



Transparency through publication of family court judgments

**An evaluation of the responses to, and effects of,
judicial guidance on publishing family court
judgments involving children and young people**

Julie Doughty, Alice Twaite and Paul Magrath

Authors:

Julie Doughty, Cardiff University, School of Law and Politics
Alice Twaite, Researcher, non-practising solicitor
Paul Magrath, The Incorporated Council of Law Reporting, barrister

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¹ www.nuffieldfoundation.org

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In this report, we refer to the guidance issued to judges in family courts by the President of the Family Division on 16 January 2014 as ‘the 2014 guidance’.

Executive summary

In January 2014, the President of the Family Division issued new practice guidance to judges in family proceedings to take effect from 3 February 2014. Commonly known as 'the transparency guidance', this was intended to address problems about media misreporting of cases that were held in private. Although since 2009, journalists have been allowed to attend hearings, this has not proved to be a practical solution to a lack of confidence in the family justice system and perceptions of family courts being held in secret. Automatic statutory restrictions on reporting family proceedings are in place to protect children and family members and to ensure full and candid evidence is available to the court. However, they also inhibit public oversight and scrutiny, and accountability of the court and other public bodies. The 2014 guidance was intended to a first step toward opening up the courts, while at the same time continuing to protect the privacy of parties. This first step was that judgments in certain categories of case would routinely be sent to a freely accessible website, BAILII, so that the media and the public could read them. Traditionally, only court judgments that created judicial precedent had been reported and published, in official law reports and on BAILII. Proceedings heard at Family Court level do not have this status. The 2014 guidance is still in place.

The aims of this research study were to analyse the cases that were published in the first two years of the guidance, to evaluate the effects of, and responses to, the guidance, by the courts and the media and other stakeholders and the contribution that the guidance has made to increasing public legal education.

We found 837 cases that had been published on BAILII in accordance with the guidance. These provide a great deal of public information about family courts that was not previously available. However, this forms only a minority of judgments, given that between 11,000 and 12,000 children are involved in care proceedings each year. There were wide variations between courts and between judges as to whether judgments were sent to BAILII. Some courts appear to publish regularly and others never at all. Amongst all the local family courts, 12 had published more than ten judgments in two years; 27 judges had more than ten of their judgments published and, of these, only 17 were local circuit judges. High Court judges, who are accustomed to having their judgments reported and who may have some clerical assistance are more likely to send their cases to BAILII than circuit judges.

Amongst the published judgments, there were also variations in practice regarding anonymisation and identification of children, families and professionals. Judges and lawyers thought that there was possibly some adverse impact on the social work profession of individual practitioners

being named. However, social workers and independent experts are only likely to be subject to this sort of public scrutiny if they work in certain parts of the country. Overall, the cases available on BAILII represent judicial and professional decisions made in only certain geographical areas, rather than providing a picture of the family justice system as a whole

We wanted to explore the views and experiences of judges in applying the 2014 guidance but only a small number (17) responded to our request and cannot be seen as representative of the wider judiciary. Nevertheless, these responses reflected a wide range of views, from judges who were enthusiastic about transparency to some who felt that publishing was irrelevant, too risky or impossible given the courts' workloads. There was a strong message that circuit judges were not given the time and resources needed to be certain that their judgments could be safely published, without risk of anonymisation errors and jigsaw identification.

Analysis of press coverage for the period indicated that allegations of secrecy in family courts had reduced and that access to judgments on BAILII had been the basis of some articles on matters of public interest. Journalists we spoke to valued BAILII as a resource and believed that the 2014 guidance did mean that the public could be better informed than previously. However, there was still evidence of cherry picking facts and misleading headlines.

Other professional groups and organisations which work with young people continue to have serious concerns about the potential effects of risks of identification and intrusion on the privacy of children involved in family court proceedings. However, the patchy application of the guidance over the country makes it difficult to formulate collective responses to anonymisation and what to tell parties and children about possible publication.

We conclude this report with a list of recommendations that might make the current system safer, fairer and more consistent. Transparency in family court processes can only be achieved if there is consensus on how the balancing exercise between Article 8 rights to privacy and Article 10 rights to freedom of expression should be undertaken. We do not think that this can be achieved by continuing as at present or by withdrawing the 2014 guidance or by amending the court rules to hold hearings in public instead of in private. Our main recommendation is to review the 2014 guidance to pilot a scheme requiring publication of a representative range of cases from every judge and every court, to be supported by adequate training and administrative assistance in safe anonymisation, removal of identifying details and focusing on issues of genuine public interest.

1. Background

1.1 The evolution of the January 2014 guidance

The tension between privacy and publicity in the family courts is one of the most troubling issues in the family justice system of England and Wales. The principle of open justice has traditionally been modified by the court's role in protecting children who are the subject of proceedings relating to 'truly domestic affairs'.² Article 6 of the European Convention of Human Rights also recognises that the right to a public hearing can be limited in the interests of juveniles.

However, this has led to perceptions, expressed in some sections of the press and broadcast media, of 'secret' courts and lack of accountability.³ This can generate distrust and confusion amongst the public, especially to the detriment of people involved in family proceedings who can become caught up in further misinformation on social media.⁴ A classic example of false allegations reaching and being accepted by a wide audience was the 'forced caesarean case' in December 2013.⁵ The widespread misreporting of this case, and ensuing damage to perceptions of the family justice system, became a catalyst for subsequent changes in judicial practice, which are the focus of this project.

There is now more than ten years' history of attempts to 'open up' the family courts to more public scrutiny, with a series of government announcements, consultations, proposals, parliamentary reports, and even new legislation being passed but never implemented and subsequently repealed. The only substantive change in law and practice was that from April 2009, accredited media representatives could attend family court hearings, although they still require permission from the court before being able to publish information about the proceedings.⁶ Some commentators have concluded from this history that the opposing arguments in the transparency debate are irreconcilable.⁷ The issue continues to be one of concern, extending to international interest.⁸

² *Scott v Scott* [1913] AC 417

³ For example, N Watt, 'Family courts must open up to avoid outrageous injustices, warns UKIP' *The Guardian* 26 October 2015; C Booker 'New family court guidelines won't improve a rotten system for children' *Sunday Telegraph* 27 July 2013

⁴ For example, see L Stevenson, 'Social worker praised by judge for professionalism amidst Facebook abuse campaign' *Community Care* 26 October 2015

⁵ J Doughty and L Series, 'Can publishing judgments prevent moral panics?' Cardiff Law School blog, 6 December 2013 <http://blogs.cardiff.ac.uk/law/the-court-of-protection-and-the-new-family-court-can-publishing-judgments-prevent-moral-panics-julie-doughty-and-lucy-series/>

⁶ Family Procedure Rules 2010 r.27.11(2)

⁷ M Hanna, 'Irreconcilable Differences: The Attempts to Increase Media Coverage of Family Courts in England and Wales' (2012) 4 (2) *Journal of Media Law* 274-301

⁸ C Fenton-Glynn, *Adoption without consent* (Study for the PETI Committee, European Parliament 2015) pp 42-45; 48

Family courts, in an increasing number of cases, and policy makers, generally, face problems in trying to achieve the right balance between individual competing interests of open justice, privacy and freedom of expression under Articles 6, 8 and 10 of the European Convention of Human Rights. The law is complex and confusing; a media guide agreed between the judiciary and the Society of Editors in 2011 has not been updated despite advances in social media communication, the introduction of new judicial guidance and amended court rules.⁹ The continual efforts to resolve these issues over the past ten years, including a series of consultations, some rule changes, and abandoned legislative reform are concisely summarised in a parliamentary briefing in 2015.¹⁰

Members of the judiciary are amongst those who call for more openness in the family courts.¹¹ In anticipation of the new Family Court being established in 2014, the President of the Family Division expressed his determination that it would not be saddled with the image of secret and unaccountable justice.¹² As a first step in what he saw as incremental reform, he issued judicial guidance that certain categories of judgment were normally to be made publicly available.¹³ These types of cases had not previously been routinely published but, from February 2014, were to be sent to the British and Irish Legal Information Institute (BAILII), which operates a freely accessible website publishing a range of UK and Irish court judgments and other mainly primary legal sources.¹⁴ BAILII does not select or edit the judgment transcripts it publishes, but simply relies on the judiciary to supply these in the form they choose to release them (anonymised or otherwise).

BAILII is a repository of legal materials, not a publisher of official law reports of judgments deciding or clarifying a point of law that can be cited in subsequent court proceedings.¹⁵ It was unusual for information from most family court proceedings to be publicly available before February 2014 because they did not appear in the law reports. The written and transcribed judgments that are published under the 2014 guidance do not necessarily include any new point of law.

⁹ A Wolanski and K Wilson, *The Family Courts: media access and reporting* July 2011

<https://www.judiciary.gov.uk/publications/the-family-courts-media-access-and-reporting/>

¹⁰ T Jarrett, *Confidentiality and openness in family proceedings: current rules and history of reform* HC Library briefing paper no. 07306 (2015)

¹¹ HC Constitutional Affairs Committee *The Operation of the Family Courts* (HC 116.1, 2005) paras 138-144

¹² Sir James Munby, *The View from the President's Chambers: the Process of Reform* [2013] Fam Law 548

¹³ Sir James Munby, *Transparency in the Family Courts: Publication of Judgments Practice Guidance* 16 January 2014, [2014] 1 WLR 230; [2014] 1 FLR 733, Fam D and at

<https://www.judiciary.gov.uk/publications/transparency-in-the-family-courts/>

¹⁴ http://ials.sas.ac.uk/research/bailii/bailii_info.htm

¹⁵ See 'What is a law report?' by the ICLR <http://www.iclr.co.uk/learning-zone/law-report/>

Some judgments, especially in high profile cases, can also be freely accessed on the Judiciary website; we discuss the contribution this site makes in Chapter 9.

1.2 Concerns about publicity

Alongside the call for greater transparency, concerns have also been raised by some professionals and groups working with children about the privacy of children and vulnerable family members if there is greater access by the press or public to family court proceedings.¹⁶ The Cafcass Young People's Board, for example, issued a strong response to the guidance in 2014.¹⁷ Research by Dr Julia Brophy with a group of young people in 2015 raised specific concerns about the level of risk of jigsaw identification from the amount of detail that remains in BAILII judgments and about the intrusive nature of some of this detail.¹⁸

The prospect of publicity may also create a risk that children and family members may be inhibited from disclosing evidence to professionals and the court.¹⁹ Articles 6 and 8 ECHR are therefore engaged both in ensuring that the court hears full and frank evidence and in protecting individual privacy.

While publication on BAILII is a welcome step toward greater transparency, lawyers and journalists have identified limitations in this process. Some of these problems had already emerged in a pilot scheme which ran in three court areas in 2009-10.²⁰ The major problem then identified was that the website material was 'large, complex, and difficult to navigate'. Overall, it appears that progress slowed in 2010 mainly because of a 'genuine non-negotiable conflict between the aims of increasing openness and protecting the privacy of the vulnerable'.²¹ Although the 2014 guidance is an attempt to make family court judgments more accessible, it has been suggested that the shortfall in the capacity for the courts and BAILII to fulfil that role has

¹⁶ For example, J Brophy, *Young people's views on media access to family courts* (Children's Commissioner for England, 2010); 'Transparency and family proceedings: Is the family court open for business?' Family Justice Council 8th Annual Debate, 11 November 2014 <https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/fjc/conference-debates/debates/family-justice-council-8th-annual-fjc-debate/>

¹⁷ See Chapter 8 below.

¹⁸ J Brophy, K Perry, and K Harrison, *A review of anonymised judgments on Bailii: Children, privacy and jigsaw identification* (ALC/NYAS 2015)

¹⁹ J Doughty, 'Confidentiality and the Family Courts: Ethical dilemmas for health and social work practice' In: N Priaulx and A Wrigley (eds.) *Ethics, Law and Society* Vol. 5. (Ashgate, 2013) 313 - 328

²⁰ Ministry of Justice, *Review of the Family Courts Information Pilot* (2011)

²¹ M Maclean 'Openness and Transparency in the Family Courts: A Policy Journey 2005-2011' In R Probert and C Barton (eds) *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia, 2012) 291 - 302

not been addressed.²² Judges, court staff and lawyers are hard-pressed to find time to address all the issues that arise and BAILII is a charity with limited resources.

We note that the HMCTS leaflet on media attendance says that:

'The President of the Family Division issued a Practice Direction on 16th January 2014 relating to 'Transparency in Family Courts – Publication of Judgments' As a consequence, in some limited circumstances a Circuit or High Court Judge can order the publication of an anonymised version of the court judgment on the British and Irish Legal Information Institute website only.²³ A fee may be payable.²⁴

This leaflet gives a hyperlink (that no longer works) to the 2014 guidance and gives no link to BAILII. Furthermore, the statement that publication is 'in limited circumstances' is perhaps misleading. Information for court users about the possibility of publication is patchy.

1.3 The content and status of the January 2014 guidance

The guidance is headed:

Transparency in the family courts

Publication of judgments

Practice guidance issued on 16 January 2014 by Sir James Munby, President of the Family Division

1.3.1 Publication and information contained in the 2014 guidance

The opening paragraph states that the guidance is intended to 'bring about an immediate and significant change in practice in relation to the publication of judgments in family courts...' The guidance was written in the first person throughout and referred to a statement made by the President in April 2013 in which he indicated his personal determination that the Family Court (which was established in April 2014) would not be 'saddled with the charge ... that we are a secret system of unaccountable justice'.²⁵ The 2014 guidance went on to say that the President anticipated 'in due course more

²² L Reed, 'Why are we still waiting for transparency in the family courts?' *Guardian* 21 June 2016

²³ This is misleading because it ignores the long established system of law reports, and gives the impression that BAILII will be the sole publisher.

²⁴ 'Can the media attend my court case?'

<https://formfinder.hmctsformfinder.justice.gov.uk/ex711-eng.pdf>

²⁵ Sir James Munby, 'View from the President's Chambers: the Process of Reform' [2013] *Fam Law* 548

formal Practice Directions and changes to the Rules', but that changes to primary legislation were unlikely in the near future. (There have been no subsequent changes to primary or secondary legislation.) The guidance can now be found on the Judiciary website.²⁶ It was originally made public through the Family Law website, operated by legal publishers, Jordans, and subsequently in the Weekly Law Reports.²⁷

The guidance was to take effect from 3 February 2014. It applies to circuit judges; High Court judges; and all judges sitting in the High Court and to all judgments made under the inherent jurisdiction with regard to children and vulnerable or incapacitated adults.²⁸ It applies to two classes of judgments that the judge *must* ordinarily allow to be published (para 16 and 17) and another class that *may* be published (para 18) (emphasis in the original).

Judgments that *must* ordinarily be published:

1. **Under para 16**, where the judge concludes that publication would be in the public interest, whether or not a request for publication has been made.

This gives the individual judge discretion as to whether publication would be in the public interest, but public interest is not defined. It appears to be a wholly subjective test, although has subsequently been applied with reference to relevant case law.

2. **Under para 17**, where a judgment relates to certain listed categories of case type and a written judgment already exists or there is to be a transcription. The starting point is that permission should be given unless there are compelling reasons otherwise.

This indicates that the judge has limited discretion in deciding *against* publication and suggests that judgments in these categories would routinely be sent to BAILII. However, under para 19 states that, in deciding whether, and if so when, to publish a judgment, the judge shall have regard to all the circumstances; the relevant ECHR articles; and the effect of publication on any current or potential criminal proceedings.

Furthermore, only judgments already in publishable form (presumably typed), or which have already been ordered to be transcribed from a

²⁶ At <https://www.judiciary.gov.uk/publications/transparency-in-the-family-courts/>

²⁷ At http://www.familylaw.co.uk/news_and_comment/practice-guidances-of-16-january-2014-on-publication-of-judgments-transparency-in-the-family-courts-and-in-the-court-of-protection#.WKnf9fJcUn8; [2014] 1 WLR 230; [2014] 1 FLR 733, Fam D

²⁸ Cases about incapacitated adults (and children aged 16 and 17) would normally be heard in the Court of Protection. There is power under the inherent jurisdiction to protect an adult who has capacity but may be vulnerable for some other reason, for example the inherent jurisdiction was used to protect victims of forced marriage before statutory protection was available. We did not find any such cases in the Family Division relating to adults.

recording, are expected to be sent under paras 16 and 17.²⁹ There does not appear to be any guidance on when a judgment should be written rather than just delivered *ex tempore* from a judge's notes. The position on ordering transcriptions is unclear.

These matters are discussed in the analysis of published judgments in Chapter 3 below.

The categories of case that come within para 17 and relate to the Family Court are:

- (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 under Part 4 of the Children Act 1989, or any order for the discharge of any such order, except where the order is made with the consent of all participating parties;
- (iii) the making or refusal of a placement order or adoption order under the Adoption and Children Act 2002, or any order made for the discharge of any such order, except where the order is made with the consent of all participating parties;
- (iv) the making or refusal of any declaration or order authorising a deprivation of liberty, including an order for a secure accommodation order under section 25 of the Children Act 1989;
- (v) any application for an order giving or withholding of serious medical treatment
- (vi) any application for an order involving a restraint of publication of information relating to the proceedings.

The guidance therefore indicates that the types of case that tend to attract the most controversy or public attention - where children may be removed from or lose contact with parents - are to be brought to public attention on BAILII.

Thirdly, judgments *may* be published on BAILII at the request of a party, where this is approved by the court, under **para 18**.

²⁹ In *Re C (A Child)(Publication of Judgment)* [2015] EWCA Civ 500; [2016] 1 FLR 495, discussed below at 1.3.2, McFarlane LJ describes at [22] the President as 'expecting' cases falling into paras 16 and 17 to be published, whereas there is judicial discretion regarding those falling into Para 18.

The net effect of the guidance can be summarised as follows:

Subject to the judgment being in written or transcribed form, and in the context of all the circumstances, the ECHR, and any associated criminal proceedings:

1. The judge should ordinarily send BAILII a judgment that s/he believes is in the public interest.
2. The judge should ordinarily send BAILII the following types of judgment:
 - (i) a serious contested fact finding in either public or private law, for example findings on domestic violence
 - (ii) section 31 orders and any contested s 39 orders
 - (iii) determination of placement and adoption applications, including contested revocations of placement orders
 - (iv) determination of s 25 secure accommodation applications
 - (v) serious medical treatment
 - (vi) applications for reporting restrictions.
3. The judge may send BAILII a judgment on application by a party.

Data is not collected in the para 17 categories by the Ministry of Justice. We have therefore been limited in analysis of any direct relationship between the numbers of cases in these categories that go before the family courts and the numbers of judgments that are available on BAILII. This is discussed in Chapter 3.

1.3.2 Status of the 2014 guidance

Our study suggests that the 2014 guidance is not being followed in every case or, possibly, most cases, which raises a question about its status. 'Guidance' in public law comes in myriad forms and individual pieces of guidance are not always clear in terms of the extent to which they bind, how easy they are to find, and where they sit in a hierarchy of governance and regulation.³⁰

³⁰ S Vaughan, 'Differentiation and Dysfunction: An Exploration of Post-Legislative Guidance Practices in 14 EU Agencies' [2016] 17 *Cambridge Yearbook of European Legal Studies* 66-91

It appears that the President anticipated that the 2014 guidance would lead into a more formalised system in due course. However, nearly three years later, this has not happened, although there is no indication that he has revised his principled approach to transparency. In September 2016, the President described the current heavy workload of the courts as presenting a clear and imminent crisis, in the absence of a clear strategy to manage this. This is an unsustainable strain on limited judicial resources and the legal aid budget.³¹ In these circumstances, addressing transparency may not hold the highest priority. Initial hopes for rapid progress with opening up the courts to more scrutiny may have been thwarted by other pressures on the system.

Consequently, what may have been envisaged as a short term introductory measure has become a fixture, which raises questions about the legal status of such practice *guidance*, as opposed to a practice *direction*, which is the normal way to supplement and support court rules.

In December 2015, the designated family judge (DFJ) in the Central Family Court issued a 'Local Practice Direction' on attendance at hearings by Cafcass guardians. This was withdrawn in February 2016 following counsel's advice to an interested party, Nagalro, that it was unlawful because (amongst other matters) it had been issued *ultra vires*.³² Whether or not this was the case, the issue in dispute was whether a DFJ had power to issue a 'direction' rather than local guidelines (which is more common). This highlights the difference between a practice direction and the term 'guidance' which can describe a wide range of enforceable and non-enforceable procedures.

We understand that the President is able to issue guidance to judges without having to first seek and obtain the approval of the Lord Chief Justice and the Master of the Rolls, as he would to issue a Practice Direction.³³ Issuing a Practice Direction would be a lengthy process, whereas simple 'guidance' can be communicated to the judiciary very quickly. The latter, however has the disadvantage of less formality and perhaps an appearance of lower status than a Practice Direction. This is reflected in some of the responses we had from judges who were uncertain about the purpose and/or mechanism for applying the 2014 guidance.³⁴

³¹ Care cases: the looming crisis. View from the President's chambers, September 2016: <https://www.judiciary.gov.uk/wp-content/uploads/2014/08/pfd-view-15-care-cases-looming-crisis.pdf>

³² <http://www.nagalro.com/feeds/news/nagalro---withdrawal-of-local-practice-direction.aspx>

³³ Constitutional Reform Act 2005 Schedule 2 Part 1

³⁴ Chapter 6

The most detailed exploration of the 2014 guidance in a court judgment itself is in ***Re C (A Child) (Publication of Judgment) [2015] EWCA Civ 500; [2016] 1 FLR 495*** which concerned an unsuccessful application under para 18. McFarlane LJ said:

... First of all, having set the context [of the guidance], it is right to draw from that that the move within the family justice system from circumstances in which it was unusual or exceptional for judgments to be published and for the public to know what occurred in family proceedings to a more open process there is a process of transition. The President is plain that what is sought to be achieved is a culture change. It is "work in progress". The Practice Guidance to which I have made reference is no more and no less than "Practice Guidance". It is not law, it is not even a Practice Direction and there is a danger, it seems to me, for this court to be invited by Mr Wilkinson [counsel for one of the parties] to afford greater technical status to the Practice Guidance than it in fact currently has.

22. Secondly, it is important, in my view, to understand that those cases which fall into paragraph 18 territory within the Guidance are expressly left to the discretion of the judge. All the other cases fall into a category where the President through the Guidance expects that publication will take place. The discretionary nature of paragraph 18 material is one that this court should understand and respect. These are case management decisions given by judges, albeit at the end of the case, looking at whether or not the judgment should be published.

...

24. The third observation I make is that the process that the President is currently engaged in is very much one which is organic and developing. It is not apt, in my view, for the Court of Appeal to intervene and to offer its own guidance, as we are invited to do by Mr Wilkinson, in the course of that process unless it is plain to this court that a judge in a particular case has fallen into an error of principle or is otherwise plainly wrong in the decision that has been given. I am therefore careful in the words that I use in this judgment to say nothing to enlarge upon or contradict the words that the President has carefully chosen to put into his guidance.

Despite the words we have underlined at [21] above, the House of Commons Library briefing paper, published in October 2015, refers to the January 2014 throughout as 'new rules' and groups it together with the primary legislation and court rules without any differentiation from statute.³⁵ Members of Parliament, or the public, reading this briefing paper are not informed that senior members of the judiciary do not individually issue rules, nor that court rules are in fact written by a specially constituted committee.

1.3.3 Local practice guidance

As will be seen from our analysis of the published cases, there are regional variations in complying with the guidance. We are aware of only one publicly issued local practice guide to the 2014 guidance, written by HHJ Clifford

³⁵ T Jarrett fn 10 above

Bellamy when he was DFJ at Leicester Family Court.³⁶ Following a summary of the relevant case law, HHJ Bellamy set out his approach as follows:

1. The decision to give permission for a judgment to be published is a judicial decision. It is a decision that can be appealed. (See *Re C (Publication of Judgment)* [2015] EWCA Civ 500.)
2. Whether or not the judgment is one which the Guidance indicates should normally be published, if the judge considers it appropriate to give permission to publish then the parties should be informed at the time the judgment is handed down.
3. If the judgment has been prepared in anonymised format, the parties are under a duty to draw the court's attention to any perceived inadequacy in the anonymisation. This is a process which requires careful attention to detail. The court should set a time limit within which any points about the anonymisation of the judgment should be made.
4. If the judge indicates that she proposes to give permission for the judgment to be published it is open to a party to seek to persuade the court that upon a proper application of the 'ultimate balancing test' permission should not be granted.
5. If advocates need time to marshal their arguments with respect to the question of publication they should ask the judge for a short adjournment to enable submissions to be prepared.
6. Submissions must be focussed on the competing Article 8 and Article 10 rights that are engaged and on the 'ultimate balancing test' which the court is required to undertake. It is not sufficient, for example, simply to state that a party does not agree to the judgment being published.
7. If, having considered the submissions, the judge remains of the opinion that permission to publish that judgment should be granted and the party opposing publication wishes to appeal against that decision then a request should be made to the judge for permission to appeal and for a stay pending the hearing of the appeal.

Bristol Family Court has some information about media attendance on its 'Family Court Info' website, and links to the HMCTS leaflet.³⁷

We have not found any other local guides for professionals or the public.

1.3.4 The 2014 guidance and human rights

The 2014 guidance states that where cases fall within para 16 or 17, the 'starting point' is that they will be published on BAILII. A balancing exercise, between any competing rights, under the European Convention of Human Rights, will then be undertaken (para 19). Before the guidance took effect, family proceedings in the lower level courts were rarely published, unless section 12 Administration of Justice Act was varied or lifted. The question therefore arises as to whether the position regarding Article 8 and Article 10 has changed. It has been long established that neither has precedence over the other.³⁸

In ***Re C (a Child) (Private Judgment: Publicity)*** [2016] EWCA Civ 798; [2016] 1 WLR 5204, heard by the Court of Appeal in July 2016, the

³⁶ Leicester and Leicestershire Local Family Justice Board, 'Practice Note: Transparency at the Family Court in Leicester', 15 July 2015

³⁷ 'Can I tell people about my court case?' at <http://www.familycourtinfo.org.uk/i-need/can-i-to-tell-people-about-my-court-case/>

³⁸ *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 FLR 591

Master of the Rolls describes the 2014 guidance as reflecting domestic and Strasbourg jurisprudence (the law as interpreted by courts in England and Wales and by the European Court of Human Rights).³⁹ He cites McFarlane LJ in ***Re W (Children)* [2016] EWCA Civ 113; [2016] 4 WLR 39** at [32]-[40] in support. In *Re W*, McFarlane LJ had stated that the default position remains, under s 12 Administration of Justice Act 1960:

... one which prohibits the publication of any information relating to the proceedings. That default position, which is designed to protect children, can, where appropriate, be modified by a judge upon the application of a party or the media. It has in any event been tempered by the President's transparency initiative, the purpose of which is to allow greater public access to, and understanding of, the work of the family courts.

In *Re W*, moving from that default position to allow a degree of controlled publicity was a matter of judicial discretion that had been exercised by balancing Article 8 and 10 interests. It was agreed in *Re W* that the fact-finding judgment fell within para 17(i) of the 2014 guidance.

Each of these cases (*Re C* and *Re W*) was notorious, relating to children who had been found to have died at the hands of their respective fathers, and featured very high profile matters of public interest.⁴⁰ According to the Court of Appeal, in these two cases, the 2014 guidance encapsulates the balancing exercise to be carried out by the court when considering Articles 8 and 10. It does not reverse the position under s 12 AJA, despite making publication the 'starting point' if the case comes within para 17.

In ***H v A (No. 2)* [2015] EWHC 2630 (Fam); [2016] 2 FLR 723**, McDonald J undertook a very detailed analysis of nearly 30 paragraphs, which he described at 94 as

the parallel analysis of the importance of the rights engaged in this case and the respective justifications for interfering with the same set out above, in which I have considered each of the children's best interests as a primary consideration, and applying the ultimate balancing test of proportionality.

However, he goes on to say at [100]

It is important, once again, to reiterate the matters set out at paragraph 22 of this judgment, derived from the observations of McFarlane LJ in *Re C*, concerning the case management nature of the decision whether or not to publish the judgment in a suitably anonymised form. It would be undesirable for the question of whether or not a judgment should be published to become an issue that is the subject of the kind of detailed examination I

³⁹ at [12]

⁴⁰ Namely, the deaths of Ellie Butler and Poppi Worthington.

have been required to engage in this case ... ordinarily, the exercise of discretion concerning the publication of the judgment will be a simple case management decision to be taken at the conclusion of the judgment and following a broad consideration of the applicable principles with basic reasons.

More recently, in the High Court, in October 2016, Hayden J considered a submission by parties not to publish a judgment that would otherwise be in the public interest, because there were 'compelling reasons' under para 17 not to do so.⁴¹ However, he states that he based his decision to publish on para 16, although the decision on the care application would fall within para 17 (ii). In any event, he rejected the arguments put forward to 'depart from the guidance', and reiterated that the balance is to be drawn between Convention rights, with no presumption that Art 8 carries more weight than Art 10. At para 37 he says,

'We are not concerned merely with a "policy", to publish more judgments, rather we are applying the obligations imposed by Article 10 and Article 8 ECHR.'

This viewpoint may represent that of judges in the High Court, who are accustomed to publication. However, the January 2014 guidance is explicitly intended to result in more judgments being published than previously.

The High Court and Court of Appeal authority is to follow the established balancing exercise, namely focusing on the respective art 8 and art 10 interests, and then balancing these.⁴² What may have changed is the point at which this exercise is undertaken. Rather than being considered on the rare occasion of a s 12 application, it should now be considered for every case where the judge thinks publication is in the public interest (para 16) and in every case that falls within the para 17 categories.

Peter Jackson J has described the purpose of the guidance as follows:

... to promote understanding of and confidence in the proceedings of the Family Court. But beneficial though that goal is, it is not an end in itself. Rather, it is part of a necessary process to ensure that the rights of individuals and the public ... referred to above, are properly balanced. That cannot happen if confidentiality in the proceedings of the Family Court, a public body, is allowed to trump all other considerations. A balance has to be struck in each case, using the guidance as a valuable aid. There will still be cases where, notwithstanding the guidance, publication is not permitted, and

⁴¹ *Re J (A minor)* [2016] EWHC 2595 (Fam). *Re J* is an example of a High Court case that has been published on BAILII but does not appear in the law reports.

⁴² *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 A.C. 593.

other cases where the judge will authorise wider publication than that contemplated by the guidance.⁴³

The sentence we have underlined emphasises the concept of the guidance as a means of balancing rights, rather than imposing a new policy.

1.4 Developments since the 2014 guidance and consultation

1.4.1 August 2014 consultation

The President proceeded swiftly with his incremental approach by issuing an invitation to respond to some questions and proposals in August 2014. He stated that:

'The underlying principles are two-fold. First, there is a need for greater transparency in order to improve public understanding of the court process and confidence in the court system. Secondly, the public has a legitimate interest in being able to read what is being done by the judges in its name.

I have been clear throughout that the process of reform must be incremental and informed at every stage by the views obtained from consultation with everyone who may be affected.'

The matters he raised were:

1. Views on the impact of the January 2014 guidance and how it might be improved or extended;
2. Steps that might be taken to enhance the court listing system;
3. Possible changes whereby certain court documents could be released to the media;
4. Preliminary views of a possible pilot for hearings to be held in public.

It does not appear that all responses to these proposals are publicly available but seven responses were collated on The Transparency Project website.⁴⁴ There have been no further developments of these proposals, although a pilot scheme for holding hearings in public (as in point 4 above) in the Court of Protection was announced in 2015. This commenced in January 2016 and continues until August 2017.

1.4.2 Court of Protection pilot

Under the Court of Protection (CoP) pilot, most hearings now take place in public. This has not generated a significant amount of publicity in the mainstream media.⁴⁵ Although there is occasional media coverage of Court of Protection cases about serious medical treatment, these were normally

⁴³ *Wigan BC v Fisher and Thomas* [2015] EWFC 34 at [20]

⁴⁴ <http://www.transparencyproject.org.uk/transparency-consultation-responses-gathered/>

⁴⁵ J Doughty and P Magrath 'Opening up the courts: the Court of Protection transparency pilot' [2016] 21(2) *Communications Law* 37-45

held in open court under the original CoP rules in any event. The existence of the pilot may mean that the CoP is becoming more accustomed generally to public attendance and to have encouraged commentators in accessing the proceedings.⁴⁶ CoP hearings are still, however, described by the press as 'secretive'.⁴⁷

We understand that there was an assessment of the original pilot by the Ministry of Justice in 2016, before it was extended in duration, but this has not been published. There is therefore no evidence base yet available about the impact of the Court of Protection open courts pilot to inform developments in the Family Court.

1.4.3 Association of Lawyers for Children report

In August 2016, the Association of Lawyers for Children (ALC) published a report, 'Anonymisation 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: judicial guidance' written by Dr Julia Brophy as part of a project funded by the Nuffield Foundation.⁴⁸ This document is currently under consideration by the President.

As noted above,⁴⁹ In **Re J (A minor) [2016] EWHC 2595 (Fam)**, Hayden J noted the submission by some parties for a summary judgment only to be placed on the public record, with the full judgment being kept private. This was, he said, an idea drawn from the ALC report. He went on to refer to para 16 in the January 2014 guidance because, in his view, publication of some issues arising in the case was in the public interest and a summary could not adequately cover all these. Hayden J welcomed the detailed suggestions in the ALC report as helpful when addressing the proportionality of intervention in a particular case, but guarded against 'constructing a paternalistic presumption of privacy for every child in every case'.

1.4.4 Family Court Reporting Watch

In July 2016, the Legal Education Foundation awarded a grant to The Transparency Project that included funding for a new 'Family Court Reporting Watch' project for 18 months. The aim is, during this period, to

⁴⁶ As illustrated in the live tweeting by academics from the hearings about Paul Briggs in November 2016 – *Briggs v Briggs* [2016] EW COP 53; [2017] 4 WLR 37

⁴⁷ See, for example, C Ellicott and S Reid, 'Grandmother who was jailed by a secret court for refusing to remove a man from a care home is freed after six weeks in prison' *Daily Mail* 9 November 2016

⁴⁸ J Brophy, 'Anonymisation 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'. Association of Lawyers for Children 2016 at http://www.alc.org.uk/publications/publications/guidance_anonymisation_of_children_judgments

⁴⁹ At 1.3.4

monitor the media and new judgments in order to correct, clarify and comment on media reports of family court cases; explain and comment on published judgments cases; and highlight other transparency news. Since October 2016, these objectives have been pursued through blog posts on specific topics and a weekly 'Round up' of relevant judgments and news about family justice. Two examples of corrections are mentioned by a journalist and by Cafcass later in this report.⁵⁰

1.5 Conclusions and Recommendations:

Despite the description in the HC paper of 'new rules' on publication, and the Court of Appeal interpretation of the 2014 guidance as introducing a new expectation about cases within paras 16 and 17 being 'ordinarily' published, the decision to do so will, in each case, turn on balancing Articles 8 and 10. Neither article has precedence over the other.

There are number of outstanding questions about the status of the January 2014 guidance and the subsequent consultation by the President, which our evaluation cannot answer. We hope that the analysis we have undertaken will contribute to an evidence base for policy development.

In the meantime, we would make the following recommendations:

The HMCTS leaflet on media attendance should be updated, and made widely available, to provide more accurate information for court users about the possibility of publication on BAILII, and how they can make representations about this.

Pending the outcome of the August 2014 consultation, clarification of the intention of the January 2014 guidance regarding publication as 'the starting point', and the steps to be taken in the judicial balancing exercise between competing rights, may help assure more consistency in expectations and practice.

⁵⁰ See 7.4 below and <http://www.transparencyproject.org.uk/correction-request-re-inaccurate-headlines-mother-who-let-her-two-boys-sleep-in-her-bed-has-them-taken-away-by-judge/>; 8.2 below and <http://www.transparencyproject.org.uk/three-sisters-whose-parents-didnt-give-them-names-are-taken-into-care/>

2. Research questions and methods

2.1 Aims of the study

Our project was designed to explore gaps between continuous demands made by the media for an end to 'secrecy' in the family courts; lawyers' concerns that the family justice system was poorly understood and often misrepresented; concerns also expressed about the intrusion upon families' privacy (particularly children); and the attempt by the President to resolve these issues by means of practice guidance and through publication on BAILII. We focused on cases that involved children. Matrimonial and financial proceedings were excluded from our study.

Our aims were to:

1. Identify patterns in the judgments published on BAILII
2. Analyse media coverage of family court cases
3. Obtain views of professionals involved in these cases.
4. Review systems of family court reporting in other jurisdictions
5. Explore potential for socio legal research in this developing area.

Our original research questions were modified following discussions with the Nuffield Foundation, before the field work began, because of the separate research proposal by Dr Julia Brophy and the Association of Lawyers for Children. Their project addressed issues of anonymisation and risks of identifying children and undertook a comparative review of systems in other jurisdictions. We therefore focused less on anonymisation practice than originally planned and have not looked at other countries' reporting systems in this study.

2.2 Ethics approval

Ethical approval of the research methods was obtained from the Ethics Committee of Cardiff University School of Law and Politics. Most of the data we have collected is publicly available. Ethical approval was specifically required in respect of the strand of the research where members of the judiciary were to be asked for their views, once we had obtained approval from the President of the Family Division.

2.3 Methods

We compiled a database of judgments that had been published under the January 2014 guidance for two years after it was issued. We found a total of 837 judgments that appeared to fit the criteria under the 2014 guidance.

We searched for mainstream media coverage of these cases, and obtained the views of journalists on their use of BAILII. We also sought the views of family court judges and representatives of other stakeholders in the family justice system about the effects of the 2014 guidance and publication. Our findings are summarised in this report.

3. Analysis of published judgments

3.1 Data collection

In order to evaluate the effects of the 2014 guidance itself, rather than publication on BAILII in general, we aimed to collect data only on judgments that were published directly as a result of the guidance. These are, notably, cases that would not normally have appeared before 3 February 2014 because they were heard in the lower courts. We have also included relevant High Court Family Division cases, namely those that involved children, because the High Court is included in the 2014 guidance.

Details of all judgments that were published on BAILII under the 2014 guidance, for the first two years after it was implemented, were entered on a database. A total of 837 judgments were selected on the basis shown in Table 1.

TABLE 1

Type of court	Dates of publication	Number of cases entered on database
England and Wales County Courts	1 February 2014 ⁵¹ – 22 April 2014	67
England and Wales Family Court (High Court judges)	22 April 2014 – 29 February 2016 ⁵²	117
England and Wales Family Court (circuit judges)	22 April 2014 – 29 February 2016	357
High Court Family Division	1 February 2014 – 29 February 2016	296
TOTAL		837 ⁵³

There was a ten-week interval between the implementation of the guidance on 3 February 2014 and the creation of the Family Court on 22 April, hence the inclusion of county court judgments from that period.

Many High Court Family Division judgments had already been customarily sent to BAILII in previous years, so this aspect of publication is not novel. The 2014 guidance does however specifically include the High Court and

⁵¹ 3rd February 2014 was a Monday but we have used 1st February for ease.

⁵² We have recorded cases published until the end of February 2016.

⁵³ There are seven more cases shown on BAILII's list for this period which are either not family court cases, duplicates or have been taken down, so we have excluded them from our analysis.

clearly envisages the aim of greater transparency spanning both levels. It has been cited as pertaining to High Court judgments.⁵⁴

As BAILII is a freely accessible website, all of the data we collected is publicly available. Our database contains no confidential or personal data. In a small number of cases where we did have concerns about what was publicly available, we took action, as we explain below in Section 4.

We aimed to collect the following data:

1. Details of courts and judges
2. Case names and case citations
3. Case types
4. Categories under para 16-18
5. Timeliness of publication
6. Information on any judgments that had to be taken down, or other anomalies
7. Any obvious problems with anonymisation
8. Practice in naming professionals
9. Elements of public interest.
10. Use of the recommended rubric (standard heading about the extent of publication)
11. Whether judgments were written by the judge or transcribed from a recording

Although a template is available for use by the family courts on which to base their approved judgment, we were informed by BAILII that this is often not used (or subject to many variations amongst different courts). We found a range of styles used, which added extra work to the task of finding the right data.

3.2 Volume and rate of publication

In April 2015, about a year after the publication guidance had taken effect, Peter Jackson J commented, in a hearing concerning whether or not a fact-finding should be published:

The guidance has had a marked effect. In 2014, its first year, over 300 judgments at High Court level were posted on the Bailii website, together with 160 judgments by other judges. These numbers are a very substantial increase on previous levels of publication, particularly in relation to judgments in local family courts. As a result, there is a very considerable body of material available to anyone who wants to better understand the way in which our proceedings are conducted.⁵⁵ [19-20]

⁵⁴ For example. *Wigan BC v Fisher and Thomas* [2015] EWFC 34; *Re J (A minor)* [2016] EWHC 2595 (Fam)

⁵⁵ *Wigan BC v Fisher and Thomas* [2015] EWFC 34 at 19-20

Our analysis of BAILII shows that 161 judgments had been posted by circuit judges in December 2014, indicating that by April 2015, the figure quoted by Peter Jackson J would have been a slight under estimate. At the end of 2014, BAILII also held 44 judgments by High Court judges sitting in the Family Court and 175 High Court judgments that fitted the 2014 guidance. The difference between the figure of 300 quoted in *Wigan* and the lower figure we have included in our analysis is that we have excluded High Court cases that did not involve children, whereas the figures used by Peter Jackson J probably related to all family proceedings in the High Court, including financial cases.

Our analysis covers only the first two years of the guidance, but this indicated that the rate of publication might not be increasing, so we checked BAILII again at the beginning of 2017. Table 2 shows the number of Family Court (not High Court) judgments published per quarter in 2015 and 2016. This shows that the rate of publication has slowed from a peak of 88 in the second quarter of 2015, just over a year after the Family Court came into existence, to a current rate of less than 40 per quarter.

TABLE 2

		Family Court (High Court judges)	Family Court (circuit judges)	TOTAL
Jan- Mar	2015	31	64	95
	2016	14	19	33
Apr – Jun	2015	23	65	88
	2016	4	31	35
Jul – Sept	2015	13	54	67
	2016	12	29	41
Oct – Dec	2015	6	37	43
	2016	17	30	47

It can be seen from Table 2 above that, apart from the October to December quarter, where slightly more Family Court judgments were published in 2016 than in 2015, for every other quarter, fewer judgments were published in 2016 than in the preceding year. The rate of publication is falling.

3.2.1 Publication on BAILII by individual judges and courts

Most judgments were published by High Court judges and by the President, in the High Court. These are shown in Table 3, together with all the circuit judges who sent more than ten cases to BAILII in the two-year period. A total of 27 judges had more than ten judgments published in two years. Of these, 17 were circuit judges.

TABLE 3

The names shown in bold are those of circuit judges.

NO OF JUDGMENTS	JUDGE	COURT relating to most cases
39	Jackson J	High Court
38	The President	High Court
36	Baker J	High Court
33	Holman J	High Court
31	Theis J	High Court
27	Keehan J	High Court
26	HHJ Hudson	Newcastle upon Tyne
23	HHJ Bellamy	Leicester/ High Court*
22	Pauffley J	High Court
20	Cobb J	High Court
20	HHJ Lynch	Leeds
19	HHJ Moir	Newcastle upon Tyne
19	HHJ Duggan	Stoke; Leyland
18	Russell J	High Court
17	HHJ Owens	Reading/Oxford
16	HHJ Simon Wood	Newcastle upon Tyne
15	HHJ Gareth Jones	Rhyl; Wrexham
15	HHJ Carol Atkinson	East London
15	HHJ Wildblood	Bristol
15	HHJ Antony Hughes	Milton Keynes/Northants
14	HHJ Lesley Newton	Manchester
13	HHJ Bond	Bournemouth
13	HHJ Hughes	Milton Keynes/Northants
13	HHJ Lynn Roberts	Chelmsford
13	Moor J	High Court
12	HHJ Venables	Barnet
12	HHJ Brown	Milton Keynes

* 17 of these cases were at Family Court level

Only 12 local family courts sent in ten or more judgments during the two year period. These are set out in Table 4 below.

TABLE 4

No. of judgments	Court
65	Newcastle
38	Leeds
30	Manchester
21	Milton Keynes
19	East London
18	Bristol
17	Leicester
14	Reading
14	Bournemouth
13	Chelmsford
13	Barnet
10	Central London

Logically, the courts that sent in most cases tended to have the most proactive judges. The reason that this pattern is not reflected in the activity of HHJ Duggan and HHJ Gareth Jones is probably because they sat in a number of different courts over the two year period. We understand that Central London Court has approximately six to eight judges and presumably most other courts will have fewer.

3.2.2 Comparing the rate of publication with total workload of the courts – MoJ data

We had originally aimed to analyse the relationship between the number of judgments published on BAILII and the number of relevant cases heard in individual courts. We had hoped to be able to report on whether more reports are published by busier courts than by others. That has, however, not been possible because of the way court statistics are recorded. There is no publicly accessible data on the number of cases that come within the categories in para. 17 of the 2014 guidance. Nor is it possible to estimate this from the data that is published about the throughput of cases. The number of cases in the family courts is however known to be rising. Recent observations by the President and the Lord Chief Justice about the imminent crisis in the family courts reflect the pressure that has been steadily building in the last eight years, and shows no sign of easing.⁵⁶

⁵⁶ The Lord Chief Justice's Report 2016. Available at www.judiciary.gov.uk, <https://www.judiciary.gov.uk/wp-content/uploads/2014/08/pfd-view-15-care-cases-looming-crisis.pdf>

Most judges who responded to our survey indicated that lack of time and pressure of the number of cases being heard were factors that inhibited their capacity to arrange publication.⁵⁷

The figures that are published by the Ministry of Justice are not easy to interpret. For example, Sandra Laville wrote in the *Guardian* on 24 December 2016:

According to Ministry of Justice figures, 225,590 cases were completed in the family court in 2015, almost half of which were divorce cases. In the same year, judges published 469 judgments on Bailii.⁵⁸

This suggests to the reader that even if divorce statistics were excluded, less than half a percent of family court cases are published on BAILII. While it is correct that Ministry of Justice (MoJ) statistics state that a total of 225,590 cases were concluded in family courts (excluding High Court) in 2015, this total includes cases about domestic violence, matrimonial and financial matters, many of which do not fall within the 2014 guidance.

We are able to see from the MoJ statistics that 11,510 children and 12,308 children were involved in care applications in in 2014 and 2015 respectively.⁵⁹ Some of these cases would have been dealt with by magistrates and district judges, who are not subject to the 2014 guidance. Nevertheless, there is a marked disparity between the number of care cases going through the courts and the number where a judgment is published.

The quarterly statistics released by the MoJ indicate that the following court areas were the ten that dealt with most care cases in 2015 (listed in order of the busiest):

- Manchester
- Liverpool
- Central London
- Newcastle upon Tyne
- Leeds
- East London
- South East Wales
- West London
- Sheffield
- Preston

⁵⁷ Chapter 6

⁵⁸ S Laville 'Certain family court hearings to take place in public in radical trial' *Guardian* 23 December 2016

⁵⁹ Ministry of Justice, Family Court Statistics Quarterly at <https://www.gov.uk/government/statistics/family-court-statistics-quarterly>

Other busy courts, according to the MoJ (and which appear often on BAILII) are Medway; Milton Keynes; Bristol; and Chelmsford.

If the courts were 'ordinarily' publishing judgments in care cases as indicated by para 17(ii) of the 2014 guidance, the highest volume of published judgements would be reflected in a list of courts similar to that above. However, the volume of care cases processed (according to the MoJ statistics) does not necessarily correspond with the volume of judgments published, as listed in Table 4.

While it would appear from these figures that there is no obvious relationship between how many cases a court deals with and how many judgments it sends to BAILII, we must emphasise the limitations of the MoJ data in this context, as it is not possible to compare it directly with the categories of case in the 2014 guidance. Nevertheless, it appears that some family courts, such as Newcastle; Leeds; Manchester; east London; Bristol; and Chelmsford developed a culture during 2015 whereby judgments were customarily sent to BAILII. Others, such as South East Wales, Wolverhampton and Devon, despite appearing as very busy family courts in the MoJ statistics, do not have any judgments appearing on BAILII.

3.2.3 Comparing the rate of publication with total workload of the courts – Cafcass data

In view of the limitations of the MoJ data, it may be more meaningful to look at figures in Cafcass and Cafcass Cymru annual reports.

The figures in Table 5 represent the numbers of applications where Cafcass was appointed, not the number where the orders sought were actually made. Therefore they are only indicative of the numbers of cases that might be publishable under para 17 (ii) and (iii).

TABLE 5

	2014-5		2015-6	
	England	Wales	England	Wales
Care applications	11,159	767	12,741	833
Open care cases at year end	8144	Not available	9071	N/A
Placement order applications	2134	N/A	2299	N/A
Adoption applications	942	85	1110	81

As pointed out in the Annual Report 2015-2016, Cafcass in England was receiving 1,000 care applications per month. Cafcass Cymru was receiving about 90 care applications per month. In contrast, Family Court judgments (of all types) were reported on BAILII at less than an average of 50 per month during 2015.

Whatever the limitations of making any comparison between court statistics and the number of cases published, it is clear that only a very small proportion of family court cases are publicly available for scrutiny, since the 2014 guidance. This raises questions about the level of transparency the guidance has achieved, if its intention was to present a balanced picture of family courts across the jurisdiction.

3.2.4 Comparing rates of publication by court with local authority caseloads

Cafcass (England only) have also published information on the numbers of care applications they receive per local authority. The national rate for care applications in England in 2015-2016 was 11 per 10,000 population of all children. Table 6 shows the 20 local authorities with the highest rates in England (according to Cafcass), the relevant Family Court (where known) and how many judgments about that local authority were published over our whole two-year sample. The years do not exactly correspond because Cafcass uses an April to March year. These figures are set out only as indicative of the relative numbers of published judgments in the courts one would expect to be the busiest.

TABLE 6

Local authority (ranked according to number of care applications)	Rate in 2015-2016 (national average is 11)	Family Court	No. of judgments published from that court in 2014-2016	No. of published judgments where this LA was named as the applicant
Blackpool	39.0	Preston; Leyland; Blackpool; Liverpool	10; 9; 4; 3	4
Middlesbrough	29.9	Middlesbrough	5	none
South Tyneside	28.9	Newcastle upon Tyne	65	5*
Sunderland	26.0	Newcastle upon Tyne	65	5
North East Lincolnshire	25.8	Hull	3	3
Barnsley	23.3	Sheffield	2	2

Liverpool	23.2	Liverpool	3	None
Medway	22.6	Medway	9	5
Torbay	22.2	Not known	-	1 (High Court)
Blackburn	19.8	Leyland	9	2
Brighton and Hove	19.5	Brighton	4	3
Newcastle on Tyne	19.2	Newcastle	65	8
Gateshead	18.7	Newcastle	65	3
Reading	18.7	Reading	14	8
Southend	18.4	Chelmsford	21	7
St Helens	18.4	Liverpool	3	1

*Many cases at Newcastle Court omit the name of the local authority. We understand that this is probably to reduce risk of identification in smaller authorities.

There appears to be a connection between the publication rate and the busiest local authorities and courts in Newcastle, Medway, Leyland, Reading and Chelmsford. However a number of local authorities which have amongst the highest rate of children of children (per head of population) subject to care applications have very few judgments about them published.

Although Cafcass Cymru has not published the rate of care applications per local authority, a broad comparison can be drawn between the numbers of children looked after under care orders and the numbers of published judgments in Wales. According to Welsh Government statistics, in March 2015, a total of 1950 children were looked after under care orders in the South Wales area whereas only 835 were under care orders in North Wales. In contrast, Family Court judgments on BAILII relate almost entirely to children in North Wales.⁶⁰

3.3 Timeliness of publication

From the point of view of a journalist, other commentator or member of the public who wants a contemporaneous picture of what is happening in the family courts, it would be important to ensure that judgments are published in a timely manner. This is illustrated only too clearly by the rapid spread of

⁶⁰ Stats Wales at <https://statswales.gov.wales/Catalogue/Health-and-Social-Care/Social-Services/Childrens-Services/Children-Looked-After>

the misreported versions of the Court of Protection and county court hearings described in the President's judgment in ***Re P (A Child) (Forced Caesarean) (Adoption) 2013 EWHC 4048 (Fam); [2014] FLR 410***, and by HHJ Newton at the 2014 Family Justice Council debate.⁶¹ The value of swifter publication of judgments has been recognised since that incident.

We therefore aimed to record the hearing date, the date the judgment was delivered (if later), and the date of publication on BAILII for each case. This proved difficult to record accurately because hearing dates were not always included in or indicated by the judgment. Secondly, the date shown on the face of the judgment was not necessarily the date that it was sent to BAILII. We understand from BAILII that confusion is occasionally caused by a different date being given in the covering email to that on the face of the judgment, or by the re-use by the court of a previous front page without amending all the details.

BAILII has two lists for each court: of recent decisions and recent additions. Recent decisions go back about three months. Recent additions are what BAILII has received in the last few weeks but may be up to a number of years old.

3.3.1 Delays between date of hearing and date of publication of judgment

We found that judgments often omit the date of the hearing itself, and/or the date the judgment was delivered, so that we were not able consistently to calculate the time lapse between that date and the date the case might appear on BAILII. The following examples are therefore illustrative only.

The longest delay between a recorded hearing date (March 2014) and publication (February 2016) that we found was two years in the case of ***AD & AM (Non-Accidental Injury: Welfare) [2014] EWHC 4899 (Fam)*** where the mother was charged with grievous bodily harm, causing life-changing injuries to the child. Similarly, the judgment in ***Kent CC v D & Ors [2014] EWFC 59*** did not appear on BAILII until nearly two years after the hearing. In the Kent case, there were associated criminal proceedings involving three families and charges of sexual offences, forced drug taking and trafficking. The delay in these two cases accord with para 19 of the guidance, that the judge should have regard to any associated criminal proceedings in deciding whether and when to publish.

Other lengthy intervals, of about a year between hearings and publication, were found in the following cases:

⁶¹ Transcript at <https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/fjc/conference-debates/debates/family-justice-council-8th-annual-fjc-debate/>

***NCC v L & Anor* [2014] EWHC 4828 (Fam)** – this was a decision about habitual residence of a Latvian child. There is no explicit indication in the judgment as to why it was in the public interest to publish it, nor why it was delayed.

***Re Y (A Child) (Private Law)* [2014] EWHC 2815 (Fam)** – this was a complex contact dispute. Again it is not explicit in the judgment why it was thought appropriate to publish, nor why it took so long.

***Re AA (A Child)* [2015] EWHC 1178 (Fam)** – this was a serious medical treatment case where publication may have been delayed pending the outcome of surgery, and therefore considered appropriate to delay under para 19, for nearly a year.

In the survey of judges that we undertook for this project, a suggestion was made that a delay in publication might reduce the risks of identification.⁶²

3.3.2 Period between judgment being sent to BAILII and publication

Almost all written and transcribed judgments have a date added either to the heading or to the end of the published judgment. By comparing this date, entered by the court, with the date that can be found through the metadata in the Word document and/or the webpage, we were able to see that BAILII customarily post judgments on their website within two days of the court's publication date. If the court uses the recommended template, the correct date of publication can be seen via the metadata, but where the standard template is not used, or where a local variation of it or the judge's own template has been used, then the metadata will not necessarily show the correct date of publication.

We understand from BAILII that, despite its resource limitations, they are normally able to post judgments shortly after receipt.

Some dates were confused, for example ***Re C (A Child)* [2014] EWCC B58** (Fam) shows two different dates - February 2014 at the top of the page and April at the end.

If BAILII is to serve as an accurate record of *current* proceedings in the family courts, it may be misleading for some cases that are several months old to appear as if they were contemporaneous. A recent example of readers of BAILII being misled is *Re W* where the earlier High Court hearing (***Re W* [2016] EWHC 2437 (Fam)**) appeared on BAILII after the Court of Appeal had overturned it (***Re W (A child)* [2016] EWCA Civ 793**). There was some accidental inaccuracy in press coverage of the 'new' case on BAILII because there was no link to the Court of Appeal judgment in the Family Court judgment and a note alerting the reader to the appeal judgment

⁶² Chapter 6

appeared at the end of the judgment not the beginning.⁶³ What happened here was that readers of the case on BAILII (and subsequently readers of the press coverage) were given the impression that the outcome for the child was that his grandparents had succeeded in stopping an adoption, whereas in fact the adoption order was eventually made (***Re W (Adoption: Contact)*** [2016] EWHC 3118 (Fam))

3.4 Level of court at which the case was heard

Judgments delivered in the Family Court (previously the family proceedings courts and county courts) do not set precedent and are not binding on any other court. This is why they are not officially reported. It is therefore important for public legal education purposes for readers of BAILII to know whether the case they are reading was heard at that level or in the High Court, where it will be binding on the lower Family Court and strongly persuasive authority in later High Court cases.

One of the journalists we spoke to specifically referred to the difficulty in understanding from reading BAILII what status different courts and judges had.⁶⁴

There was inconsistency in recording whether cases were heard in the High Court or not, despite the fact that BAILII has separate categories in its database for:

- England and Wales High Court (Family Division) Decisions
- England and Wales Family Court
 - England and Wales Family Court (High Court Judges)
 - England and Wales Family Court (Other Judges)

Cases heard in the High Court are given names consistent with traditional legal citation, i.e.:

Name of case [year] EWHC⁶⁵ number of case (Fam) – known as the neutral citation

And

Name of case [year] law reports number and series

Where a High Court judge sits in the Family Court, cases are given a neutral citation only as follows:

Name of case [year] EWFC⁶⁶ number of case

⁶³ Some newspapers corrected this on being informed; some did not. See 'Re W – the wrong end of the stick' The Transparency Project, 7 October 2016 at <http://www.transparencyproject.org.uk/re-w-the-wrong-end-of-the-stick/>

⁶⁴ Chapter 7

⁶⁵ England and Wales High Court

These numbers are assigned by the court before being sent to BAILII. BAILII are instructed that if a Family Court case is sent to them without a number, they are to add their own B number and post the judgment under Family Court (other judges). The citation for a Family Court case heard by a circuit judge is therefore:

Name of case [year] EWFC B number of case

The 2014 guidance applies to High Court judges whether they are sitting in the High Court or as section 9 judges in a family court, hence they appear in two of the categories in the BAILII database. It was not always clear in the published judgments at what level the judge was hearing the case.

For example, in ***Re HA (A Child) (No.2) [2015] EWHC 1310 (Fam)***, the matter is before Baker J (a High Court judge) but the heading states 'In the Bristol Family Court'. An earlier linked hearing before Baker J, ***Bristol City Council v AA & Anor [2014] EWHC 1022 (Fam)***, is stated to be in the High Court. Both judgments appear in the High Court BAILII database and have High Court citations. The case featured complex international jurisdictional issues so was presumably heard throughout in the High Court.

Another example is ***Re L (A Child) [2015] EWFC B188***, a case clearly held in the High Court (by a circuit judge sitting as a judge of the High Court) yet posted in the Family Court database with a family court citation – 'B'. This was an application for leave under a Children Act s 91(5) order that had been made in a previous High Court hearing.

We found nine family court cases that had similarly been posted in the incorrect database. We also found five High Court cases that had been given B numbers, for example ***Re P (A Child: enforcement of contact order) [2015] EWHC B9 (Fam)*** where HHJ Lesley Newton (a circuit judge) was sitting as a High Court judge. We understand that if no number is attached by the court, BAILII will create (what is intended to be) a temporary B number.

However, in ***Re J and E (Children: Brussels II Revised: Article 15) [2014] EWFC 45***, where HHJ Bellamy is described as sitting as a 'Deputy High Court Judge⁶⁷ in the Family Court' at the Royal Courts of Justice, the case citation on BAILII has no B prefix to EWFC.

A case included in BAILII's High Court list, ***Re M (A Child) also known as H v S (Disputed Surrogacy Agreement) [2015] EWFC 36; [2016] 1 FLR 723*** has a Family Court number, although the transcript states that

⁶⁶ England and Wales Family Court

⁶⁷ We think this is an error as circuit judges do not sit as deputies.

Russell J was sitting in the High Court and it is reported in a series of law reports (hence the two different case names).

We found that in 33 cases, the court was not named. Of these, a local authority was named in 18 cases, so the omission of the court appears to be accidental. An intention of blanket anonymisation seems likely in ten cases where the local authority was also not identified,⁶⁸ and seven other cases where there was no local authority involvement. The judge was always named. We are not aware of any Family Court judgments that have been published without the name of the judge, although some who participated in this research pointed out that naming the judge always gives a clue to the locality and might prevent effective non-identification.⁶⁹ In one instance, a judge's name was inadvertently omitted from one version of the judgment on BAILII, which led to press stories attributing sinister motives of secrecy to what had been a technical error.⁷⁰

3.5 Use of the rubric

The 2014 guidance states at para 21 that, unless the judge provides expressly to the contrary, 'every published judgment shall be deemed to contain the following rubric':

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the child and members of his family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

We found that most Family Court judgments appearing on BAILII had this clause set out at the head of the judgment in red. Many High Court judgments, including those given by the President, do not contain a rubric because they are handed down in open court. There were 52 judgments in our sample that were stated to be held in open court, and no rubric was needed because issues of identification had been considered when the judgment was written.⁷¹ Our analysis shows that there was no rubric attached to a further 207 cases where there was no statement regarding open court, many of which appear to have been held in private and would be deemed to contain the rubric. Unless the 2014 guidance is immediately to

⁶⁸ Chapter 4

⁶⁹ Chapter 6

⁷⁰ Paul Magrath, Julie Doughty and Sarah Phillimore. 'Transparency – the strange case of the judge with no name' [2015] 45(4) *Family Law* 422-425

⁷¹ See explanation in *Re X (A child) (no. 2)* [2016] EWHC 1668 (Fam)

hand, however, it might not be entirely clear to readers and commentators that this warning is standard.

Generally, we found a variety of different rubrics used, some of which were adaptations of the standard rubric to fit the circumstances of the case.

Others ranged from:

In confidence (HHJ Carol Atkinson in five cases)

to

The Judge hereby gives leave for this judgment to be reported on the strict understanding that in any report no person other than the advocates or the solicitors instructing them may be identified by name or location. In particular the anonymity of the child and the adult members of his family must be strictly preserved. If reported, it shall be the duty of the Law Reporters to anonymise this judgment (**X v Y & Anor [2014] EWHC 2147 (Fam)**)

Some judges have devised their own standard rubric which they adapt as appropriate, for example:

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment no person other than the advocates or the solicitors instructing them and other persons named in this version of the judgment may be identified by name or location and that in particular the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court. (**Baker J**)

This judgment was delivered in private. The judge has given leave for it to be reported on the strict understanding that (irrespective of what is contained in the judgment) in any report no person other than the advocates or the solicitors instructing them and any other persons identified by name in the judgment itself may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved. (**HHJ Bellamy**)

It is important that suitable variations to the standard rubric can be made in individual cases and the reasons for doing so may not need to be set out for the public, but omitting the rubric altogether may be misleading.

3.6 Written and transcribed judgments

The 2014 guidance requires judgments to be sent to BAILII where a written judgment has been produced or has been transcribed from a recording. This presents two issues: whether the judge has typed a judgment in a publishable form, which may be time-consuming and not needed by the parties, and secondly whether the cost of ordering a transcription is justified. We found that of the 857 judgments in the two-year period, 551

were written by the judge and 296 were written by a transcribing service from a recording.

We found comments or directions by the judge about transcription in 91 cases where there were issues to be determined about how this would be paid for.

3.7 Types of cases published

Table 7 shows the number of cases published within each category in the 2014 guidance.

TABLE 7

Para	Description	No. of judgments
16	Public interest (in the judge's view)	307
17 (i)	Finding of fact	127
17 (ii)	Care order	140
17 (iii)	Placement and adoption orders	214
17 (iv)	Secure accommodation	11
17 (v)	Serious medical treatment	19
17 (vi)	Reporting Restrictions	16
18	Party application	3
	TOTAL	837

We have categorised any case that did not fall within paras 17 and 18 as falling under para 16. Therefore of 837 cases, 530 (about two-thirds) were published because they fell within the President's envisaged areas of public interest and about one third because the individual judge believed that it would be in the public interest to publish the judgment although it fell outside paras 17 and 18.

Where applications for care orders and placement orders were being heard together we categorised these as placement orders. Some abduction cases fall within the inherent jurisdiction and others under the Hague Convention or a Brussels II dispute. We have therefore included all abduction cases because these are heard in private.

TABLE 8 shows the type of case that the judgments were about, in order of frequency. The categories do not correspond exactly between Table 7 and Table 8 because, for example, a finding of fact hearing may be either part of an application for a care order or for a child arrangements order.

TABLE 8

Case type	Number of judgments
Care applications	289
Placement order applications	181
Child arrangements order	66
Abduction	50
Inherent jurisdiction	35
Permission to remove from jurisdiction	22
Adoption	22
Leave to oppose adoption	19
Serous medical treatment	18
Parental order	14
Revoke placement order	14
Committal	13
Jurisdictional dispute	13
Appeal	12
Reporting restrictions	11
Discharge care order	10
Secure accommodation/deprivation of liberty	9
Reopen a finding of fact	5
Removal of child under interim care order	5
No contact	5
Schedule 1 Children Act 1989 application	4
Declaration of parentage	3
Human Rights Act application	3
Miscellaneous	3
Emergency protection order	2
Register foreign order	2
Female genital mutilation protection order	1
Forced marriage protection order	1
Passport order	1
TOTAL	837

3.7.1 Judgments published under para 16 because of public interest

In weighing up Article 8 and Article 10 interests in any decision about publication, including under paras 17 and 18, the judge will always have the public interest in mind. Under para 16, however publication is not required by categorisation in the guidance nor following an application. Where a judgment published on BAILII did not fall within paras 17 and 18, it would have been sent in because the individual judge decided it should be published. We began our analysis by attempting to identify the details of the

public interest elements in each of these cases but refined this method when we realised that it would be more meaningful to formulate some broad groups of reasons for publication. Sometimes the reasons were explicit; at other times we had to interpret these from the content of the judgment. To that extent then, we should emphasise that what we may have identified as a public interest element, may not accord with what was in the judge’s mind. This raises a question about the subjectivity of para 16. If the case did not come within paras 17 and 18 but the judge decided it was in the public interest (after weighing up articles 8 and 10) to publish, one would expect those reasons to be clear in the judgment and we therefore hope that we have been reasonably accurate in identifying them for the purposes of this study.

Table 9 shows the para 16 cases according to the groups we used, namely:

1. Public interest element spelt out by the judge
2. Complex, developing or controversial areas of law - in category 2, we included cases that featured: international issues; fostering for adoption; threshold regarding future emotional harm; non accidental injuries; conflict between child and guardians’ views; intractable contact disputes; lack of safe placements.
3. Professionals criticised or held to account
4. Legal aid issues
5. Point of law
6. Death of a child known to children’s services
7. Media interest
8. Punitive orders (committals or wasted costs)
9. Hostility, distrust or loss of partnership working
10. Local authority case not made out, refused or overturned
11. Vulnerable parents

TABLE 9

Category of public interest	No.
Explained by judge	28
Complexity	197
Accountability	15
Legal laid	14
Point of law	13
Death of child	12
Media	12
Committals etc.	9
Loss of trust	3
LA case	2
Vulnerability	2
TOTAL	307

3.7.2 Applications for publication by a party to proceedings under para 18

It appears that successful applications for a judgment to be published are almost unknown. However, this may be because a para 18 application is not always explicit on the face of the judgment.

The three cases we found related to an interim care order; a child arrangements order; and a female genital mutilation protection order respectively and were therefore outside the para 17 categories. In the first of these, the judge responds to a request by the local authority's lawyer for a transcript to be ordered by stating that this comes within para 18 and should be paid by the local authority.⁷² The second is a short judgment after a lengthy directions hearing where the mother's lawyer has indicated she wants a transcript and the judge (Holman J) gives permission, but adds that this will be at her own expense, and that if one is obtained it must be put on BAILII.⁷³ In the third of these cases there is an interesting exchange in the transcript between the lawyer for the mother and the judge (Holman J again) in which the lawyer begins to ask for a direction for transcript at public expense but Holman J immediately agrees because this is one of the earliest orders made under the new Female Genital Mutilation Protection Act. Holman J then adds:

I will automatically put it on BAILII, because my personal view is that, if any judgment is transcribed for any purpose, it should be placed on BAILII. It is not for judges to decide what is or is not in the public interest. As far as I am concerned, if a judge says it and it is available, it is in the public interest that the public should be able to read it if they wish. If it bores them to tears, that is nothing to do with me.⁷⁴

Here, Holman J encapsulates the spirit of the 2014 guidance in the sense that if a transcript exists it should be published. However, he perhaps goes further in assuming that *any* transcript must be suitable for publication – because not all judges deliver their judgments with this possibility in mind.

3.8 Conclusions and recommendations.

The 2014 guidance has resulted in hundreds of family court judgments being publicly available in an anonymised form. While we have highlighted some inconsistencies in style and accuracy, these could be avoided in the future by reviewing the guidance and working toward a common understanding of the template.

The rate of publication started slowing in 2015 and further analysis of 2016-2017 figures may indicate whether this is a continuing trend. Some judges

⁷² *Doncaster MBC v DA* [2014] EWCC B14 (Fam)

⁷³ *AL v DA* [2014] EWHC 2632 (Fam)

⁷⁴ *Re E (Children) (Female Genital Mutilation Protection Orders)* [2015] EWHC 2275 (Fam)

in our survey, Chapter 6, mentioned that they had started sending in fewer rather than more judgments.

The figures set out in this section indicate that some of the busiest courts and judges were regularly sending judgments to BAILII in the two year period. These include: Newcastle; Leeds; Manchester; Reading; and the London and Essex areas. The judgments appearing on BAILII do therefore represent, to an extent, practice over the country. However there are some anomalies, where individual judges are sending a relatively high number of their cases in and others are sending few, or none at all.

While a great deal of information about the family justice system can now be found in publicly available judgments on BAILII, this presents only a limited view of the work of the courts as a whole, because of patchy application of the guidance. We are not able to make an accurate estimate of the proportions of cases that do and do not appear, nor the reasons behind this. We do have some indication from judges themselves, in Chapter 6. Rather than publication becoming accepted as routine, it appears to be increasingly exceptional. This may have happened because of the hiatus in what was originally envisaged as a rolling programme of reform.

We suggest that one way of prompting lawyers and judges to think about publication as a 'starting point' would be to add a section to the current Case Management Order template at the final hearing stage (or earlier if appropriate) along the following lines:

Guidance applies under para 16/17/18;

Any compelling reasons not to publish;

If publishing, arrangements for anonymisation.

Recommendations:

The correct status of the judgment in the hierarchy of precedent should be made plain by the court when it is sent to BAILII.

Each judgment could contain a statement (or a link to an explanation) as to whether it is a Family Court case published for the purposes of transparency or a High Court case which may be an authority for wider application.

Confusion when a High Court judge is sitting in the Family Court or a circuit judge is sitting as a High Court judge could be avoided by the use of standard descriptions.

It would be helpful if reasons for deliberate delay in publication were set out at the end of the judgment, with any other directions about publication.

The template could be modified to show clearly the hearing date; the date of the approved judgment; and the date sent for publication separately at the top of the judgment.

Routinely adding a rubric to the judgments, rather than one being assumed to apply, would contribute to more consistency in anonymisation practice.

Applications by parties for publication should be noted in the judgment as having been made under para 18.

An addition to the standard Case Management Order form about applying the guidance in each case might lead to more judgments being published or, at least, provide an opportunity for it to be considered on a case by case basis as appropriate.

4 Anonymisation and identification

As noted by Bodey J in **X v X [2016] EWHC 3512 (Fam)** at [22], anonymisation allows the court to give more information to enable the public better to understand the court's processes and thinking, whereas non-anonymisation provides a much reduced amount of what would otherwise be helpful information for the public to understand the court's workings. Family court judgments have traditionally been anonymised to the extent appropriate for the official law reports, although the bar against identification under s 97 Children Act 1989 ceases when the case has finished.⁷⁵ There is no formal rule for naming a case – this was usually done by the law reporter. Recent practice, as the number of reports increased, is suggestive of an attempt to try to include a description to the law report such as: *Re B (A Child) (Care proceedings: Threshold Criteria)* [2013] UKSC 33, rather than merely *Re B (a child)*.

Now that many judgments are reported, but only on BAILII, the task of naming them will fall to the judge. There is variation in practice here, with some judges adding helpful descriptions, such as *P (A Child: enforcement of contact order)* [2015] EWHC B9 (Fam); *AD & AM (Fact-Finding Hearing) (Application for Re-Hearing)* [2016] EWHC 326 (Fam) and so on. Many cases names still lack any clue as to their subject matter, for example, *Re A (A child)* [2016] EWFC B6; *Re R (A Child)* [2016] EWFC B3; and so on. Names can change between the BAILII version and the law report, for example: *Re SO* [2015] EWHC 935 (Fam) reported on BAILII appears as *O v P* [2016] 3 Fam 333 in the official report.⁷⁶ Consistent practice in naming cases, including a description, would be helpful for practitioners as well as the public. The Incorporated Council of Law Reporting was consulted on proposals for a practice direction to this effect but none has been forthcoming.

The 2014 guidance states at para 20 that the children who are the subject of the proceedings, and other members of their family should not normally be named in the judgment approved for publication unless the judge otherwise orders, but that anonymity in the judgment as published should not normally extend beyond protecting the privacy of these children and adults, unless there are compelling reasons to do so. However, anonymisation in itself is not guaranteed protection against jigsaw identification.

There are serious questions about whether there is an increased risk of children and young people being identified as being subject to court

⁷⁵ *Clayton v Clayton* [2006] EWCA Civ 878; [2006] Fam. 83

⁷⁶ See also, [2016] 3 WLR 716 and [2016] 1 All ER 1021.

proceedings since 2014, and the effect on them of knowing their case was publicly available. These are being investigated separately by Dr Julia Brophy.⁷⁷ In our study, we looked at a 'snapshot' level of identifying details in cases and, secondly, tried to identify examples of careful anonymisation, which might be helpful in informing future good practice, linking with Dr Brophy's recommendations.

4.1 Failures in anonymisation

However, shortly after the fieldwork began, we found instances of failure to redact identifying details in some judgments that were already online. It should be emphasised that BAILII has no editorial control over what it publishes. The expectation is that staff at BAILII who receive the judgment from the court will automatically place it on the site in good faith, without checking the content. Any errors or omissions are therefore part of the information that is sent to BAILII which, under their contractual arrangements with the MoJ, they are expected to accept without question.

We encountered two problems about anonymisation early in our study.

1. Finding some judgments that had not been fully redacted but had remained on the BAILII site for some time (apparently unnoticed)

We should emphasise that we were not searching for errors in anonymisation when reading judgments, and those we noticed were by chance. These errors were not speculation about potential jigsaw identification but simply a name being left in the judgment by mistake.

2. Being notified of a new judgment with errors in it

On two occasions early in our study we were notified by professional contacts of new judgments appearing on BAILII which appeared problematic. One of these was completely unredacted and one still contained a name of the future carer of the child. BAILII was contacted direct and took immediate remedial action.

We raised these emerging findings with the MoJ, following which the President clarified the process of dealing with such events, at paras 31-32 of his judgment in ***Re X (A Child) (No 2)* [2016] EWHC 1668 (Fam); [2016] 4 WLR 116**, as follows:

In the course of her research, Dr Doughty identified a number of family judgments on BAILII containing identifying details. She brought her concerns to HMCTS on 18 May 2016.

32. HMCTS responded with an email to Dr Doughty sent, as it happened, on

⁷⁷ fn 48 above

16 June 2016. The email, which I had seen and approved before it was sent, was as follows:

"The judgments identified as part of your research have been removed from BAILII and will, if the judges concerned think appropriate, be amended and re-published. In those cases where the judge has retired, the judgments have been referred to the President of the Family Division.

Judges are responsible for anonymising and sending their judgments to BAILII. Judges may ask for the assistance of counsel, solicitors or others in the task of anonymising the judgment but the responsibility for checking the judgment and sending it to BAILII is the responsibility of the judge and the judge alone.

HMCTS takes the security of personal data very seriously. Where a sensitive data breach is reported, our specialist Information Assurance and Data Security Team are notified and a rigorous impact assessment is conducted. If, as part of that process, it is considered to be high impact then the ICO is informed.

In terms of work to be done now, HMCTS is reviewing its internal guidance to judges' clerks on the protocols for releasing judgments to BAILII, and is currently discussing this with the President of the Family Division to ensure it aligns with judicial guidance. The President of the Family Division has indicated that he intends to issue fresh guidance on the anonymisation of judgments following the publication of research on the issue which is expected in the summer. He is likely also to publish fuller guidance to judges on sending judgments to BAILII and taking them down from BAILII.

We have made improving the process for removing judgments a priority. Currently, if BAILII is notified of a potential error and the judgment needs to be removed at short notice, they have specific contacts in the Judicial Office who will facilitate that process. Work is also underway to make this process more efficient by clarifying the roles and process within the Judicial Office and HMCTS for contacting judges to consider taking judgments down from BAILII, making amendments and re-publishing them.

While we work to put these new arrangements in place if, as part of your research, you find any other judgments which you believe to contain an error please contact the Judicial Office press office on 0207 073 4852 and they will ensure that the judge responsible for the judgment is contacted. Where a judge cannot be contacted, or has retired, the matter will be referred to the President of the Family Division."

I draw attention in particular to the second paragraph and to the final paragraph.

Further to the email of 16 June, we wrote to the Judicial Press Office on 23 September with a list of what appeared as possible errors we had found when scanning cases on BAILII. Most these had occurred in the early months of implementation of the 2014 guidance.

We are aware that occasionally cases are still being published with errors that judges, and that the Press Office and BAILII deal with these promptly. The Transparency Project asked the Court Service about procedures in July 2016, when they were advised that new guidance was being drafted.⁷⁸

We understand from BAILII that about 70% of requests for judgments to be removed are made because of inadequate anonymization; about 20% where it was not actually intended to have the judgment published at all, so sent in error; and the remainder where the wrong, unredacted version was sent. These are informal estimates. BAILII can usually deal swiftly with cases in the first and third categories, especially when judges have made their out-of-hours contact details available. However, the second category is more complex as they are asked to provide data about views and downloads. When asking views of judges for this project, we included a question about whether any judgments of theirs had been taken down. The judges who replied on this point thought that BAILII was very efficient in responding to any requests. Several, however, had reservations about the capacity of the court service to ensure full and effective anonymisation in every case.⁷⁹

4.2 Jigsaw identification

Accidentally leaving identifying details in a case is rare, but sometimes enough detail remains in even a carefully written judgment to make it possible to identify a child or family. For example, in July 2015, MacDonald J went to considerable lengths to anonymise and protect a family who were at extremely serious risk from the father, who was serving a prison sentence for attempted murder. As related in ***H v A (No. 2) [2015] EWHC 2630 (Fam); [2016] 2 FLR 723***, the Press Association journalist who read the BAILII judgment was able to locate the whereabouts of the family quite easily by internet searches and alerted the judge. The judgment was taken down from BAILII and rewritten accordingly. This case presented a dilemma for the judge who believed that unusual facts in the case (in this instance that led to the rare order of revoking parental responsibility) are such that publication is in the public interest, but it is the very nature of the facts (especially those relating to associated criminal proceedings) that might make the family easier to identify.

In view of the separate research being undertaken on the aspect by Julia Brophy, we did not explore the potential risks of identification in depth. We formulated three broad categories for the level of detail that was contained in the judgments that might possibly lead to a reader being able to identify the family. These were:

⁷⁸ At <http://www.transparencyproject.org.uk/the-state-of-transparency-what-happens-when-anonymisation-safeguards-fail/>

⁷⁹ Chapter 6

1. Careful anonymisation and a low risk of a child being identified – 213 cases
2. Some unnecessary specific details given – 244 cases
3. Child's full date of birth and/or other identifying details given - 380 cases.

Our research questions did not require us to read every case in detail and we are not in a position to offer any view on why some judgments contain more information about the individual facts than others do. Nevertheless, we hope that this indication of the variations in practice might assist in assessing the current situation.

We recognise that this is a very complex area, because there are tensions between privacy and protection, on the one hand, and the need for fully reasoned judgments and the principles of open justice, on the other. The lack of any practical guidance on anonymisation procedure to date has meant that the system's capacity to anonymise as consistently and capably as possible has not yet been tested. We look forward to developments further to the ALC report in this regard.

4.3 Naming public authorities and expert witnesses

The 2014 guidance states (para 20) that public authorities and expert witnesses should be identified in the published judgment unless there are compelling reasons not to do so. Anonymity should not normally extend beyond the families concerned.

There is no definition of 'expert witness' in the 2014 guidance, but this term could include professional social work witnesses employed by local authorities and Cafcass. However, we found that although it was standard practice to name expert witnesses appointed by the court, local authority or Cafcass social workers were not routinely named.

4.3.1 Local authorities

We found 40 judgments when care orders had been determined where the name of the local authority was omitted from the judgment. The reason was not always discernible, but presumably to reduce the risk of identification. However, in 19 of those cases, the names of the local authority social workers were included, which seems counter to that aim. In some instances, the omission of the local authority seemed accidental, because there was other information in the judgment about the locality.

Some judges were explicit about local accountability. In ***Re TM and TJ (Children : care orders) [2015] EWFC B83***, HHJ Wildblood said:

I will release this judgment on BAILII. I know that it will be picked up at least by the local press and I consider that people in South Gloucestershire need to know how their Local Authority is functioning.

and in a complex case, ***Chd (A Child: Care and Placement Orders) [2014] EWFC B125***, where some professionals were praised and others criticised, he said.

I am releasing this judgment for publication because of the procedural and evidential deficiencies that are revealed in this case. Because the case has had to be adjourned part heard I have anonymised it fully.

4.3.2 Individual social workers

Local authority social workers were named in 48 judgments. The reasons for doing so were not always given, although this departed from normal practice. Social workers were named for the purpose of being publicly praised in three judgments; in two cases, unnamed social workers were praised. Social workers were named and criticised in four. It was more likely that the local authority would be criticised and the social workers not named – this happened in six cases. In some cases of extremely poor practice the social workers were anonymised.⁸⁰

Occasionally, we found some discussion about the issue. For example, in a case that received media attention,⁸¹ ***Medway Council v M & T (By Her Children's Guardian) [2015] EWFC B164*** HHJ Lazarus said that she had directed Medway Council to file statements from the Head of Service Looked After Children and Proceedings, and from the Principal Reviewing Officer at Medway Council. She had been asked to anonymise the names of social workers, the Head of Services and the independent reviewing officers involved, as those named were no longer in Medway's employment and have not therefore been notified of these proceedings and the issues raised that involve them. In those circumstances, she decided that part-anonymisation was a reasonable course to take, on condition that Medway Council ensured that it used its best endeavours to bring this judgment to their attention. She referred to ***Re A (A Child) [2015] EWFC 11***, where the President had anonymised the identities of social work professionals. As she put it, 'Part-anonymisation protects their identities but identifies them sufficiently that they and Medway Council understand to whom I refer.'

Re A (A Child) [2015] EWFC 11 was a more controversial case than *Medway*. The President heard this case in Middlesbrough Family Court and described it as 'an object lesson in, almost a textbook example of, how not to embark upon and pursue a care case' [7]. It was featured in the

⁸⁰ For example, *Re AS (unlawful removal of a child) [2015] EWFC B150*

⁸¹ For example, B Farmer, 'Mum and daughter paid £40,000 damages after council breaches human rights by unlawfully taking girl into care' *Daily Mirror* 21 October 2015

professional social work media because the President issued guidance to social workers on range of practice matters.⁸² Mainstream media coverage centred on the issue of the father's association with an extreme political party.⁸³

In *Re A*, the President was explicit in his reasons for anonymising some staff:

It will be noticed that I have, quite deliberately, not identified either SW1 or SW2 or TM, though their employer [the local authority] has, equally deliberately, been named. There is, in principle, every reason why public authorities and their employees should be named, not least when there have been failings as serious as those chronicled here. But in the case of local authorities there is a problem which has to be acknowledged.

Ultimate responsibility for such failings often lies much higher up the hierarchy, with those who, if experience is anything to go by, are almost invariably completely invisible in court. The present case is a good example. Only SW1, SW2 and TM were exposed to the forensic process, although much of the responsibility for what I have had to catalogue undoubtedly lies with other, more senior, figures. Why, to take her as an example, should the hapless SW1 be exposed to public criticism and run the risk of being scapegoated when, as it might be thought, anonymous and unidentified senior management should never have put someone so inexperienced in charge of such a demanding case. And why should the social workers SW1, SW2 and TM be pilloried when the legal department, which reviewed and presumably passed the exceedingly unsatisfactory assessments, remains, like senior management, anonymous beneath the radar? It is Darlington Borough Council and its senior management that are to blame, not only SW1, SW2 and TM. It would be unjust to SW1, SW2 and TM to name and shame them when others are not similarly exposed.

CG [the guardian] stands in a rather different position. I have expressed various criticisms of her ... But it would be unfair and unjust to identify her if others are not. [102-104]

In other situations, judges have been explicit about naming individual social workers. For example, HHJ Mark V. Horton named members of local authority staff in a case where he sent three judgments to BAILII. He said in ***Re A, B, C, D & E (Final Hearing) [2015] EWFC B186*** that the case would receive publicity, so he was taking care to protect the identity of the family in the version to be placed online. He also specified that he wanted this version to be sent to the designated family judge, the director of children's services, and the professional bodies of the four individuals. This is the only case before HHJ Horton that we found published in the two year

⁸² L Stevenson 'England's top family judge criticises social workers for acting as 'guardians of morality' *Community Care* 18 February 2015

⁸³ 'Darlington Council wrong to take child from EDL father' BBC website 17 February 2015 <http://www.bbc.co.uk/news/uk-england-tees-31509391>

period of our study, and only six judgments in total appear from Portsmouth Family Court. (We found only one other published judgment involving Hampshire County Council; this was in the High Court and featured no criticism of the local authority.) The decision by HHJ Horton to publish these judgments was therefore exceptional and the case did receive publicity, as he had predicted.⁸⁴

Publishing these judgments may well have been in the public interest and helped to improve practice and make authorities accountable. On the other hand, there is an absence of information on BAILII about Hampshire's practice in other cases. Cases which feature poor practice tend to receive more media coverage than those in which judges praise practice, so even if BAILII contained several cases where practice had been good, it is unlikely they would all feature in the press. However, this focus on one case in BAILII makes it an isolated example, without much context to help the reader understand the family justice system.

4.3.3 Independent expert witnesses

Independent experts were rarely anonymised, and this only happened when all other individuals were also anonymised. Expert witnesses, especially psychiatrists, were the target of much of the media attention to 'secret' courts in the years preceding the 2014 guidance. We would therefore expect named experts to be of particular interest to the media.

We found only a small number of judgments that featured expert witnesses in a negative light.

In ***Re MB (Expert's Court Report) [2015] EWFC B178***, all parties and witnesses were anonymised apart from a psychologist (now deceased), who the judge suggested the guardian should report for unprofessional conduct. The same expert was named in an earlier case, ***Re JC (Care order) [2014] EWFC B185*** where his evidence was rejected as it had been commissioned in breach of the relevant procedure rules. In the earlier case, all expert witnesses were named but not the social worker or guardian.

In ***C City Council v T & Ors [2014] EWFC 32***, HHJ Cleary was disappointed that two clinicians, on whose evidence the local authority had taken the proceedings, subsequently failed to co-operate with the local authority although their reports were before the court and their opinions had given the local authority no choice as to whether to proceed. However, their evidence was wholly contradicted by other expert witnesses and found by the judge to be mistaken. All the experts are named.

⁸⁴ J Cooper, 'Judge names social workers and recommends disciplinary investigation' *Community Care* 23 November 2015; 'Children's social services staff "altered report"' BBC News website 23 November 2015 <http://www.bbc.co.uk/news/uk-england-hampshire-34898799>

The process of instructing an expert to produce a report without meeting the mother and in 'a terrifyingly tight timeframe' is criticised by Pauffley J in **Re NL (A Child) (Appeal: Interim Care Order: Facts And Reasons) [2014] EWHC 270 (Fam); [2014] 1 WLR 2795**. She said that it was unacceptable for an 'independent' expert to be instructed in a way that led her to conduct a 'scant inquiry in preparation for a hearing which was to have such wide ranging consequences for the child' [36]. This expert was named in that judgment and also in six others in our sample, where her reports were accepted.

There is interesting comment in a judgment where the eligibility of an expert for funding was questioned by the Legal Aid Agency, **Re AB (A Child: Temporary Leave To Remove From Jurisdiction: Expert Evidence) [2014] EWFC 2758**

Further analysis of the use of experts, now publicly available from some courts, may be of interest, but the numbers have of course decreased since the Children and Families Act 2014 restricted the circumstances in which they are instructed. This may no longer be as newsworthy a topic as it was before the 2014 guidance.⁸⁵

4.3.3 Omitting the name of the court

The geographical location of the court was omitted in 33 cases.⁸⁶ The judge was always named, but 18 of these cases had a High Court judge sitting in the family court, so the locality would not be immediately traceable. In some of these cases, the rubric stated that localities should not be identified. In other cases, omission of the court name may have been accidental. For example, in **Re A (care order with placement at home) [2014] EWFC B196** the name of the court is missing but the local authority is named.

4.4 Conclusions and Recommendations:

When read together with the concerns some judges still have about effective anonymisation and minimising jigsaw identification, these findings suggest that training and/or guidance on both aspects of publication is urgently needed. Since who undertakes the task of anonymisation varies, such guidance and training may need to extend beyond the judiciary.

The seriousness and likelihood of risks of identification, especially with social media, are explored in the reports by Brophy and colleagues which form the basis of the ALC report published in 2016.⁸⁷ This work can be drawn on to inform safer publication.

⁸⁵ Discussed in Chapter 5 below.

⁸⁶ See 3.4 above.

⁸⁷ fn 18 and 48 above

With regard to being notified about errors, HMCTS appears takes a different view from that which would be taken by the Information Commissioner or a regulator if, for example, a lawyer or a social worker erroneously posted such identifying details on a website. We note elsewhere in this report that court users are not necessarily being fully informed about the possibility of their case being published on BAILII. This raises a question as to how aware parties are that if their personal details escape, they will not be told this has happened.

Recommendations:

A new practice direction could set out best practice on effective anonymisation, and how this will be undertaken in each case as appropriate, in accordance with the reasons that the decision was taken about whether to publish.

This practice direction could also provide guidance on using publication for the purpose of calling public bodies, other organisations, and professional individuals to account, so that those organisations and individuals will be better informed about what to expect regarding publication.

The practice direction could also give guidance on the naming of anonymised cases, including the use of single and double initials, and on descriptors, so that cases are consistently named in BAILII and the law reports.

5. Media representation of family court cases

The President has emphasised that it is not the role of judges in family courts to exercise any kind of prior restraint or editorial control over the way in which the media reports information which it is lawfully entitled to publish, nor is it their function to legitimise 'responsible' reporting.⁸⁸ However, he and other senior members of the judiciary have expressed the hope for some years now that access to routine cases would allow a realistic picture of family courts to emerge, rather than attention being paid to only the most exceptional events. In 2011, the former President of the Family Division, Sir Nicholas Wall, described a 'huge credibility gap' between reality and perception, because of a lack of judgments in the public domain.⁸⁹ Increased access to the courts through publication on BAILII is intended to address perceptions of secrecy and enable the media to report on the courts' day-to-day work as well as more accurately on the most striking and newsworthy cases. We therefore wanted to enquire about both these aspects of transparency, as to whether the tone of media coverage had changed since the guidance took effect.

This research study does not encompass an in-depth analysis of the nature and quality of media reporting, but our aims include an evaluation of media responses to the guidance. We have therefore enquired about professional and stakeholder perceptions of developments. In Chapter 7, we report on ways in which journalists use BAILII. We were interested in ways in which BAILII might help the media to provide information on family justice, acting as 'the eyes and ears of the public'. In this chapter, we look, first, at the way cases were reported in the first two years of the 2014 guidance. Secondly, we look at press descriptions of 'secrecy' for a longer, five year, period between 2012 and 2016. The methods used include searches on NexisUK, a comprehensive newspaper database that provides full text access to most UK national and regional newspapers.⁹⁰

We did not search Nexis for coverage by local newspapers. In the light of comments from some of the participants in this study, it appears that the risks of identification and impact on individuals may be greater where a case is covered locally and that local reporting of Family Court cases is a direct result of the 2014 guidance. The type of case picked up by the national press is more likely to be in the High Court and would have been published

⁸⁸ Sir James Munby, 'Opening up the family courts', Speech at the Society of Editors Annual Conference, London, 11 November 2013

⁸⁹ HC Justice Committee, *Operation of the Family Courts: Sixth report of session 210-2102 Volume II* HC 518-II Ev 41

⁹⁰ <http://bis.lexisnexis.co.uk/products/nexis>

irrespective of the 2014 guidance. This can be seen in some of the examples below.

5.1 Press coverage February 2014- February 2016

Our search of UK national newspapers for the two years following the implementation of the January 2014 guidance showed **a total of 88 articles published about family court cases in the first year and 157 in the second year**. Most articles were published in the *Mail* and *Telegraph* newspapers, with an increase in the second year in numbers published in the *Mirror* and the *Independent*.

5.1.1 Cases that had a high profile in the national press

Our search found only 11 family court cases that were reported on by several newspapers in the two years following the 2014 guidance. There was a significant amount of coverage of three notorious cases which involved family court proceedings during this period. These were: the final judgment in the *Re P* 'forced caesarean' case;⁹¹ the Ashya King case, where a child who was a ward of court was taken abroad by his parents for medical treatment;⁹² and relating to the siblings of Poppi Worthington.⁹³

We list below eight other, less prominent, cases that were featured in several stories in a range of newspapers. Issues of genuine public interest did feature in these cases.

The cases that attracted coverage were:

1. *Re CC, DD, EE and FF (Children)* [2014] EWFC B170

This was a fact-finding hearing in care proceedings in the Family Court. There was potential public interest in the unusual situation of the care applications having been made because local authority intervention was necessary to protect the children from emotional harm caused by 'warring parents'. This is explained by HHJ Lea at the outset:

'... the children had become the weapons of choice for the parents. The Court heard evidence over 5 days last week. Anyone who heard that evidence would be rightly appalled at how 2 intelligent, well-educated and well-heeled parents, in their determination to fight each other, have failed to protect their children from the damaging emotional consequences ... the father has admitted behaviour towards his children in his efforts to hurt the mother which has been amongst some of the most damagingly abusive that I have encountered.' para 2

⁹¹ *Re P (A Child) (Enforced Caesarean: Adoption)* [2014] EWHC 1146 (Fam); [2014] 2 FLR 426 delivered in open court, subject to reporting restrictions.

⁹² *Re King* [2014] EWHC 2964 (Fam); [2014] 2 FLR 855

⁹³ *Re (W) (Children)* [2016] EWCA Civ 113; [2016] 4 WLR 39 is the most recent judgment. See 1.3.2. above.

Media coverage accurately reflected the judgment, without elaboration. The dates of birth had been redacted and risk of identification appeared low.

2. *Hertfordshire County Council v F & others* [2014] EWHC 2159 (Fam)

This is an example of a High Court judgment that was not reported in the law reports, so does not contain a point of law. It was an application for a placement order heard by Parker J in the High Court. Unusually, she gave the judgment in open court, with members of the press present, because the father had made false allegations about professionals involved in the case and posted these online, where he was attracting support for his position (as he had portrayed it). The judge attempted to correct this misleading account and the responses to it by setting out the real reasons for the orders made. Her judgment includes, for example, details about an assault the father had made on a social worker in court, with the baby present. As a consequence of her findings, Parker J was clear that there was to be no identification of anyone involved in the case, apart from the expert witnesses, all of whom she named.

An aspect of the case that caught the imagination of journalists was that the father refused to give the baby a name, but coverage was generally accurate reporting of the judgment. However, Christopher Booker in the *Telegraph* claimed to know the 'true' reasons behind the story and encouraged the father to appeal against a miscarriage of justice.⁹⁴ The fact that readers could quickly learn about the judgment for themselves on BAILII, without having to wait for weeks to do so, as in the *Re P* situation, may however have gone some way toward countering the views of Mr Booker and the father's other supporters in the public domain.

3. *Lincolnshire County Council v Father* [2015] EWFC 48

Prior to the 2014 guidance, a case like this, heard by a High Court judge in the Family Court, may not have been published at all, although Holman J may well have considered it in the public interest to do so, to avoid unhelpful speculation in a very high profile case, where the child's mother had been murdered by his father. He heard this case in public throughout, explaining at para 2:

I will deliberately generalise some identifying details and locations. I appreciate, however, that it would not be difficult to identify the child nor other people in the case by what is known as jigsaw identification,

⁹⁴ C Booker, 'The real story of the "baby with no name": A stressed father had to leave his £90k job after his son was sent for adoption - but the public were not told the full story' *Telegraph* 31 May 2014

particularly as there was a recent, long public murder trial. I direct that no report of this case or judgment may name or identify or depict the child concerned, nor his foster family, nor his aunt and uncle and their children, nor his grandparents, nor reveal the whereabouts of any of them. Anything said in this partially anonymised judgment (including the names of the professionals) may be freely quoted.

Unsurprisingly, there were many media reports of his judgment but these did not appear to add any extra pieces to the 'jigsaw'. An otherwise sensitive report by Emily Dugan in the *Independent* was, however, topped by a misleading headline about the child being 'told to live with killer's relatives'.⁹⁵

4. Lancashire County Council v ABC and others [2015] EWFC B124

This was heard by a circuit judge, HHJ Singleton, in the Family Court and is a fact-finding hearing that falls within para 17 of the 2014 guidance. The reason that it was picked up by the national press may be that the judge was very critical indeed about the lack of action and poor practice by the police and the local authority, that had unduly extended the duration of the child's suffering. However, the judgment also contains a great deal of detail of the abuse, much of which is laid out in the media stories. Although the judge is explicit about anonymisation, there are details of dates of birth, ethnicity and various locations, that might contribute to jigsaw identification.

Another troubling aspect of the media coverage is that the abusers are consistently described as 'foster parents', without explaining the vital fact (clear in the judgment) that they were not local authority approved foster carers but just a couple who the mother had met. An article in the *Telegraph*, however, is helpfully balanced by a statement from the local authority that this was an 'informal arrangement'.⁹⁶

5. Re D & R [2015] EWFC B198

In this care application to the Family Court, falling within para 17(ii) of the 2014 guidance, HHJ Bellamy criticises the local authority for leaving a vulnerable nine-year-old child residing with a relative, a known sex abuser, for two years. This is picked up by the media as newsworthy presumably

⁹⁵ E Dugan, 'Six-year-old boy whose mother was murdered by his father told to live with killer's relatives' *Independent* 15 June 2015

⁹⁶ B Farmer, 'Foster couple 'scalded girl and treated her worse than pet pig: Social services were warned by neighbours that the girl, now 12, was being mistreated, but took no action after an assessment a family court judge criticised as "superficial"' *Telegraph* 27 August 2015

because of the 'paedophile' element, but the coverage accurately reports the judgment, which does not appear to contain identifying or extraneous detail.

6. *A Local Authority v ZA* [2015] EWFC B58

This case received wide coverage, of which this headline in the *Mail* is typical:

'Toddler, two, is taken away from his parents and put up for adoption after health visitor complained about the amount of cigarette smoke in his home'.⁹⁷

Even more bluntly, the *Telegraph* claimed: 'Toddler put up for adoption because parents are heavy smokers'. The opening sentence is: 'A two-year-old boy has been put up for adoption because his parents are smokers'. A sentence does appear part way through that: 'Health and social services staff had also raised other concerns about the boy's care', but the article goes on to enlist an opinion from an anti-smoking organisation to add to the impression that smoking was the sole child protection issue.⁹⁸

In a 110-paragraph judgment in the Family Court, the smoke problem is mentioned as one of a list of 12 concerns that the local authority had. Moreover, the health visitor had not 'complained'; her evidence was amongst that of several professionals who had worked with the family. This extensive evidence was relied on by HHJ Pemberton to evaluate the welfare outcome for the child and his judgment sets out the history and extent of the health and social work support the family was receiving.

This case could have been reported as an example of efforts made by the local authority and health services to keep the family together. Instead, it is an example of cherry picking facts for a catchy headline. We did not find any news story that linked to the lengthy judgment on BAILII where the public could read that the parents' smoking habits, while adversely affecting the child's health, was by no means the only reason the care order was sought or made.

7. *Re A (A Child: Wardship: Fact Finding: Domestic Violence)* [2015] EWHC 1598 (Fam)

This wardship case in the High Court attracted publicity because Pauffley J concluded that a seven-year-old child had not been subject to more than

⁹⁷ C Brooke, 'Toddler, two, is taken away from his parents and put up for adoption after health visitor complained about the amount of cigarette smoke in his home' *Daily Mail* 1 June 2015

⁹⁸ M Evans 'Toddler put up for adoption because parents are heavy smokers: A judge recommends that a two-year-old boy is taken into care after social workers say his parents heavy smoking is causing him to suffer breathing difficulties' *Daily Telegraph* 1 June 2015

'sadness and transient pain' when assaulted by his father, and also referred to cultural differences in the use of physical punishment. A typical headline was: 'Immigrants who beat their children should get special treatment, says judge'.⁹⁹ The topic was arguably one of public interest, and some stories did give the wider context, for example, adding discussion by 'child protection experts'.¹⁰⁰

The issue about physical abuse of the child was only one of several before the court, and the judge found the father's behaviour overall to be harmful to the child.

8. *Re M (A Child) also known as H v S (Disputed Surrogacy Agreement)* [2015] EWFC 36; [2016] 1 FLR 723 and *S v H* [2015] EWHC 3313 (Fam)

(Although the first judgment has a Family Court number, it is reported in a series of law reports and the transcript states that Russell J was sitting in the High Court)

A reporting restrictions order was made by Russell J in February 2015, in view of a publicity campaign that had been undertaken by the mother in the case. Press coverage referred to the mother as 'gagged', 'unable to tell her side of the story', with constant references to 'the gay couple' to whom she was 'forced to hand over' the baby.

Associated Newspapers funded the mother to apply to vary the order. Holman J sat in open court in the subsequent hearing in October, during which an agreed order was redrafted which allowed the mother to speak to the *Mail* under restrictions not to identify the child or his family. Holman J set out the reasons for the original judgment which was, as he says, freely available on BAILII. There is now a hyperlink in the October judgment to the February judgment although not in reverse. In the final paragraph, Russell J had said:

'There will be a reporting restriction order to protect the identity of the child and her carers. This is put in place because of the posting on social media early in the proceedings. The judgment will be published in anonymised form.' [137]

⁹⁹ D Barrett 'Immigrants who beat their children should get special treatment, says judge: Mrs Justice Pauffley sitting in the High Court says "proper allowance" should be made for the way immigrants parents choose to discipline their children' *Daily Telegraph* 9 June 2015

¹⁰⁰ E Dugan 'Judge says 'cultural context' should be considered when investigating allegations of parental child abuse' *Independent* 9 June 2015

However, in contradiction to these judgments as they appear on BAILII, the *Times* quotes Holman J as saying that he 'did not know why she had made the order'.¹⁰¹

Of the eight cases outlined above, only one (*A Local Authority v ZA*) was, arguably, inaccurately reported, despite journalists being able to access the judgment in full. However other mis-reported cases have arisen since the dates of our search, for example, the 'co-sleeping' case cited by a journalist in Chapter 7.¹⁰²

5.1.2 Linking to BAILII

We used the Nexis database to search for coverage of family court cases during the period and cross checked this with the article as published online to see if the author had included a hyperlink to the judgment on BAILII, allowing the reader to access the primary source. We found that this was very rare. We only found four cases (all in the *Guardian*) in that selection with links to the judgments: one to the Judiciary website and three to BAILII.

Good journalism allows the reader to check the facts that form the basis of an opinion.¹⁰³ This is reflected in the requirement for this basis to be indicated in a defence of 'honest opinion' to libel claims.¹⁰⁴ The phrase 'Detail of the case has emerged in a written ruling published on a legal website' is still used quite widely by the press, indicating an editorial reluctance to identify BAILII to general readers. This has recently been taken up by The Transparency Project with the Press Association, an important source of news about the courts. The Press Association have now agreed to include a link where practicable, although they do not have any subsequent control over whether other publishers include it.¹⁰⁵

We did not search either the BBC website or the Community Care website in this research study but we are aware that their online stories about cases often do link to BAILII.

5.2 Descriptions of family courts 2012-2016

We also searched the Nexis database for press articles generally about family courts for the years 2012 – 2016, to enquire as to any changes in prevalence of the 'secret court' narrative that the President hoped the 2014

¹⁰¹ N Johnson, 'Judge lifts legal gag on mother' *Times* 24 October 2015

¹⁰² See 7.4 below

¹⁰³ O O'Neill, 'A Question of Trust', Reith Lectures 2002 at <http://www.bbc.co.uk/radio4/reith2002/lectures.shtml>

¹⁰⁴ S 2(3) Defamation Act 2013

¹⁰⁵ See The Transparency Project blog 21 December 2016

<http://www.transparencyproject.org.uk/girls-rape-claim-upheld-in-leeds-despite-prior-no-trial-decision/>

guidance would address. We summarise here our findings for the period prior to and following the guidance being issued.

5.2.1 Descriptions prior to the 2014 guidance

2012:

One headline claimed that the idea of closed courts (proposed for security purposes) was nothing new.

'We already have unjust secret courts: Behind a wall of secrecy, the family courts routinely turn all the familiar principles of justice upside down'.¹⁰⁶

Of the ten most relevant news stories, five were critical of the use of independent expert witnesses. For example:

'Why is doctor in GMC probe STILL being allowed to break up families? Psychiatrist accused of falsely diagnosing parents with mental health illnesses'.¹⁰⁷

And

'Remove the veil of secrecy from these fakes; So-called expert witnesses in the family courts hold children's fate in their hands. But they are nothing of the sort'.¹⁰⁸

Two stories related to campaigners against secret family courts and another by Mr Booker to 'stolen children'.¹⁰⁹

Two other prominent stories related to the Ben Butler case, at the point it in time when his children had been returned to him.

2013:

In the year preceding the 2014 guidance, we found three headlines about family courts. These all related to the move toward more openness that was being mooted by the President:

Top judge's war on secret courts: Family hearings must be exposed to 'glare of publicity'¹¹⁰

For years I fought against secret courts breaking up families. At last there's hope¹¹¹

¹⁰⁶ C Booker *Telegraph* 3 March 2012

¹⁰⁷ K Faulkner *Mail* 23 November 2012

¹⁰⁸ C Cavendish *Times* 29 March 2012

¹⁰⁹ N Lakhani, 'Love rat of the year' - who became scourge of adulterers; Lib Dem MP John Hemming tells Nina Lakhani why transparency is an issue worth fighting for' *Independent* 9 January 2012; C Booker, 'Children stolen by the state' *Daily Mail* 19 April 2012

¹¹⁰ S Doughty *Mail* 5 September 2013

The opposition to secret courts is gathering pace; Justice should never been conducted in secrecy. Just look at the family courts¹¹²

A search for the most relevant news stories in 2013 builds up an interesting chronological picture.

In June, the *Mail* published an inaccurate front page story headed 'Secret court jails father for sending son birthday greeting on Facebook' which was corrected (in a less prominent place than the original front page story) six months later.¹¹³

In July, the President indicated that he intended to encourage publication of more judgments. This elicited stories about the 'cloak of secrecy' being lifted and, less positively,

'New family court guidelines won't improve a rotten system for children; Lord Justice Munby's proposals won't change the fact that far too many children are taken into care for no good reason'.¹¹⁴

At the end of November, the *Telegraph* broke the 'forced caesarean' story, which might be described as a perfect storm, out of control until publication of the Court of Protection judgment that explained the basis of the later family court involvement.¹¹⁵ Even when this storm had calmed down, the *Times* ran a story

'For the children's sake; The news that a mother had been forced to have a caesarean and her baby adopted caused outrage last week. Camilla Cavendish, who fought successfully to curb secrecy in family courts, unravels the truth and warns that her battle has been only partially won.'¹¹⁶

Although the volume of articles about 'secret' family courts appears to have increased in 2013 over 2012, they are not so focused on individual expert witnesses but more on the system as a whole, citing the President as supporting concerns about lack of public confidence and need for more openness.

¹¹¹ S Reid *Mail* 27 April 2013

¹¹² C Booker *Telegraph* 27 April 2013

¹¹³ (Author unknown) *Daily Mail* 1 June 2013

¹¹⁴ C Booker *Telegraph* 23 July 2013

¹¹⁵ *Re AA (Compulsorily Detained Patient: Elective Caesarean)* [2012] EWHC 4378 (COP); [2014] 2 FLR 237

¹¹⁶ C Cavendish *Times* 8 December 2013

5.2.2 Descriptions from 2014

2014:

The 2014 guidance was heralded by the Mail as a victory for its campaign.¹¹⁷ The *Guardian* interpreted the guidance as an 'order to publish secret court judgments'.¹¹⁸ In August there were a number of stories about the President's further proposals to make some court documents available to the media.¹¹⁹

At the end of the year, the Family Justice Council public debate on transparency was featured in the *Mail* as:

'Opening up family courts 'will cause child suicides': Fury at claim by children tsar in secret justice battle'¹²⁰

In general, however the press appeared to have viewed developments positively.

2015:

In 2015, most press stories about family courts related to the Worthington case and to that of Rebecca Minnock.¹²¹

Despite the 2014 guidance having been in place for more than 18 months, in autumn 2015 Nicola Gill in the *Times* wrote that 'The secrecy of family courts plays into the hands of accusers, and victims' lives are ruined.'¹²² The *Guardian* reported that a MP was launching a new policy, because 'Family courts must open up to avoid 'outrageous injustices' in 'breakup of families and forced adoptions'.¹²³

2016:

In 2016 almost all references secret family courts as secret related to the Butler and Worthington cases.

In one case where a reporting restrictions order on identifying a family was unsuccessfully challenged, **X v X [2016] EWHC 3512 (Fam)**, Bodey J

¹¹⁷ S Doughty 'At last! Victory on secret courts: Rulings in family cases to be made public after Mail campaign' *Daily Mail* 16 January 2014

¹¹⁸ O Boycott 'Order to publish secret family court judgments' *Guardian* 17 January 2015

¹¹⁹ For example, I Drury, 'Let press see secret court files, says top family judge' *Daily Mail* 19 August 2014

¹²⁰ S Doughty *Daily Mail* 12 December 2014

¹²¹ S Morris 'The Rebecca Minnock case: rare insights into the family court system' *Guardian* 12 June 2015

¹²² N Gill, *Times* 'Families blown apart; Lawyers call it the "nuclear option" 22 November 2015

¹²³ N Watt 'Family courts must open up to avoid 'outrageous injustices', warns Ukip' *Guardian* 26 October 2015

relates at [19] the father's evidence about members of the press breaking into the family home, and letters from the children that:

... show that they have felt embarrassed and upset by the media coverage prior to the main hearing. One of the children's letters speaks of judgmental remarks being made to him by his peers, and of journalists trying to get into the family home. Another speaks of being afraid to leave the house because of journalists waiting at the end of the road. [Further information given about the impact of press reports on the children]. One speaks of not wanting to leave the house because "...people were trying to take photographs and ask us questions".

This case illustrates that concerns about press behaviour toward children still need to be taken seriously.¹²⁴

Toward the end of 2016, Sandra Laville reported in the *Guardian* that women were conscious that they might have risked being in contempt under s 12 Administration of Justice Act 1960 by speaking to a journalist about their experiences in court.¹²⁵

5.3 Applications in respect of reporting restrictions

In our two year sample, there were 16 judgments where the primary issue was restraint on publication, and therefore published under para 17(vi) of the 2014 guidance. All of these judgments, as one would expect, contained very minimal identifying information. Five of them related to the Worthington case. Six others also had associated criminal proceedings. One case related to child sexual exploitation. Three orders were made because of risks of exposure on social media. One judgment was an application to relax s 12 Administration of Justice Act 1960 to allow a mother to talk to a journalist about her experience of care proceedings.

5.4 Conclusions and recommendations

The policy papers on transparency that have been issued over the past decade were premised on a belief that there is a lack of confidence in the family court system. However, there has also been a lack of confidence in the press over this period and it is not surprising that concerns are expressed by many about the nature of media coverage, despite children ostensibly being given added protection under the Editors Code. With the risks of additional exposure through social media, strong reporting restrictions are almost always going to be required in family court cases; their extent will always need to be made explicit to parties and the media.

¹²⁴ As does the unethical behaviour regarding a 15-year-old involved in a Court of Protection case about her mother in *V v Associated Newspapers* [2016] EWCOP 21.

¹²⁵ S Laville 'Certain family court hearings to take place in public in radical trial' *Guardian* 23 December 2016

The range of cases discussed in this chapter illustrate some of the complexities involved. The Media Law guide jointly issued between the Judiciary and The Society of Editors in 2011 is now badly out of date and could be reissued alongside any new guidance to judges.

Although we did not find many instances of serious mis-reporting, there appears to be more of a problem with exaggerated headlines than in the text itself. With IPSO beginning to pay more attention to the content of headlines in its complaints procedures, perhaps the culture will change.

It seems that family court cases are being reported on in the mainstream media more than they were before February 2014. However the availability of the judgment does not necessarily guarantee a balanced report. Readers are not told that they can read the judgment for themselves and some of the cases that receive the most coverage simply do not accurately report the judgment.

The focus in the media on criticism of expert witnesses appears to have waned in more recent years, This may be because experts have been instructed in fewer cases since 2014. Complaints have become more about social workers and judges. However, although only a minority of judgments are being published, accusations of secrecy seem to be made less often. Prompt publication on BAILII of High Court cases, which are going to be the most newsworthy, has possibly contributed to a sense of greater transparency.

Recommendations

Online publishers of news items about a published judgment should be encouraged to link it to BAILII.

Future research on the impact of local press and radio on identifying children, families and others - and how this might be managed - could provide a valuable contribution to protecting privacy while encouraging transparency.

6 Judges' views and experiences

6.1 Survey of judges' views

There is a prescribed process for applications by researchers to collect data from judges, which requires applying for permission from the President of the Family Division. This application was submitted on 10 June 2016 and, following some correspondence with the Ministry of Justice, was approved by the President on 16 July 2016.

The research team emailed all the family courts in England and Wales with the survey questionnaire and also wrote to a number of judges for whom they had direct contact details. The President also sent an email attaching the form to all family court judges on 7 August 2016. This email explained that the research was independent of the judiciary and the Ministry of Justice, and that responses should be sent direct to the research team. It was also emphasised that data would be kept confidential and that respondents would not be identified in any publications.

The number of judges who hear family cases is not a publicly available figure. There are 43 designated family judge areas, according to Ministry of Justice figures; these will have different numbers of circuit judges attached to them. A total of 145 judges had judgments published in the two year period in our study, but of these, some will have retired or been appointed during that period. Some judges do not appear on BAILII at all. As noted above, High Court judges sit in both the High Court Family Division and the Family Court while circuit judges sit in the Family Court and on occasion in the High Court.¹²⁶ District judges and recorders also sit in the Family Court and some publish occasionally on BAILII although they are not asked to do so in the January 2014 guidance.

The number of judges who responded to the survey was 17, with another three replying that they did not wish to complete the survey. The sample is therefore small and self-selecting and cannot be said to be representative of the judiciary as a whole. The responses do however represent a wide range of views and we therefore set these out extensively fully in this chapter

The judges who completed the survey were:

Circuit judges: 13

High Court: 4

Each circuit in England and Wales was represented by at least one reply.

There were 11 male judges and six female, so for ease of reference, all participants are referred to as 'he' in this summary.

¹²⁶ See 3.4 above

6.2 Rate of publication by judges who responded

The survey questionnaire asked how many judgments the respondents had sent to BAILII under the 2014 guidance, over a period of just over two years. The judges in the High Court replied that they had all sent more than ten cases each. Of the 13 circuit judges, three had sent none; six had sent between one and ten; and four had sent more than ten. There was therefore an over-representation of judges who tended to publish their cases. However, not all 13 were enthusiastic about doing so, as can be seen below.

6.3 Impact of the guidance

Judges were asked for their views on the impact, if any, of the 2014 guidance, as follows.

6.3.1 Impact on parties and children

Two judges thought that parties felt the process was now more open and fair as a result of the 2014 guidance.

Most judges did not think there had been a direct impact on adult parties or children involved in their cases, or others, although some were aware that there was potential for concern. Two instances were described. One judge who had thoroughly anonymised a judgement but left in the name of the local authority was told that the mother had hate mail put through her door after the matter was featured in the local press. The nature of the case is likely to have prompted this reaction, whatever the tone of the press report. This judge added that he had stopped including children's dates of birth but still had concerns. A second judge had been told that after one of his cases appeared on BAILII the parents were extremely distressed when it was reported on local media and that others had worked out who they were

There was more disquiet about the impact on children than on parents. One judge said that he knew young people who were horrified at the thought. No other respondents were aware of any actual impact on children in their own cases or more widely, but this did not allay their concerns. One judge expressed a view that children should not ever be told about publication, although he did not suggest how they would be shielded from this knowledge as they grew older.

6.3.2 Impact on professionals in the family justice system

Three judges referred to social workers being criticised. However, one judge said that if he wanted to bring a social work matter to anyone's attention, it was more effective to order a transcript be disclosed to a senior manager in that service, than to publish on BAILII.

One said that publication was a spur to better practice, another that it improved professional standards. However, others took a more negative view. One judge worried that social workers would be vulnerable to

campaign groups and internet trolls. Another said that some social workers held genuine fears that awareness of publication would affect safe working practice. One judge said he usually anonymised social workers because any fault lay higher up the chain, but he would go out of his way to praise good practice. However, he said, this never seemed to attract as much attention as more negative observations.

One judge said that he was concerned that medical professionals were relying on facts they could read in individual cases to inform their opinions in subsequent cases on the cause of injuries, and that 'it is now accepted that very severe injuries can be caused in ways not previously thought possible i.e. much more easily and with considerably less force than previously thought.' Another knew of doctors who had become reluctant to take up court work since the 2014 guidance as they had concerns about extra publicity encouraging pressure groups for disaffected parents.

Views of the effects of publication – or potential publication – on social workers and other professionals were mixed. As discussed at 4.3 above, there is a variety of approaches to naming individuals in the judgments.

6.3.3 Impact on media coverage

Five out of 17 judges were positive about media coverage having improved since the guidance came in, one referring to a much more informed level of publication on important issues rather than a few salacious details. Another said that the media now refer less often to a 'secret' court. One High Court judge who was not aware of any adverse consequences to individuals thought that the media was now presenting a better informed picture of why some children are removed. Two respondents thought that specialist court reporters were now able to pick up cases more easily. Another judge found current media reporting predominantly very fair and responsible.

However, the majority were not aware of any impact of the 2014 guidance on media coverage. One judge thought that it was the process not the outcome of cases that needs to be transparent and that the former was not of interest to media. One judge (who does publish) said that the transparency initiative had not assisted at all and compared the media reaction in condemning the courts both where a child was returned (giving the example of the Ellie Butler case) and where there was a failure to return (referring to Christopher Booker, case not specified.)¹²⁷

Other descriptions of media coverage were: routinely awful; journalists have not taken time to educate themselves; spectacularly uninformed and

¹²⁷ See for example, D Taylor and L O'Carroll 'Ellie Butler judge took unwarranted steps to reunite her with her parents' *The Guardian* 22 June 2016; C Booker 'Baby forcibly removed by caesarean taken into care' *Telegraph* 30 November 2013

attracting vitriolic comment. Another judge felt that that, in practice, extra insight is scorned in favour of cherry picking, salacious or dogma-driven headlines and simplistic and inaccurate stories.

One judge referred to his direct experience of having several cases publicised by press, broadcast, and websites. He found the accuracy of the press and broadcasters generally poor and had had to complain on one occasion and request rectification. In another of his cases, he said, the real public interest in local authority practice was ignored and the press focused on a parent's immigration status although this was irrelevant to the decision. In contrast, he added, blogs by legal commentators such as 'Suesspicious Minds' can be very informative, not just to the wider public but to professionals.¹²⁸

6.3.4 Impact on public understanding of family justice

Consequently, few judges were positive about the public being better informed since the 2014 guidance or that there was a less common perception of family courts being held in secret. Even some who were not negative about the media thought there had been very little improvement in public understanding.

Two judges said that people don't know about BAILII and are only being informed by the media. This view supports the arguments being made for the media to link to the judgment so that the reader can check the source.¹²⁹

One had seen some of his judgments publicised online and a wide range of below the line comments, which ranged from sensitive to outrageous. He was therefore dubious that efforts at transparency were educating the public. Other comments were: the guidance was little help because only atypical cases are publicised; the family courts are still accused of secret justice. One judge thought there was a gradual understanding but there was still a long way to go.

6.3.5 Impact on litigants in person

We asked whether judges thought the guidance had affected litigants in person (LiPs), as we are aware that an argument can be made that unrepresented litigants (of which there are increasing numbers) might have a better understanding of what to expect if judgments are available. However we perhaps should have made this question more explicit, as respondents generally saw LiPs as synonymous with parties.

¹²⁸ <https://suesspiciousminds.com/>

¹²⁹ See 5.1.2 above.

One judge did say that LiPs may have better information about the way a court will handle their case, but transparency was not an answer to the consequences of LASPO and lack of planning to meet that. Another said that LiPs need more than just BAILII to work with.

One judge thought that the issue of publication was confusing for LiPs who are warned about confidentiality, and another pointed out that a LiP will not have legal advice about the possibility of publication. This concern reflects the discussion in Chapter 1 about the lack of clear information on the rules, for court users.

One judge knew of a number of LiPs who broadcast distorted versions of care proceedings, including the findings, with the consequence that it was not then possible (in the interests of the children) to publish the true version. He was concerned that the record could not be corrected where parents were identifying their children themselves. Presumably he thought this less likely to occur when parents had lawyers.

6.4 Problems and barriers to publication

Judges were asked to outline any problems or barriers they encountered in deciding whether to send a judgment to BAILII

6.4.1 Problems identified

The following issues were raised in answer to this question:

- The process of anonymisation. This is time consuming (one judge was working on anonymising three judgments in the week he responded to the survey.)
- Finding the time to write a publishable judgment.
- Avoiding jigsaw identification, especially when there are ongoing criminal proceedings. (Four judges gave this as a problem) There is no process to notify the family court judge when the criminal process has ended, to trigger publication.
- Restricting the ability to write the judgment in the best way for other purposes because of the priority of anonymity.
- Judgments becoming less personal to the litigants and addressed to a wider audience.
- One High Court judge echoed the themes in the Brophy research – the problems are first, anonymity and protecting against jigsaw identification and, second, preventing explicit detail getting into the public domain.
- One circuit judge said that many parties are not well-informed when they consent to publication because counsel do not always understand the balancing exercise and may fail to make potential Article 8 arguments. He thought parties are probably unaware that the media

will publicise the case as a human interest story, the type of headline that will be given to it, and the risks of jigsaw identification.

- On the other hand, a High Court judge said that counsel had become adept at exactly those arguments.
- In a locality where the circuit judge thought the risk of identification was generally too great, the major problem was his name as the judge would indicate where the case was, however much else he anonymised. He does not publish, and says he is supported in this by local professionals. A second respondent also said that just the name of judge can be enough to narrow down who the family is.
- Three judges listed lack of resources as the main problem. Comments included: No time was allowed in the working day, with circuit judges under a great deal of pressure; one cannot always know what will lead to jigsaw identification and trying to ensure safety is too demanding in an already overloaded role; there is no time or support to edit judgments; already working at full capacity – until 8 or 9 pm most nights.
- Another judge thought that his judgments did not merit wider publication. He had considered sending in a few, but then decided this would be a 'vanity project'. A second judge also said that his judgments tended not to be interesting enough to publish.

6.4.2 How these problems could be overcome

We asked what judges did to try to overcome these problems. Answers included:

- I taught myself to write an anonymised judgment from the first stage of the decision.
- Careful conscientious redacting, but this is an enormous task. Even where anonymised by counsel, I still have to check carefully and approve.
- I invite counsel to anonymise but check carefully myself; creating a second version of the judgment in sexual abuse cases or placing this detail in an appendix for the parties which is not published. (High Court judge)
- Regarding associated criminal proceedings, wait until they end, but by then I am not sure of the rationale for publishing. (Two other judges referred to ensuring the criminal proceedings were finished before publishing.)
- Exclude all identification except expert witnesses; remove all dates.
- They can't be overcome except by more judicial appointments.
- Use common sense.

Some judges who did not publish (or not often) suggested that the following would help:

- It can often be concluded that publication isn't appropriate.
- Address the lack of transcripts; local authorities don't often ask for one because they are expensive.
- Clear guidance on how to do it. High Court judges have clerks but circuit judges have no-one trained to help.
- I send in fewer than I did originally, as do not have the time.
- I ask transcribers to redact and provide a key for reading out in court.

6.5 Anonymisation and avoidance of identification

We asked whether the respondents could suggest any recommendations for good practice in anonymisation and checking.

One reply was

'Do it from the start... ask yourself 'is this specific detail necessary to make the judgment understandable? If not, do not give the detail.'

Similarly, a recommendation was to not assume that removing names and dates of birth was enough; one needs to stand back and consider other risks of jigsaw identification. Another was to deliver in anonymised form from the outset.

However one reply was that any recommendations that might help would inevitably divert resources away from more pressing matters in the courts.

Two judges suggested that the risk of identification could be reduced by allowing a reasonable time (e.g. standard six months) between judgment and publication of standard cases, except for the High Court or in high profile cases.

A circuit judge outlined the process he had developed (although saying that no process was foolproof):

1. Send the anonymised version to all parties
2. Use letters or names not belong to the child
3. If parent agrees, may change gender of the child
4. Omit names, possibly even the court and LA
5. Omit anything else that might identify child (schools, agencies etc.)
6. Send final version to BAILII and to parents.

A High Court judge requires all counsel to check; he makes it clear they share responsibility and there is rarely a slip. Counsel have absorbed the importance of this process, he added.¹³⁰

A circuit judge said that dedicated listing time to check names etc. with parties was needed.

¹³⁰ However, the President is clear that responsibility lies ultimately with the judge – see 4.1 above.

6.6 Authorisation and checking judgments

As noted in the Introduction, the January 2014 guidance advises that the task of anonymisation should be undertaken by the lawyer for the applicant in proceedings. Practice however seems varied.

We asked about the process the judges used for authorising checking and emailing and whether there had been instances where they had sent any judgments that they later wished to remove from BAILII.

One judge, who does not publish, said he did not know how to do so and neither did other circuit judges he knew. He had been asked to publish a particular judgment but said he could not find anyone in his circuit who knew the process, and trying to find out was proving time-consuming. There was a need for trained staff. This final observation was echoed across the sample.

6.7 Processes used when publishing

We outline here the different approaches that were taken by judges when submitting their judgments to BAILII.

One judge said that his usual procedure was to invite submissions on publication, agree publication with counsel, ask counsel to anonymise and redact with Track Changes, approve, and finally ask the court manager to forward to BAILII. Two circuit judges simply said they do it all completely alone.

A High Court judge said that counsel suggest redactions; he approves or amends; the clerk incorporates these; they both check. They may send it to parties in sensitive cases. The clerk sends to BAILII. Another High Court judge drafts the judgment as intended for publication and his clerk checks it. A third left the redaction to counsel, he checks it and then the clerk sends it in.

One judge asks the local authority to undertake the anonymisation but this takes two months. He then emails it to BAILII himself.

Two answers were that the transcribers did the redacting and the judges then check this before sending in.

6.8 Process where a published judgment contains errors

We asked whether judges had ever had to ask BAILII to remove a judgment of theirs. Four had done so.

1. On three occasions: the Press Association reporter had notified him of one where names were left in and two where jigsaw identification could find the child. The judgments were amended and republished. He felt that the process was satisfactory although regretted the initial errors.

2. On five occasions: the judge later found some typographical errors. BAILII had been very efficient in dealing with this.
3. Yes, but usually in financial cases. BAILII are good at helping and the press never noticed.
4. Once. Much later, after criminal proceeding finished, an unredacted care case judgment was sent in in error. BAILII took it down very quickly, as soon as notified, and there was no apparent harm, but the judge remains concerned about these cases being dealt with in a system under so much pressure.

6.9 Developments the judiciary would like to see regarding transparency, and general comments

In the survey, we asked about future developments and any general comments

6.9.1 Future developments

Respondents said they would like to see the following:

- More consistency amongst judges about which cases are published and which not.
- More cases published.
- The Family Court must continue to embrace an open and transparent regime. Being paternalistic and patronising has harmed public confidence and inhibited the flow of information. This has led to children being exposed to harm they might otherwise have been protected from.
- National guidelines on how to publish.
- Greater consideration of the individual child and Cafcass views, and avoiding blanket policies.
- Make judgments more user friendly and shorter
- Reverse the policy and take any criticism (a judge who publishes).
- No more developments, as there is no time (a judge who publishes)
- Be cautious about over loading. Not everything has to be published.
- Less – the volume published is unmanageable.
- Restrict publication to what is in the public interest, with reasons. The vast majority of cases would not meet this test.
- Scrap the 'every case' requirement and open the courts, as in Court of Protection.
- Support, time, and funding for BAILII

6.9.2 General comments:

In space given for general comments, judges also made a variety of observations:

- It is wise to take transparency step by step.

- Although in agreement with the President’s view, it is an extremely fine balance.
- BAILII operates as a charity and it seems an abuse of this to upload cases below High Court level, to the extent that there are so many there, it is difficult to find those that might be relevant. A second judge said that too many cases are being published and this is not helpful.
- A High Court judge said that circuit judges should be encouraged to publish but need assistance as they don’t have clerks.
- Judges need comprehensive guidance on anonymisation.
- The media need a locality to engage the reader, but this requires great attention to detail to publish safely.
- A return to the basics for publication only if a case is legally interesting is not realistic. If there is a generalised anxiety about publication harming children, rather than evidenced, we should not change direction.
- Judgments about child abuse should not be sanitised unless there is evidence of harm through publishing.
- The reason for publication was precedent. Now it is for other reasons which are not justifiable when balanced with privacy rights. (judge who publishes)
- Non-compliance by other judges gives the public only a limited view.
- Pointless exercise as cases are fact-specific. This is not done in the civil county courts, nor all High Court.

6.10 Reasons given for not publishing

As can be seen from the responses summarised above, the main reasons in our small sample that some judges do not send their judgments to BAILII are:

1. Concerns that protecting the child’s identity cannot be guaranteed;
2. Lack of time, especially the time that thorough anonymisation requires;
3. A feeling that routine cases do not merit publication.

While we cannot say that these views are representative of all judges who rarely publish, they do give an indication of some factors that lead to reluctance to comply with the 2014 guidance. It is difficult to see how the first and second can be resolved without new investment in training and employing more staff. The third seems to reflect local culture. Unless publication is the local norm, it might feel odd to single out one’s own judgments. This mindset does not reflect the concept of transparency in the sense of gaining public confidence through access to routine cases.

6.11 Conclusions and recommendations:

Some judges did have personal experience of family members and social work professionals being adversely affected by publication, through media reports of what appeared on BAILII. A greater number had general concerns, even though they did not have direct knowledge of children or others being affected. Some respondents believed that geographical factors meant that they would rarely, if ever, be safe in publishing cases. However, one judge observed that there is more newsworthiness in stories that can be located.

There was a range of views on the effects on media reporting and public legal education. These tended to be pessimistic but in such a small sample, these may not be representative of the wider view. It would be useful to explore further how publication can function as a resource for people who have to navigate the family justice system without legal advice would be useful, as this was not an aspect that judges appeared to have noticed as a result of publication.

There is however a clear message that the judiciary are very conscious of the necessity for effective anonymisation and the heavy burden this responsibility places on them and on lawyers and HMCTS staff. It seems reasonable to conclude from these views that lack of time, resources and training may well contribute to the low rate of publication across the country. Some judges had developed methods to help them overcome the challenges but it was generally recognised that the task was more difficult for circuit judges who do not have clerks to assist them.

Some judges suggested that leaving a longer period between the hearing and publication might reduce the risk of identification. This would only be workable in cases where there was no risk that an aggrieved party would go to the media (or on social media) with a partial version of the case. Rather than a blanket six-month moratorium, considering delay on case by case basis or an alternative shorter form of judgment, as part of the balancing exercise, might be more appropriate. Even a delay may not resolve the problem where location or other facts mean that a judge has reason to believe that a family can be easily identified.

We note that sensitive use may be made of timing to counter other potentially adverse effects of publication, from Hayden J's comment in **Re J**:

During the course of submissions Mr Brian Farmer (Press Association) informed me of a recent case in which Keehan J had deferred the handing down of a judgment until a child's half term holiday, in order that any

distress to the child consequent upon publication could be managed most effectively. That seems to me to be a very sensible course¹³¹

Where errors came to light after publication, there was unanimous approval of the efficiency of BAILII in dealing with this, but this does still depend on someone else spotting the problem in good time. Some judges suggested that BAILII, as a small charity, was being unduly exploited. Awareness of the lack of resources for the courts and for BAILII threatens to continue to undermine the purpose of the 2014 guidance.

Recommendations:

Training and guidance based on sharing good practice amongst judges could help achieve more consistency and more confidence in safe publishing.

Consultation and agreement with professional bodies on the purposes of publication, to inform decision making about naming and accountability could achieve fairer treatment.

It would be helpful to develop a protocol for local authorities to be directed to notify the Family Court judge as soon as any associated criminal proceedings have ended.

Ways to make BAILII more navigable, together with alternative methods of public legal education, including for LiPs, could be investigated.

¹³¹ *Re J (A minor)* [2016] EWHC 2595 (Fam)

7. Journalists' views and experiences

We spoke to four journalists who often write or broadcast about family courts. Three of them regularly consult BAILII as a news source and look at the recent decisions, often alerted by the BAILII twitter feed. One person we spoke to is a features writer, rather than a news writer, and uses BAILII to read individual cases after she has seen or been sent references to cases of interest. She looks at cases which are illustrative of particular systemic problems, whereas the news reporters regularly check BAILII for developments.

7.1 Use of BAILII since the 2014 guidance

One journalist had been reporting about family courts for several years so welcomed the guidance. She said that when the 2014 guidance came in, there was a great deal of activity on BAILII and that, for the first time, journalists could easily access details of what was happening in the family courts. She felt that this presented an excellent opportunity to get a picture from across the country about how decisions are made about children being taken away from their families. There was interest in whether certain experts or public bodies were being challenged, praised or criticised. However, she had noticed that the number of reported cases had started to drop.

A view was expressed that most mainstream media stories were based on being alerted by the Press Association (PA), and how valuable this service was. Sometimes other journalists who pick up the PA material can spend time teasing out the issues in particular cases, whereas they might not have time to constantly monitor the BAILII site, far less attend court on the chance of a story. One journalist emphasised that an editor would never be able to authorise her to be paid to sit in court.

A journalist who writes for a social work publication uses BAILII to keep up with family court cases and find stories that are of interest to social workers. This includes issues around poor practice, good practice, and changes in case law that may impact on the wider system.

Although all four did not experience particular difficulty in reading the judgments themselves, not all were confident in using BAILII for research because of unfamiliarity with the language used. Some had managed to 'tune in' better than others.

7.2 Ways in which the media can report on family courts

A journalist who had written for a national newspaper about the experiences of a parent in the child protection and family court systems

had only been able to do so by making a formal application under s 12 Administration of Justice act 1960, because although the parent wanted to tell her story, this was not possible without the journalist applying to lift the s 12 restrictions.¹³² She thought that the introduction of the 2014 guidance had been helpful in supporting her arguments for allowing the mother to speak to her. However when she had attended other court proceedings (with the consent of the parties) and asked for leave to write about them, the judge had told her she must make a formal application and pay the court fee.

7.3 Risks of publicity

The journalists we spoke to were sensitive to the risks of identification but did not know of anyone directly affected by publication. The PA is on record as having notified judges when the risk was high.¹³³ Advice from the PA on other matters relating to publication has been noted by judges.¹³⁴

One journalist spoke about the great interest of local cases to local radio, but was concerned that judges can leave details in the BAILII judgment without realising this might make children local identifiable. The only instances we found in this study of identification stemmed from local news coverage.¹³⁵ The impact of local news can be very profound, as has been demonstrated in research about what juries remember.¹³⁶

7.4 Improving public understanding

The journalists thought that more accessibility to cases was helpful to the general public. There are now more stories on family court judgments than before the guidance but, one person said, access to these stories does not necessarily improve the wider understanding of them. He referred to a story in the *Independent* that co-sleeping was the reason two children were placed for adoption, when reading the judgment showed that wasn't the case. However, he noted that on that newspaper's Facebook page, the immediate reaction was that the headline and story were misrepresenting the facts. This implied that there is a greater public awareness of these cases, and the process of removing a child, than one might think when reading misleading news items.¹³⁷

¹³² L Tickle, 'Sleepless nights reporting the family courts' [2015] 45(11) *Family Law* 1304-1307

¹³³ *H v A (No. 2)* [2015] EWHC 2630 (Fam); [2016] 2 FLR 723

¹³⁴ Chapter 6

¹³⁵ Chapters 6 and 8

¹³⁶ C Thomas, *Are Juries Fair?* Ministry of Justice, 2010

¹³⁷ The *Independent* amended its story after a correction request by The Transparency Project and it now has a more accurate title: S Khan 'Mother who slept in same bed as her children has them taken away over safety concerns,' 16 February 2017. Other press coverage was also misleading and has not all been corrected.

All the journalists we spoke to thought that publication of even more court cases would be a benefit. One said that we are still in a position that only cases that really impact case law, or feature very good or bad practice are highlighted. It would be helpful from a learning perspective to see how a 'usual' case is played out, as this would be a benchmark. As another journalist put it, cases about celebrities and 'big money' are not in the public interest; what *is* in the public interest is to know what *most* people go through if they have to go to court.

One journalist said that summaries would also be a benefit, similar to those provided in some serious case reviews. Executive summaries about long, complex cases with many people involved can help clarify what went on. It would help journalists to have judgments broken down and, on a wider access point, being able to break down complex judgments into a few paragraphs would help members of the public (and members of the press who perhaps do not read many judgments) become better informed about the clear outcome and issue in each case.

Although the 2014 guidance has helped, some journalists would like to be able to write about the dynamics that play out in court – what difference having a lawyer makes; good practice and bad. Good reporting can bring about reforms in court proceedings, as has been shown in some aspects of the criminal justice system.

7.5 Conclusions and recommendations

Some of the journalists we spoke to had come up against barriers to responsible reporting about family justice. The complexities of the law could be confusing and frustrating. The 2014 guidance was of great assistance to them because they can now read the judgments for themselves. However, they were aware that BAILII provides only a partial picture, when it comes to writing about matters of public interest.

Recommendations

Journalists would benefit from the 2011 Media Law guide being updated, to include detailed explanations of how section 12 of the Administration of Justice Act 1960 is applied.

8. Views of other stakeholders

We sought the views of other actors in the family justice system through professional and representative bodies and organisations that work in the interests of families and children.

We were aware of continuing concerns expressed from many quarters on behalf of children, during the decade of consultation on transparency in the family courts. These have not necessarily been resolved by the 2014 guidance despite its emphasis on anonymisation and balancing Articles 8 and 10.

Since the 2014 guidance took effect, and more cases are published, there are additional issues that affect practitioners, such as the risks of exposure of social workers and expert witnesses; the task of explaining online publication to the child; and the burden of responsibility for anonymising judgments. We had these in mind when attempting to engage with professional bodies about their views, and therefore contacted as many as we thought might have relevant views. The response rate was low; we summarise all of these in this chapter.

We aimed to obtain the following information from these stakeholder organisations:

1. Whether they were aware of any effects on individual children or families as a result of the 2014 guidance.
2. Whether they were aware of any effects of the guidance on their members/employees etc.
3. Whether they thought the media representation of family justice had changed
4. They thought public understanding of justice had changed

8.1 The legal profession

Organisations that represent lawyers replied as follows.

The Law Society Children Sub-committee

The main issue for the sub-committee was the inconsistency of approach which their members described as 'a lottery'. The idea of open justice needs to be rationalised to balance it with the rights of those involved in the system to be well-informed about what they are getting themselves into from the start and without the uncertainty which we currently have.

Some of these comments were based on members' experience in financial cases which may be held in open court. These observations may be

pertinent in any future policy development that includes proposals for hearings about children in public. In one locality with a large number of judges with different approaches to publication of judgments, hearings in open court and publication of the details of litigants, this discretion leads to the lottery of choice of judge on matters unrelated to strict consideration of the merits. Solicitors are aware that certain judges will specify that hearings take place in open court, and this can have an impact on negotiations, whether clients proceed to trial and whether crucial witnesses will attend. Some parties are aware there are different rules and provisions in overseas jurisdictions and that information can be communicated from the hearing to reports abroad. One example given was of a case settled at final hearing mid-evidence because legal representatives knew an application by the press would be made after the lunch break, rather a resolution based on the merits of the case.

In public law cases, solicitors knew of instances where judges had suggested inviting local press to attend hearings, usually in response to a local authority's reluctance to fund a residential placement or other intervention.

Where cases are to be published, the task of checking and anonymising the judgments has been onerous. Where members are very familiar with a case, it is often very difficult to ensure all the identifying information has been removed. It is necessary to ask colleagues to read and check that every last identifying detail has gone. This role seems to always fall to the local authorities, and those representing the child are rarely able to assist, as they are not paid to do this. In cases where a local authority is criticised, the job of preparing the case for publication might be particularly arduous.

An interesting example was given of the published judgments in one case, described as 'extremely brutal' towards the local authority.¹³⁸ The case is being used as a training tool in terms of practice to avoid; whilst being mindful that it could happen to any local authority presented with the pressures of such a case. Although the actions of the local authority were recognised as regrettable at certain points in a very long running and difficult case, the amount of criticism led other professionals to wonder about the impact these type of judgments have, both in terms of improving practice but also personally on the professionals involved.

The sub committee made no comment on quality of media reporting; on the question of improved public understanding of family courts, they were aware of efforts outside the court to promote better understanding, for

¹³⁸ *LB of Haringey v Musa* [2014] EWHC 2883

example, The Transparency Project. In their members' views, improved understanding requires analysis of full reading of the judgments, rather than just the headlines, which often seems to be all that is considered in the mainstream media. Given that practice is so variable across geographical areas, the sub-committee was not sure that media reporting assists the public in appreciating the complexity of court processes.

A member of the sub-committee suggested that an analogous situation is the publication of serious case reviews and domestic homicide reviews. Safeguarding Boards go to great lengths to anonymise these reviews almost to the point where learning is lost, but invariably the press know precisely which family they relate to because of all the ancillary processes that have been ongoing (such as, a criminal trial). This sometimes means publication does not take place at all. The aim of publication of reviews is quite similar to the stated aim of publishing judgments and in many ways is equally fraught. Perhaps there is learning to be had from this process which might assist in considering the impact of the publication of judgments.

Resolution

Resolution replied that publication on BAILII was a cause for concern for members but both Resolution itself and the system generally lacked evidence about it. Members had not reported any direct evidence that the 2014 guidance had had any detrimental impact on adult parties, children and families, but were also very mindful of the findings on young people's views on their privacy and how failures to completely anonymise and jigsaw identification put children at risk; and there can be no rectifying process.¹³⁹ Resolution also pointed to the lack of evidence about the views of parents and adult parties on the increased availability of written judgments and any impact.

Resolution had called for a formal evaluation of the impact to date of the increase in the number of judgments being published on BAILII, including the extent to which the media are interested in accessing and reporting those matters; if they have done so, whether the information helps them to make sense of court decisions and whether there have been any changes in relation to reporting, particularly in relation to the quality and accuracy of that reporting; and if they have not done so, why not.

¹³⁹ J Brophy, K Perry, A Prescott and C Renouf, *Safeguarding and respect for children and young people and the next steps in media access to family courts* (ALC/NYAS 2015)

8.2 Social workers

We understand that after the 2014 guidance was introduced, some social workers expressed concern about the personal impact on them.¹⁴⁰ However we have not seen anything more recent on this point than 2015.

The Association of Directors of Children's Services (England)

replied that they did not have resources to collate their members' views. The **All Wales Heads of Children's Services** responded, but the numbers of published judgments from Wales are so low, that they did not feel they could offer a view.¹⁴¹

Cafcass

Following discussion with some of their practitioners, Cafcass said that they were not aware of any individual impact. It was not common for a judgment to be published and if it was, the case was by that time often closed to Cafcass, who would therefore not necessarily know of the effects on the child or family. Cafcass was not aware of any effects of the guidance on them as an organisation but their staff were aware that an increase in the publication of judgments meant their professional judgement is open to closer and wider scrutiny by the public. This did not change the way they worked.

Regarding the effect on the media, Cafcass had not seen a sea-change in the way that the media report family court cases since the guidance was introduced. There tends to be coverage of criminal proceedings, which may precede or follow family proceedings: in such cases they suspect that the family proceedings may be considered by editors and journalists to have less public interest than the criminal proceedings. Examples were the Ellie Butler case and radicalisation cases. However, Cafcass noted that there was still inaccurate reporting, for example in a *Daily Mirror* report in January 2017 where The Transparency Project highlight that the *Mirror* does not explain this or link their readers to the BAILII judgment to allow them to read the judgment in full.¹⁴² Their experience was that there was a shortage of information about the judgment in the vast majority of published comment.

With regard to BAILII, Cafcass supported the view that transparency does not follow simply by publishing a judgment; BAILII is difficult to navigate and mainly used by professionals in the sector. They had said in their

¹⁴⁰ R Schraer, 'It's soul destroying and career destroying: Social workers in the firing line' *New Statesman* 24 June 2015

¹⁴¹ 19 judgments during the period of the study. Given this low number, we did not approach Cafcass Cymru, but only Cafcass in England.

¹⁴² B Farmer, 'Three sisters whose parents didn't give then names are taken into care' *Daily Mirror* 4 January 2017

response to the August 2014 consultation that transparency is not just about publication of judgments; and they produce case studies, videos and factsheets about their work to demonstrate and be accountable. All agencies should take steps to promote greater transparency about their work, and the sector as a whole, in order to improve public understanding of the family courts.

Cafcass does not provide any training or guidance for staff on how to advise individual children that the judgment about them might be published online. They say that it is the practitioner's responsibility to tell the child where they believe this is relevant and in some cases the child's social worker may be better placed to tell the child. They did not believe specific guidance/training for staff was necessary, because their practitioners use their social work skills and professional judgement.

Nagalro

Nagalro was the only social work professional organisation that responded to our requests but was not aware of any direct impact on children or their members.¹⁴³

8.3 Children and young people

Groups of young people have worked with Julia Brophy on successive studies on this subject in recent years, and their views on the risks of publicity and likelihood of identification have been powerfully conveyed.¹⁴⁴

Cafcass Young People's Board

The Board did not have any new knowledge of young people affected nor of any changes in the way proceedings were being conducted or in media reporting since February 2014. However, they still felt very strongly that family court judgments should not be routinely published and had not been reassured by any developments since they delivered that firm message at that time. Although they were not aware of any training being given to Cafcass officers in how to inform young people about the likelihood of publication, they felt confident that they would be consulted by Cafcass in the design of any such training, were it to be proposed.

¹⁴³ UNISON tried to raise awareness at one stage, see for example J Silman 'Children's social workers unaware they can be named in court judgments, survey finds' *Community Care* 17 June 2015 <http://www.communitycare.co.uk/2015/06/17/childrens-social-workers-dont-realise-named-court-judgements-survey-finds/>

¹⁴⁴ fn 16; 18 and 139 above

NYAS

NYAS was not aware of any individuals being affected by the 2014 guidance. In one case that predated the guidance, a girl's school friends were able to identify her when a local press story was followed up in national press. Her father engaged with the press and was interviewed by a journalist for national paper, which only served to worsen her opinion of him.

Young people within NYAS working on the transparency debate did not think media coverage had improved. They consistently talk about feeling uncomfortable in the way in which the media reports any family court cases and note a real lack of consistency. This has remained unchanged with the introduction of the guidance. Nor do young people involved with NYAS who have been looking at the privacy debate feel that the guidance has made any real impact on the public's general awareness of the family courts. Young people have consistently cited that they understand the need for greater public awareness but recognise the media as not being the appropriate conduit to achieve this.

Children's Commissioner for Wales

This office replied that they have not been involved in case work that has raised any issues about publication.

8.4 Conclusions and recommendations:

Overall, these views illustrate the inconsistency across the country of the patchy compliance with the 2014 guidance.

Although it is a concern that young people are not all being fully informed about the existence of the 2014 guidance, our data analysis indicates that statistically any case in which they are involved is very unlikely to be reported unless it is transferred up to the High Court, where there is more capacity for effective anonymization. In these circumstances, where the possibility of the judgment being published is so low, it is understandable that professionals may not wish to unnecessarily alarm the child. There is a risk of children withdrawing from support services if they are frightened of getting media attention.¹⁴⁵

No strong conclusion can be drawn about the impact of the 2014 guidance on the social work profession from this low response rate. Nevertheless the example given by the Law Society (and by some judges in Chapter 6) about the potential negative impact on social workers of being identified in court judgments should not be ignored.

¹⁴⁵ *Re X (A Child) (Residence and Contact: Rights of Media Attendance)* [2009] EWHC 1728 (Fam); [2009] 2 FLR 1467

Recommendations

As noted in other recommendations in this report, the input of professional groups and organisations that represent children and families would help to achieve a common purpose in the process of improving transparency.

9. The Judiciary website and other resources

Some court judgments are also available on a freely accessible Court Service Judiciary website.¹⁴⁶ The publication policy appears to be to post judgments that may be of interest to the press and public. Although these are usually also published on BAILII, their being highlighted on the Judiciary website might make them more obviously newsworthy. Occasionally a slightly different version appears there to that on BAILII.¹⁴⁷

We found a number of broken links on the Judiciary website, which we understand result from the content being moved two years ago, without any automatic redirect facility. Searching the site with the filters provided is not easy. For example, a search on 'court' and 'family' brings up far fewer results than searching on 'jurisdiction' and 'family'. We were only able to find 74 family court cases published between 2014 and 2016. Of these, most were delivered by the President. The remainder were all High Court cases apart from that of HHJ Wildblood in the Minnock case.¹⁴⁸

Presumably content can be removed or redacted from the Judiciary website. But given the difficulty in finding content even when it is there, and the possibility that Google may have cached it, it is hard to assess how effective the removal policy is, in comparison to BAILII.

Other free websites are Family Law Week and Jordans Family Law, both of which post important judgments and, sometimes, summaries, additional comment or articles about them. The ICLR publish free cases summaries of cases that are likely to be published in the law reports; these are linked from BAILII.

¹⁴⁶ At <https://www.judiciary.gov.uk/judgments/>

¹⁴⁷ For example, in *Re N (Adoption; Children; Jurisdiction)* [2015] EWCA Civ 1112 The judgment published on BAILII includes five footnotes which the Judiciary version omits.

¹⁴⁸ *Williams v Minnock* (eight judgments) No neutral citations given.

<https://www.judiciary.gov.uk/judgments/roger-williams-v-rebecca-minnock-and-ethan-freeman-williams-2-judgments/>

10. Conclusions and recommendations

The 2014 guidance has led to a large numbers of family court judgments being available to the public and the media, that would not otherwise be in the public domain. These are potentially a valuable resource for public legal education. The guidance also seems to have achieved its aims to reduce (if not entirely negate) the level of allegations of secrecy in the court system made in the mainstream media. Publishing on BAILII seems to work well at High Court level, where most cases of interest to the media will be heard.

However, patchy understanding of and adherence to the 2014 guidance over the country means that the aim of presenting a holistic picture of the system is not being achieved. The burden of preparing judgments for publication, with all the associated concerns about identification of children, families and practitioners is falling inequitably on some areas. The rate of publication on BAILII is falling and the demands of the publication process may make it unsustainable in the current resource-starved environment.

There appear to be five options:

1. Continue as at present

The 2014 guidance was written as a first step toward more transparency. A pragmatic approach might be to abandon any development and leave matters as they are. This would mean that that the inconsistencies outlined in this report would continue. The rate of publication might continue to fall and progress would halt.

2. Reverse the guidance

Returning to the position that preceded the 2014 guidance might lift a burden from local judges and reduce concerns about the effects on children. However, some judges believe that more judgments should be publicly accessible. Reversing the position may lead to concerns about Article 8 taking priority over Article 10, and would be seen as a retrograde step by critics of the family justice system.

3. Incorporate a version of the guidance into the court Procedure Rules and Practice Directions

While this might impose a stronger obligation on the judiciary (and the parties through the overriding objective), we cannot see this being effective without considerable investment in extra staff and more judicial appointments.

4. Hold family court hearings in public (as in the Court of Protection pilot)

This option could remove the requirement for routine cases at circuit judge level to be sent to BAILII. However, the task of reporting restrictions and redacting documents would be onerous. Attendance would have to be carefully managed. We believe that the risks to children, especially because of their greater use of social media, would be greater than to individuals in the Court of Protection. Holding hearings in public would not necessarily stop the demand for published judgments as few people will be able to attend in person, and it is not economically viable for the press to attend hearings routinely. We do not feel we can recommend a similar pilot in the Family Court without full consideration of robust research on the impact of the CoP pilot.

5. Pilot a variation of the 2014 guidance. This is our recommended option

We do not think that the current situation is satisfactory, nor that it achieves the original aim of the guidance to make public the work of the Family Court throughout the jurisdiction. We suggest that the 2014 guidance could be modified to require every court and every circuit judge to provide a small and manageable representative sample of cases that fall within paras 16 and 17 of the guidance. Applications under para 18 should also be supported by making transcripts more easily obtainable.

We recognise that this selection process would mean that not all judgments would be available but, in reality, they are not now. Consideration could therefore be given to requiring courts to lodge audio recordings of all judgments with a central register and database (managed by the Judiciary) where they would remain as an archive for accredited researchers or members of the media to apply to access. This would enable scrutiny, subject to controls that protect privacy. Judgments could be made public at a point in the future, especially if someone who was a child in the proceedings wants to read the decision in adult life. This would address one of the original aims of transparency that seems to have been lost over the years, and would ensure that material that could be of enormous value does not disappear.

This scheme could be introduced over a reasonable timescale, with support provided by the Ministry of Justice and the senior judiciary by way of training and guidelines. This scheme should be piloted and evaluated, on the basis of publishing cases that are genuinely in the

public interest, including consultation with all relevant stakeholders, and readers of BAILII could be asked for feedback. We believe that this approach would be fairer and would more accurately publicise the work of the courts than at present.

In the meantime, we have made some basic recommendations, listed at the end of the relevant chapter and reproduced here:

1. The HMCTS leaflet on media attendance should be updated, and made widely available, to provide more accurate information for court users about the possibility of publication on BAILII, and how they can make representations about this.
2. Pending the outcome of the August 2014 consultation, clarification of the intention of the January 2014 guidance regarding publication as 'the starting point', and the steps to be taken in the judicial balancing exercise between competing rights, may help assure more consistency in expectations and practice.
3. The correct status of the judgment in the hierarchy of precedent should be made plain by the court when it is sent to BAILII.
4. Each judgment could contain a statement (or a link to an explanation) as to whether it is a Family Court case published for the purposes of transparency or a High Court case which may be an authority for wider application.
5. Confusion when a High Court judge is sitting in the Family Court or a circuit judge is sitting as a High Court judge could be avoided by the use of standard descriptions.
6. It would be helpful if reasons for deliberate delay in publication were set out at the end of the judgment, with any other directions about publication.
7. The template could be modified to show clearly the hearing date; the date of the approved judgment; and the date sent for publication separately at the top of the judgment.
8. Routinely adding a rubric to the judgments, rather than one being assumed to apply, would contribute to more consistency in anonymisation practice.
9. Applications by parties for publication should be noted in the judgment as having been made under para 18 of the guidance.

10. An addition to the standard Case Management Order form about applying the guidance in each case might lead to more judgments being published or, at least, provide an opportunity for the guidance to be considered on a case by case basis as appropriate.
11. A new practice direction could set out best practice on effective anonymisation, and how this will be undertaken in each case as appropriate, in accordance with the reasons that the decision was taken about whether to publish.
12. This practice direction could also provide guidance on using publication for the purpose of calling public bodies, other organisations, and professional individuals to account, so that those organisations and individuals will be better informed about what to expect regarding publication.
13. The practice direction could also give guidance on the naming of anonymised cases, including the use of single and double initials, and on descriptors, so that cases are consistently named in BAILII and the law reports.
14. Online publishers of news items about a published judgment should be encouraged to link it to BAILII.
15. Future research on the impact of local press and radio on identifying children, families and others - and how this might be managed - could provide a valuable contribution to protecting privacy while encouraging transparency.
16. Training and guidance based on sharing good practice amongst judges could help achieve more consistency and more confidence in safe publishing.
17. Consultation and agreement with professional bodies on the purposes of publication, to inform decision making about naming and accountability could achieve fairer treatment.
18. It would helpful to develop a protocol for local authorities to be directed to notify the Family Court judge as soon as any associated criminal proceedings have ended.

19. Ways to make BAILII more navigable, together with alternative methods of public legal education, including for LiPs, could be investigated.
20. Journalists would benefit from the 2011 Media Law guide being updated, to include detailed explanations of how section 12 of the Administration of Justice Act 1960 is applied.
21. Our summary of the views of stakeholder groups suggests that the input of professional groups and organisations that represent children and families would help to achieve a common purpose in the process of improving transparency.