those voices are not singing the praises of the family justice system in harmony.

As Lucy Reed [1] said in her recent lecture for Bloomsbury:

> *'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. '*

Moreover, with the decimation of legal aid under the ***Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*** affecting funding for private law family cases, unrepresented litigants now go to court armed with carrier bags of papers rather than with a solicitor or barrister by their side. Going to court in those circumstances has meant the courtroom has become a place where the parent has to be prepared to deal with the judge directly and they with him or her. There are fewer barriers between 'them and us'. Trust and respect for judicial decisions is no longer a given: it has to be earnt.

All in all, the legal arena has changed fundamentally.

**'Secrecy or Privacy' Whose Story Is It?**

Family courts are heard 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 courts duty to protect the welfare of the child. The family court is the only court that looks to the past to make plans that will protect the child's future. It 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.

For this lecture on transparency in the family justice system I am going to focus on public law, not only because it is the world I know, but because in the course of the court investigation we trespass into the most intimate details of a family's life and pore over minute aspects of it with an attention to detail that leaves every private dispute pored over and exposed to professional gaze. The graphic nature of the evidence we hear in court imposes a duty on us to recognise how much we put at risk if we do not think through the tension between competing demands of secrecy and confidentiality properly.

I deal with cases involving a grotesque degree of alleged harm towards children: whether it be ritualised religious practices such as 'kindoki', sexual abuse that spans generations or physical abuse that leads to death.

Here are just a few examples of the type of evidence that is heard behind the closed door of the family court room taken from judgments of reported cases.

> *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.*

Or:

> *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.*

[1] A respected barrister and colleague of mine at the Family Bar and co-founder of 'The Transparency Project' (of which more later ) ,

As a barrister I have been confronted by descriptions of children being found in squalor, surrounded by and eating faeces, their own and the dogs, oblivious to a dead baby lying in a pulled out drawer serving as a 'cot' beside them.

As a barrister I have looked at images of a post mortem taking the child from whole to segmented parts.

As a barrister I have listened to the words of children in ABE interviews or giving evidence in court which have corrupted me just by the hearing of them: taking me into a world of cruelty I had no comprehension of until forced to learn of it.

As a barrister I have looked at images or read words that have burned themselves onto my retina and become imprinted upon my brain.

I make that choice because of the job I do. The children who are the subject of these cases have no choice about being the subjects of this type of detailed evidence called in the name of child protection.

Would we expect them to give a frank account of their experiences, not only in court, but to a police officer in an 'Achieving Best Evidence' interview if they knew that what they said would be listened to by strangers many times over before being played out in a courtroom? What information might be lost if they feared their accounts might leave the courtroom and move into the world they move in? What risk is there to their mental health if they run the risk that what they had said to an adult would be replayed in public? It would be them, not the professionals, who would have to live with the consequences for the rest of their childhood, infecting their friendships and daily lives.

So, before I go further in this lecture and talk about whether we have the balance right between secrecy, privacy and confidentially; just hold in mind what may be at risk because too often within this lecture hall and on twitter, I have 'secret courts' thrown at me as an insult to describe the family justice system I work in. Many of those who shout the loudest repeat that phrase as a Pavlovian response, a learnt response, absorbed from the experiences of others who have been hurt by the court process, lobbing the words like a grenade as though to say it alone wins the argument and ends discussion. 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 to become the subject of titillation and gossip ?

Moreover: when we talk about 'transparency' what does that mean? Does everyone think it means the same thing?

**<u>What Does Transparency Mean?</u>**

This will not be the last time in this lecture that I dip into and borrow the words and works of others who know who have been confronting this issue for a significant period.

This contribution comes from The Transparency Project [2]

*'Transparency is about seeing and understanding how things work. When we talk about family courts and child protection we think about:*

- *Whether hearings (and court documents) should be public or private (or somewhere in between)*
- *Whether court cases should be reported in the media or on social media (and whether some information should be kept private, like children's names)*
- *How the law and the court procedure is made clear for the people using it or whose lives might be affected by it (where do people find the law and how do they work out what it means)*

[2] The Transparency Project is a registered charity seeking to explain and discuss family law and family courts in England & Wales, to signpost to useful resources to help people understand the system and the law better. Their aim is to work towards improving the quality, range and accessibility of information available to the public both in the press and elsewhere. They do not take on individual cases or provide legal services. http://www.transparencyproject.org.uk/about-us/

- *How families are helped to understanding how a decision has been made in their own case*
- *What information is available about how the system works overall? (things like statistics, complaints data, audits and inspection reports)'*

I endorse that description of 'transparency' as a lawyer: but what does transparency mean to the public or the press? From the questions posed to me in these lectures and through social media I think it might be more basic from the public's perception. 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 there as their eyes and ears. So what can and can't be done by the press and public (and parties) under our current system in the family court?

**What Can Be Reported?**

I am again going to borrow the work of 'The Transparency Project'[3] because they are the 'go-to' resource to bridge the gap between the courts and legal and social commentary in my view. Their ***Media Guide*** is accessible (it's on line), clear (no Jabberwocky speech here) and comprehensive. It's also too long (because it is so comprehensive) to do more than select highlights for this lecture. The link is footnoted for you to take up.

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. Moreover, protection against intrusive and damaging publicity for children caught up in court proceedings may also be found in the 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[4] 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. It would defeat their purpose, or harm the interests of those involved, to hold them in public.

**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. However, under the Family Procedure Rules accredited media reporters[5] 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 court can exclude people from a hearing, including accredited media, in some circumstances (i.e. reasons of confidentiality or to avoid frustrating the administration of justice). In my experience that happens most often in alleged ISIS radicalism cases when police evidence is given on issues of security and intelligence.

The right of accredited media representatives to attend private hearings in the Family Court does not include the right to report them (which is subject to other rules: see below) and the right to attend does not extend to all hearings. Placement Order Hearings and Adoption Order Hearings in particular are still excluded, as are those hearings which have as their main purpose negotiation and settlement: i.e. "dispute resolution hearings" in both children and financial matters.[6]

**What Can A Non-party Read?**

In family proceedings heard in private, a media representative will need to apply to the judge to see documents referred to during proceedings. The judge must then carry out a balancing exercise, considering on the one hand the right of the litigants (if they object to disclosure) 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.

[3] http://www.transparencyproject.org.uk/media/

[4] 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.

[5] Journalists with a press card issued by the UK Press Card Authority

[6] *Family Reporting Guidance page 7, FPR 2010 rules 27.10 & 11*

Under the Family Procedure Rules, a party may only disclose information from family proceedings to certain other persons for specific purposes only, e.g. for the purposes of an appeal, or to take advice, or to see treatment – but not to journalists or members of the public generally. 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.[7]

**What Can Be Reported?**

A private family law hearing to which accredited media representatives have been given access will generally be subject to reporting restrictions which may continue after the conclusion of the case. 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[8] 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. It is striking however, how few times the media do so, or provide the link to the judgment even if reporting on the case that has led to its publication.

**Have we got the Balance Right between Privacy and Transparency Right?**

In April 2013 the most senior Family Judge in the UK, Sir James Munby, President of the family Division, pulling on the mantle of the great Sir Nicholas Wall (our former President )[9], said this

> *"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.*

In 2014 Munby P was frank in saying that '*there is a need for greater transparency in order to improve public understanding of the court process and confidence in the court system'.*

As a result he produced Guidance, ***'Transparency in the Family Courts and Publication of Judgments'***[10], explaining that

> *'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).*

Through the Guidance, the President focused minds on the responsibility of the judiciary qua state to balance competing ECHR (European Court of Human Rights) in each individual case in all its decision making. Or, in a phrase coined by Julie Doughty, he *'modified the chilling effect of s 12'.*

The new Guidance meant that all judges (apart from District Judges or Magistrates) should routinely consider whether their judgment should be published, and think about whether there was a public interest in doing so. The starting point is that permission should be given for the judgment to be published unless there are compelling reasons why the Judgment should not be published.

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

i. A substantial contested fact-finding hearing at which serious allegations, for example allegations of significant physical, emotional or sexual harm, have been determined;
ii. the making or refusal of a final care order or supervision order or any order for the discharge of any such order, except where the order is made with the consent of all participating parties;

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[7] *Family Reporting Guidance: paras 31 – 38, FPR Rule 12.73 and Practice Direction 12G – Communication of information*
[8] *Family Reporting Guidance: paras 44-46.*
[9] In July 2011 Sir Nicholas Wall P issued, jointly with Bob Satchwell, Executive Director of the Society of Editors, *'The Family Courts: Media Access & Reporting* (Media Access & Reporting), http://www.judiciary.gov.uk/?p=49977. He was a man ahead of his time
[10] https://www.judiciary.gov.uk/publications/transparency-in-the-family-courts/

iii. The making or refusal of a placement order or adoption order under the Adoption and Children Act 2002, or any order for the discharge of any such order,
iv. Deprivation of liberty cases, including an order for a secure accommodation order under section 25 of the Children Act 1989;
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.

Moreover he 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. This meant that expert child care professionals etc. could be named unless to do so could lead to 'jigsaw identification'

The Guidance applied in the Family Court to judgments delivered by Circuit Judges, High Court Judges and persons sitting as judges of the High Court. It took effect from 3rd February 2014;

Has it been effective?
A review of family judgments on BAILII (British and Irish Legal Information Institute) reveals this legacy:
Jan 05-Jan 06: 44 HC, 0 CC[11] total 44
Jan 10-Jan 11: 94 HC, 3 CC total 97
Jan 12-Jan 13: 93 HC, 5 CC total 98

Guidance issued Feb 14
Jan 16-Jan 17: 192 HC, 184 CC total 376
Jan 17-Jan 18: 182 HC, 154 CC total 336

This initiative was launched by The President in order to provide the press and public with examples of what was being decided in court by judges in society's name. It was a targeted attempt to provide some transparency and to illuminate discussion about how family courts arrived at their decisions. However, not all such judgments necessarily appear on BAILII. 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. A higher proportion of radicalism judgements are not published. 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[12]. 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.

One notable omission from this attempt at transparency is that the product of 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.

As Keehan J said in the aftermath of the second Bridget Lindley lecture in 2018 (see further in this lecture):

> '*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.'*

To which Munby P said:

> *And I suspect …….that because the case is in front of the magistrates, the professionals think it's hopeless and that is the bit of the system when, we've got to be honest about this, people are going through the motions rather than fighting*

[11] HC= High Court, CC= County Court
[12] *In the Matter of X (A Child) (No 2) [2016] EWHC 1668 (Fam) explains the purpose and effect of the prohibition*

*with all their energy on behalf of the parents. So it is a worrying aspect and of course……. We don't trust the magistrates to give more than six months jail sentence, up to a year maximum, is it, and yet they can make adoption orders'*

With the focus of the most challenging and legally complex cases we run the danger of overlooking the work engine of the family justice system. Without judgments available and the vigilant attendance of the press, the quality of decision making in the magistrates court is hidden from public view.

Research by Julie Doughty and others, ***'Transparency through publication of family court judgments'*** published in 2017 [13] evaluated the responses to, and effects of, judicial guidance on publishing family court judgments involving children and young people. Julia Doughty found wide variations in practice from court to court. Overall the cases available on BAILII represented judicial and professional decisions made in only some geographical areas. 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.

If the published judgment is rejected as a touchstone care must be taken by the press in terms of what they can publish of the care proceedings. There are a number of statutory prohibitions which may apply, including the **Administration of Justice Act (AJA) 1960, section 12** which prohibits publication (at any time) of information about proceedings in private which affect a family and especially a child[14]. 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. Interestingly what it doesn't prevent reporting of, is 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. But that is an illusionary freedom as **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. (Albeit the prohibition only lasts for the duration of the proceedings and does not apply in the Court of Appeal). The court can dis-apply the prohibitions under either section 12 of the Administration of Justice Act 1960 or section 97 of the Children Act 1989 (or both) in order to permit reporting of the case or certain limited aspects of it. I have used that route when I have secured a judicial exoneration of my client from allegations of child abuse and they want to tell their story to the public through the media: especially if they have had to undergo a criminal trial where their names have featured in the press and they want to wipe away the stain of suspicion.

In addition, 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.

Absent the lifting of these provisions the effect of s 12 AJA and s 98 CA is that while they 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.[15]

The effect of this is that few journalists are interested in touring the corridors of the family courts on the off chance that they may be listening into a big story, one significant enough that it's going to go viral and overtake and outwit the barriers to public interest. Cause lists[16] don't identify the names of the parties or what the case is about. In family cases in public law they simply list the Case number, the court it is being heard in and if it is in

[13] www.cardiff.ac.uk/research/explore/find-a-project/view/238849...

[14] This includes proceedings that relate to the High Court's exercise of the inherent jurisdiction, are brought under the Children Act 1989,are brought under the Adoption and Children Act 2002, or relate wholly or mainly to the maintenance or upbringing of a minor, where the welfare of a child is a major issue (such as applications for an occupation order under Part IV of the Family Law Act 1996)

[15] *Family Reporting Guidance: paras 47-59, 66.*

[16] The schedule of cases listed to be heard on that day

chambers (as it will be unless it's a contempt hearing). 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. It has not become so habitual that is passes without effect. Many barristers are wary of the press and the impact their presence could have on their, often vulnerable, clients and the chill winds of a 'cold front' might be felt emanating from any combination of people in the courtroom towards the press bench.

And so, 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 its work through the reporting of judgments, there has been, I believe, little change in practice. We may not have barricades up between the family court and the press but there are still pretty daunting barriers between us. The consequence is that, without attendance in court by the accredited press and without responsible reporting, there is little material in the public domain that shows the degree of care taken over decisions arrived at in the family court, little that records the breadth of the material called upon to decide them (psychiatric, paediatric, pathological, histopathological, radiological, neuropathological etc.) and the dedication and skill of the specialist family advocates and the judge in seeking to explore and resolve them.

Feelings run high and are mixed amongst professionals about whether there should be more or less access by the press and public to the decision making process in court and the publication of judgments arising from it.

<u>The view in support of maintaining the status quo</u>
Dr Julia Brophy coordinated and published a study commissioned by the ALC and NYAS in 2014[17] *'**Safeguarding , privacy and Respect for children and Young People and Next Steps in media access to the Family*** The forward to the research was written by the Commissioners for children of the UK and Wales. They pulled no punches asserting that

> *'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.'*
>
> *Children are not involved in family proceedings by choice. They cannot protect themselves and are doubly vulnerable as a result of the difficulties that brought their families to court. Society rightly looks to the family court, presided over by its judges, to protect these children and to safeguard their welfare. Research over many years tells us a great deal about the potential for long term ill effects on the health, wellbeing and development of many children who have had troubled childhoods. This study indicates, and we agree, that ensuring their safety and wellbeing during court processes matters. This may well mean ensuring that the courts actively protect them from unwanted press intrusion, and the publication of the intimate, painful details about their life. We agree with this study, that such protection should be provided not only whilst a case is in progress but also in the longer term.*

They supported the argument that *'courts should be placed under a 'duty to consider, and actively to protect, children's reputation, dignity, safety and wellbeing both during and after proceedings'.*

They continued:

> *'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'*

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[17] *Safeguarding, Privacy and Respect for Children and Young People and the Next Steps in Media Access to Family Courts] – NYAS / ALC* *http://alc.org.uk/uploads/NYAS_ALC_Report_CHILDREN_SAFEGUARDING_AND_THE_NEXT_STEPS_-_MEDIA_ACCESS_TO_FAMILY_COURTS_-_July_2014.pdf*

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'.*

Strong stuff. The foreword and report argue for less rather than more press freedom. The Report makes a strong case for confidentiality based on the views of the young persons who participated in it. They had strong views:

- They articulated how a young person might feel, reading about their case in a newspaper – even if not named. They described feelings of anger, sadness and depression, embarrassment, shame, guilt, and humiliation.
- They identified that where children suffer emotional problems these could spiral in the face of potential media coverage leading to serious depression, self-harm and suicide.
- They described the ongoing stress and anxiety for those in care: they highlighted the stigma involved and the constant fear that people will discover the reasons they are in care. Media access and reporting will exacerbate that stress.
- They feared that once information is published, public humiliation will follow and that those affected would then have to live with the fear of further exposure of highly intimate details of their care for the rest of their lives: web sites, they pointed out were not 'next week's chip paper'.
- They discussed Facebook and the increasing realisation of how quickly things can 'go viral' – with an example of a picture of a young person which had had some 3 million hits in a very short period*: 'once it's out there – it's out'.*

*'…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 it's right - without permission - to put things out there, especially pictures…'*

- They wanted any judgments published to exclude details of the local authority, treating doctors, social work professionals. In effect a reversal of the President's Guidance on what content could be reported in published details.

*'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 they did not think newspapers could or would achieve change in family proceedings. 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 posing the media as the solution to a perceived lack of public confidence in family courts represented unimaginative and clichéd thinking: they said there were better ways to address issues of public confidence.
- They said the President should stop trying to please the media.

*'No – there's no difference at all; at the end of the day, no difference. If they do not let the public in, they should not let the press in – it's a family court not a public court.'*

But, and this is an important but, 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. 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. While this was described as a consultation exercise, the methods employed sat more clearly with that of a group interview (rather than a focus group or consultation).

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.

I read many comments by parents distraught at the decisions made against them by a family court; but the voice of the child is silent

After several meetings between the NYAS Young People's Participation Group and the President, and with the help of an advisory group chaired by Lord Justice McFarlane, Dr Brophy was asked to draft some' ***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[18].**

This was published in August 2016 and contains a detailed list of do's and don'ts to avoid inadvertent and jigsaw identification. It gave guidance on how to abridge judgments to avoid explicit descriptions of child sexual abuse being placed on the internet for all to see. 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."[19]*

**<u>The View in Favour of Change</u>**

On 13th 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".***

She eloquently brought two words to the attention of her audience; 'connectivity' and 'speed'. She described how modern technology had brought intense heartache and anger into her internet world *'At its very simplest, I'm thinking about my email inbox. I approach this with apprehension because sometimes my inbox feels like one long, dreadful scream of pain.'*

She signposted a warning:

> "*Whatever the rights and wrongs, family members who get in touch with journalists are genuinely suffering, and while there is both economically and practically, because of the punitive rules preventing reporting of the details of what goes on in care proceedings, no way for the most part for me to find out if anything systemic is going wrong, what the number, length, detail and emotional tone of these many messages do achieve is to alert journalists to the fact that there is a growing disquiet about the wider social consequences of how we currently seek to protect children. They are, I see them as, an alert which is coming upwards from the deep but getting close to the surface now, which tells me that there is too much pain being endured to be contained.*

[18] http://alc.org.uk/uploads/EXECUTIVE_SUMMARY_-_GUIDANCE_-_ANON_CHILDREN_JUDGMENTS_-_Dr_J_Brophy__Nuffield_(D10)_(2).pdf

[19] https://www.judiciary.gov.uk/announcements/transparency-in-the-family-courts-guidance-by-the-president-of-the-family-division/

She was frank that in her view the stories she had covered persuaded her that

> *'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.*
>
> *When problems are held up to the light, there is at least a fighting chance of addressing them. Sequestered from view and any meaningful accountability, changes in how family law is done to people will be agonisingly slow. And while the reasons for privacy – that children are protected – have enormous traction, with the inexorable and, as I see it, inevitable explosion in people speaking out on social media and the speed by which this testimony spreads, the tension set up between the two human rights of respect for private life as against freedom of expression are now, I believe, becoming strained to breaking point'*

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

> '*First is that I entirely agree with Louise that the state needs to be held to account and when local authorities, when individual social workers have got it wrong, it's important that that is made known either by judges or by journalists. How that's precisely done is a difficult question. We at the moment do it, certainly in the High Court, by giving public judgments, particularly where we are being critical of local authorities and condemning practices or actions or dishonest evidence that we find had been given. I don't believe, secondly, that we've got the balance right between transparency and keeping matters confidential. I shall avoid the word "secret."*
>
> *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?*
>
> *You will all know the research that has been done where children, a group of children were asked about how they would feel about their case being reported even anonymously. Apparently, to a young person, they were absolutely against their cases being reported. I'm not sure that's necessarily completely accurate across the board but it does paint a very powerful picture of the young people and the children who are the subject of the proceedings in the family courts take about their cases being known and I entirely agree that it's an immensely difficult balance to strike between a wronged and aggrieved parent speaking about the way that they have been wronged and aggrieved whilst at the same time protecting the children from adverse and unwanted publicity.'*

**<u>Insight from three "Greats' of the legal world</u>**

**Sir Nick Wall: former President of the Family Division**

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

He opened the lecture with his classic ability to state what others feared to express

*'There appears to be general agreement among non-family lawyers (and also among some family lawyers) that Family Proceedings should be more transparent.*

*What is equally clear, however, it seems to me is that nobody knows quite how to achieve it.*

*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.'*

Hence the 'Eternal Tension' referred to in his title.

*'There will always be journalists – in the same way as there will be always be some politicians, for whom the Family Justice System is corrupt and for whom the judge can do no right. But am I alone in thinking they are, perhaps, a minority, and that a more open - dare I say, - trusting attitude would lead to the truth being published – namely as found by the FJR that the family justice system, for all its faults is, on the whole, peopled by decent individuals, doing their best for the children who are the subject of their involvement?*

*As I have said several times before, it is, in my view, unacceptable that conscientious judges and magistrates up and down the country, doing their best, with limited resources and under heavy pressure of work to make difficult decisions in the best interests of children, should be accused of administering 'secret' justice, especially when what they are doing is following Parliament's instructions. It was, after all. Parliament, not the courts, which imposed the restrictions contained in s 97 of the 1989 Act and s 12 of the 1960 Act. The judicial task is to interpret and apply those statutes.'*

He concluded with the sentiment that

*'It is. I think, significant, that when sentencing a person for contempt of court in a case heard in chambers, the judge is bound to go into open court to pass sentence. People in this country are not sent to prison "in secret". A great deal of public money is spent on care proceedings. As the press argue, is the public not entitled to know how its money is spent?*

*What may be required is not legislation which, at best, can be both a blunt and not entirely clear instrument and is likely to give rise to argument leading in turn to litigation; but an agreement that in return for information about proceedings and access to them the Press would not publish the names of the parties without the consent of the latter and the court, and that under no circumstances would the names of children go into the public domain. I acknowledge that the argument are finely balanced'*

One wonders what he would now say both in light of the degree to which the cases of Charlie Gard and Alfie Evans have absorbed and galvanised public perception of the courts functions when it comes to cases involving the right to withdraw medical treatment - from which lessons might be learnt about how to open the courts workings to the press.

**Lady Hale: President of the Supreme Court**

Lady Hale delivered The **Sir Nicholas Wall Memorial Lecture 2018, Gray's Inn, and London** on 10 May 2018. [20] It was titled ***'Openness and Privacy in Family Proceedings'***

[20] https://www.supremecourt.uk/docs/speech-180510.pdf

After paying tribute to the work of Sir Nicholas Wall Lady Hale drew on her experience of cases from the breadth of disciplines within which Family Law was just one part and reminded us of three basic legal principles:

First: The principle of open justice

> *'The first is that open justice is there, not only to police the judges, and indeed the other participants in the story, such as health care professionals and social workers, to make sure that they are behaving properly, but also to engender public confidence that they are indeed doing so. Family courts have from time to time had a very bad press, from some politicians and some people in the media. But this is especially apparent in care cases, where the state is interfering in family life, often very drastically, to deprive parents of their children and children of their parents. We would not countenance sending someone to prison behind closed doors – save in the most exceptional cases – so, it might be thought, why should we countenance putting children in care behind closed doors?'*

Nonetheless she reminds her audience that '*children cases are different from ordinary civil or criminal proceedings. Their very object is to further the best interests of the child. Those best interests should not be put at risk by unnecessary public intrusion into their private and family lives.'*

Lady Hale then identified a second principle which flowed from the principle of open justice.

> *'There is not much point in allowing the media into the court room if they cannot then report upon what they have seen and heard. Fair and accurate reporting is protected by the law of defamation for precisely that reason. As Lord Sumption said in Khuja[21], 'It has been recognised for many years that press reporting of legal proceedings is an extension of the concept of open justice, and is inseparable from it. In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so.'*

And then she addressed the third principle:

> *'However, there is a third principle at stake here, and that is the right to respect for private and family life, guaranteed by article 8 of the European Convention. As with article 10, this is not an absolute right. A public authority, including a court, can only interfere with the right if this is in accordance with the law and a proportionate means of achieving one of the legitimate aims set out in article 8(2). The most relevant of these for our purposes is the protection of the rights and freedoms of others, which include the best interests of children.'*

She posed the question*:*

> *'Obviously, family courts are interfering in people's private and family lives all the time. Publishing information about what they do is likewise interfering in people's private and family lives. So how is this to be reconciled with the media and its right to freedom of expression under article 10?'*

She pointed out it had been addressed in the case of **Re S**[22] by Lord Steyn:

> *'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'*

Lady Hale then anticipated changes to be visited upon the legal world imminently in the form of data protection legislation;

[21] Bank Mellat v HM Treasury [2014] AC 700.
[22] [2005] 1 AC 593, para 17

*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.*

I confess I had not had the GDPR in mind when starting to write this lecture. That is why I am not a Law Lord. She explained

*'It applies to the processing of personal data by automatic means or by other means if the data are held in a filing system. Personal data means any information relating to an identified or identifiable natural person. Processing means any operation performed upon such data, including their use, disclosure and dissemination. Data have to be collected for specified, limited and legitimate purposes and processed lawfully, fairly and in a transparent manner'.*

Special categories of data, including data concerning health or revealing racial origin or religious belief, cannot be processed at all except in defined circumstances, but these include whenever courts are acting in their judicial capacity. And 'processing' means any operation performed upon such data, including their use, disclosure and dissemination and it has to be 'necessary' for the controller to perform its task.

Lady Hale put this impact of into plain language, for which I am grateful:

'*So it looks as if this all boils down to whether, if a journalist or academic wants to publish the data, the controller – presumably the court – considers that publication would be in the public interest. A special steer is given in favour of freedom of expression and information, but it looks as if we are back to balancing open justice, the public's right to know what goes on in courts and the author's right to tell them, against the privacy interests of the data subject. Those principles apply whether the proceedings are in private or in open court and whether in civil or family proceedings'.*

*…' there is the interest which we all have in keeping private information private. The GDPR assumes that all our information is private until we have put in into the public domain and then makes exceptions to that assumption. Our own law tends to distinguish between situations in which there is a reasonable expectation of privacy, such as visiting narcotics anonymous, and situations in which there is not, including legal proceedings in open court. If proceedings are held in private, there may be a reasonable expectation that the information revealed will be kept private.'*

She concluded her lecture with these words *'our children are our future and, as Nicholas was always the first to say, we need to treat them right'.*

**Lord Justice McFarlane: current Lord of Appeal and about to become the President of the Family Division**

Our next President of the Family Division gave us some insight into what might come with two contributions to the public debate. The first in The Bridget Lindley Memorial Lecture in 2017 and the second in April this year when providing a foreword to a new missive on transparency in the family courts.

Lord Justice McFarlane's **Bridget Lindley Memorial Lecture in 2017** [23] heralded a move towards a greater frankness in conversations between the bench and the public perception of family courts. He said this:

*'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'**[24]:

[23] **https://www.judiciary.gov.uk/wp-content/uploads/2017/03/lecture-by-lj-mcfarlane-20160309.pdf**

[24] Transparency in the Family Courts: Publicity and Privacy in Practice; by Julie Doughty, Lucy Reed and Paul Maggrath

*'Just 25 years ago, when the Children Act 1989 was coming into force, I doubt that many, if any, family lawyers would have acknowledged the relevance of the term 'transparency' to the work of the family courts. Events have moved swiftly and there can now be no family lawyer or judge who is unaware of the justified impetus towards greater transparency in family cases or of the importance of the need for a clear understanding of just where the line is drawn between what can or cannot be disclosed to those outside the court about what has gone on within it.*

*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.*

*Over the years, the understanding of what transparency may require has developed. Initially, many of us will have held an unduly simplistic view that the issue was to be resolved in a binary manner by either letting the press and the public in to the Family Court, or keeping them out. Thanks to the ground-breaking and inspired work of The Transparency Project, and now this book, transparency is to be seen as a much more subtle, sophisticated and flexible concept. There is much that can be achieved to 'open up' the Family Court in terms of describing and explaining its workings and decisions which falls short of allowing unrestricted access to all and sundry.*

*….Given the impossibility of totally squaring the 'Confidence and Confidentiality' circle, any development will involve an element of compromise and sacrifice of one or both of these competing principles'.*

**My View?**

I read Sarah Phillimore's article [25]' ***Transparency- not just opening doors but inviting people in'*** with huge interest. Ms Phillimore was reflecting on the two Bridget Lindley lectures referenced above. She identified the difference between 'active' and 'passive' transparency in the family justice system. She writes

*'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'.*

She bluntly said that the

*'treasured distinction often repeated by family lawyers between 'privacy 'and 'secrecy' does now seem-to the general public at least- a distinction without a difference' …… 'Lack of trust is corrosive ad needs to be tackled before serious and long lasting damage is done to the very structure of our family justice system and the rule of law'.*

For my part, having started off some years ago as a practitioner filled with horror at the prospect of a journalist in court, my views have changed. I look around the courtroom in cases and I am in proud to be standing side by side with some of the most dedicated legal aid family practitioners in the world. Their industry is undimmed by the stress of the work they do and the excellence of their skill as they take the LA case apart in the course of cross examining eminent experts in their field, is a sight to behold. Our clients know what we do. I am rarely met by anything other than total gratitude for our efforts on their behalf. Legal aid lawyers work in child protection as a vocation, not just for a job. I do not think we have anything to fear by those practices being brought to public attention by informed and professional court reporting by accredited journalists.

I also wonder if the scrutiny of the press might mean that some judicial behaviour that otherwise goes unchecked might be moderated if the judge were conscious that the press were the eyes and ears of the public. I refer to the intemperate interjections, the rudeness, the conduct that can affect the quality of evidence and

[25] May 2018 FAM Law 605

advocacy in court. This happens on a minority of cases but when it happens it has a profound effect on the administration of justice in their court. I have written about this subject elsewhere[26].

Press scrutiny has and should continue to play a vital role in reporting systemic failures by the local authority as the organs of state.

But, on a very basic and human level, the press might be able to see that the professional world of those who engage in child protection is always fraught with tension that comes with the privilege and responsibility of making 'hard decisions'. The impact of cuts to social service budgets would be seen in action. The frustration of social workers who want to help mother and child but are confronted by a parent turning their face away from the brutality and squalor of the life they are choosing to lead with a new partner but, in so doing, giving their children no choice.

The press have the power to make stories or to halt those in their tracks that are mischievous and misconceived. When government cuts impact on the ability of parents to receive legal advice and representation, we have seen clearly how sympathetic and informed reporting by the press can make a difference to public understanding. Emily Duggan has written some excellent pieces for the Buzzfeed of which this is just one example[27].

The type of crusading journalism exemplified by Ms Duggan, Ms Tickle and Sanchia Berg is a force to be reckoned with. When the time comes for a political and public debate on the impact of cuts to the legal aid budget for decades I would want them on my side rather than on the side lines

Whilst I remain concerned about the views expressed so eloquently by the 11 young people in the Brophy study I am conscious that a sample of 11 cannot tie the courts hands for the thousands it deals with every year. But consultation may be required because we can't make children the products of adult experiments with their futures. Rather than using the Brophy research to throw a grenade beneath the wheels of the transparency wagon, or, conversely, attacking the Brophy research by calling out its small sample base so as to seek to jettison its work, I think 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.

I am clear in my mind that we cannot stand still. Change must happen because the danger of ill-informed and hostile public opinion infecting the work of the family courts cannot be ignored. The scenes outside Alder Hay Hospital by Alfie's army were unacceptable. One cannot turn the family court into a war field. Action has to be taken by those who are prepared to participate 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.


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**With thanks to**
Lucy Reed, Barrister and her' Pink Tape' Blog[28] @familoo
Sarah Phillimore, Barrister and her info site childprotectionresource.online and blog @suesspiciousminds
Paul Maggrath. Law Reporter and editor ICLR and his blog @maggotlaw
David Burrows, Lawyer, writer, teacher and his blog @dbfamilylaw
The entire Transparency Team and their web library of comment and correction[29]:Lucy Reed, Sarah Phillimore, Barbara Rich Julie Doughty, Paul Magrath , Louise Tickle, Alice Twait, Jacqui Gilliat Emma Nottingham, Polly Morgan, Judith Townend

[26] Please see my Gresham Lecture "what do Judges do" https://www.gresham.ac.uk/.../**what-do-judges-do-in-the-family-court** and in Counsel Magazine "Judicial conduct: when it all goes wrong' https://www.**counselmagazine**.co.uk/articles/judicial-conduct-when...
[27] https://www.buzzfeed.com/emilydugan/legal-aid-cuts-have-ended-up-costing-the-taxpayer-money?utm_term=.xfR4Mb9WX#.avvOjP3oG
[28] St John's Chambers, Bristol @familoo

The Justice Gap[30]
Family Rights Group[31] a charity that works with families who are caught up in the child protection system
Louise Tickle, award-winning freelance who writes for the Guardian on education, social affairs and family law @louisetickle
Surviving Safeguarding [32] and her blog[33] @survivecourt
Emily Duggan, journalist Buzzfeed @emilydugan

## RELEVANT DOCUMENTS AND OTHER MEDIA RESOURCES

### Judgments and court documents

British and Irish Legal Information Institute (BAILII) – for published judgments.
Judiciary website published judgments; practice directions, guidance, speeches by judges
HMCTS guidance on obtaining court transcripts for Court transcripts
Practice Direction on Committal for Contempt of Court – Open Court
Courts and Tribunals Judiciary: Going to court
Practice Direction 52C, para 33 (in Civil Procedure Rules) on Documents to be provided to court reporters at the hearing of an appeal
**Legislation** is available on www.legislation.gov.uk
**Procedure rules and practice directions** are available on www.justice.gov.uk
**President's guidance** notes are available on www.judiciary.gov.uk
**Research bulletin** summarizing recent research relevant to family law is published from time to time by the Ministry of Justice Knowledge Hub, (email knowledgehub@justice.gsi.gov.uk).

### Family case materials

Transparency in the Family Courts: Publication of Judgments
The Family Courts: Media Access and Reporting (2011) (the Family Reporting Guidance)
Family Procedure Rules 2010 (FPR)
Practice Direction 12G – Communication of Information
Children Safeguarding and Next Steps NYAS/ALC: Dr Julia Brophy [34]
Research Briefing – Confidentiality and Openness in the Family Courts. September 2015. House of Commons website



[29] www.**transparencyproject**.org.uk
[30] http://www.thejusticegap.com/2017/03/transparency-family-courts-evaluated-better/
[31] http://www.frg.org.uk/
[32] http://survivingsafeguarding.co.uk/2016/02/22/louise-tickle-the-guardian-20-02-16/
[33] http://survivingsafeguarding.co.uk/author/safeguardingsurvivor/
[34]http://alc.org.uk/uploads/NYAS_ALC_Report_CHILDREN_SAFEGUARDING_AND_THE_NEXT_STEPS_-_MEDIA_ACCESS_TO_FAMILY_COURTS_-_July_2014.pdf