

# Confidence and confidentiality: improving transparency and privacy in the family courts

Response to the DCA  
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## Introduction

This paper is my personal response to the DCA paper on improving transparency and privacy in the family courts.

I set out my details in the appendix. In summary, I have practised as a specialist family law solicitor for 20 years, almost entirely in central London. The primary area of my work has been financial aspects of marriage breakdown, often with an international element. I have recently worked for two years in Sydney, Australia, and I bring my Australian experience on this subject to bear in this paper. I have also been a deputy district judge at the Principal Registry of the Family Division (PRFD) for the past 11 years and I bring this experience as well to this paper. Over the years of my practice, I have acted for a number of very high profile individuals, many in the music industry, and there have been frequent tensions and difficulties with the media on this issue. I deal with some of these experiences in this paper.

My primary interest in this subject derives from my Australian experience. The element of openness of their courts was totally unexpected and I was able to reflect on the comparison with the English experience. As I was leaving England, there was increasing interest in the topic particularly following the case of Clibbery, and so I spent some time discussing with Australian practitioners how it operated in practice and investigating more closely. I returned 15 months or so ago convinced that there should be much greater openness in the family courts but also convinced that there must be anonymity in family court judgments and confidentiality of family court documents which, in practice, does not now always exist.

In summary, I endorse the principles set out on page 34. I support most of the recommendations. However I believe the public generally should be allowed into the court, with safeguards. I believe there should be a specific court service providing for anonymity of judgments. The consultation paper is not specific on the criminal offence for breach of anonymity and I am certain that it must be a very serious one and in practice operated vigorously and be seen to operate vigorously.

In this paper, I specifically do not deal with adoption and with care proceedings. This has not been my area of practice for the past 20 years or more. As a deputy district judge, I am not qualified to deal with such matters. There are very many much better and more knowledgeable people and organisations to comment.

## The Australian experience

I appreciate that the paper covers the position in New Zealand and in British Columbia. These are very different jurisdictions from England in many ways. I agree that some lessons can be learned but there is a cultural difference.

In many ways, Australia is more similar. It has a much larger population than either of the other two jurisdictions although still much smaller than England. It has some domestic high-profile personalities and cases, although again incredibly less than England. It has a moderately intrusive media, although again nothing apart from the US compares with England. It has a highly specialised family law profession, highly specialised courts and judges, a shared heritage of law and procedure moreover with the tradition of innovative change in family law matters.

Attached to this paper is a document I prepared for the Chatham House rules conference in Oxford in September 2005 arranged by the DCA for discussion of this topic. The document itself is open. I have already shared it with the DCA team dealing with this issue but I rely on the document in this paper so I attach again.

In summary, after relatively recent changes based on similar considerations behind the DCA paper, the Australian family courts are open to the public, judgments of courts at all levels are published, they are made anonymous with a prohibition from publication of a list of factors which could identify and with vigorous and effective criminal sanctions operating against publication.

As stated in the document, it is my perception that part of the culture of Australia is a real distrust of authority and authority figures. I suspect it is quite historic in origin but it is still very present and very strong. It is a much stronger feature than we have had in England although the past few years in England have seen increasing elements of this in relation to distrust and unhappiness of secrecy with respect to the family courts. This is picked up and explored in the DCA paper. Nevertheless it has been a much stronger feature of Australian culture for a longer period. Hence this has been a theme for the family Court for quite a few years. I pick this up in several quotes set out in the attached document. It is clear that one predominant aspect has been the importance of openness to remove suspicion, distrust and lack of confidence. Australia has gone ahead of England, as so often in family law, and I think we are quite entitled to look at how it has worked for them in making comparisons. It comes from a background of even greater distrust than exists in England.

### Access to the courts themselves

The simple reality is that the Australian family courts, situated invariably in separate buildings to other courts and with dedicated web sites and excellent public information, are open to everyone. Specifically it is not restricted to the media. Other lawyers are free to attend, and indeed often do so whilst waiting for their own cases. Students attend. By and large the general public do not attend but the principle is that they are free to do so.

Initially I found this exceedingly odd and frankly rather scary. In part because of the call over system whereby all cases for a day are listed at 10 a.m. and the judge then goes through the entire list to ascertain which cases will take longer and then allocates for a time during the day, many lawyers are at the back of the court when one undertakes one's advocacy. Having only undertaken family law, in chambers, for the past 20 years, this was very strange. However it was no different to my experience in the criminal courts on qualification nor different to my experience in the civil litigation Masters courts at the RCJ in the years immediately before I specialised in family law. After a while, one simply ignored it. (Including incidentally quite abusive remarks, audible and emanating from the lawyers in the back row of the court, about the advocacy style of Poms, which strangely the judges did not feel inclined to reprimand!)

However what it does do, from the perspective of the legal profession, is that it opens up the courts to the scrutiny of other lawyers. Specifically the performance of judges can be witnessed. Their approach to particular issues, their conduct in handling witnesses, and their style, content of their judgments, the timetable and progress of cases and so many other important aspects can be seen at first hand. It may be that in local English courts when there are perhaps only two or three full time district judges, most local specialist family lawyers would pick this up in time. In larger metropolitan centres, most obviously London but also Manchester, Birmingham and Leeds, specialist solicitors may not appear before certain district judges very frequently. District judges do have very distinctive styles and approaches and it is part of the skill of the lawyer to be able to best present the case for the client for the particular court and particular judge. This requires reliable, first hand knowledge.

My Australian experience made me absolutely convinced that members of the legal profession, including law students, should have complete access to family courts, subject to the restrictions in any individual case along the lines set out in the DCA paper. Reference is made to the media being able to attend as proxy for the public. Lawyers should also be able to attend as proxy for the

consumers of the family Court justice system, namely those clients who will subsequently appear before the courts. I can see no disadvantages with this and very many fundamentally necessary advantages. I was surprised it was not included in the consultation paper. I was surprised that the media were given access whereas lawyers were not.

Moreover, the Australian experience was that members of the public are entitled to attend. In reality, as pointed out by the Chief Justice of New Zealand, invariably the media do not attend and it is unlikely that the public would often attend. Nevertheless, in this it is the principle rather than the practice which is fundamental.

Naturally I advised my Australian clients, in advance of a court hearing, about the possibility that members of the public, including those associated with the family, may be in attendance. In fact the knowledge of the opportunity to attend is pretty common and most of my clients were aware already. At the same time I would of course advise about the confidentiality and privacy. At no stage did I have any concerns expressed to me by my clients about general members of the public being in attendance. I was working at one of the top international family law practices in Sydney and we had some high profile clients. With these again, I did not have anxieties expressed. The concern was not about members of the public being at the back of the court. The concern was about subsequent information and publicity. This is why I support entirely the DCA proposals about the absolute ban on certain information and publicity coupled with vigorous criminal sanctions. However with this ban in place, there is then less anxiety about the attendance of the public. I return to this below as it is a major areas where I depart from the DCA paper.

### Publicity of the court judgments

Another aspect of my Australian experience in this regard was the proliferation of published court judgments. For a jurisdiction with possibly a third of the population, there were reported probably about 10 times as many published judgments. These were on the family Court website but also circulated by the family law section of the Law Council, equivalent to the SFLA/resolution, in its monthly bulletin. These judgments were at all levels and throughout Australia. But crucially they were written in a way that was anonymous and did not identify facts. My belief, although this may need to be checked, is that part of the Family Court service undertook this exercise of making anonymous from the original judgment. The advantage is that they are much quicker, thorough and consistent than if left to each judge to make anonymous. I have no idea of the cost of this service but I suspect that overall it produces a much better outcome than leaving it to individual judges.

I found the availability of these very many family court judgments to be incredibly helpful to me as a lawyer, admittedly getting to grips with a new system of law, but generally in understanding how certain themes and principles from the higher courts or from statute were being applied.

Very many years ago the SFLA national committee, of which I was then a member, identified a problem in England concerning the lack of knowledge of how cases were being dealt with across the country and beneath the Court of Appeal and occasional High Court judgments which were reported. We set up a system in which we invited practitioners to let us have the outcomes of decided cases in chambers. Obviously certain information had to be withheld. We produced a pro forma document to produce some consistency of the information we were given. Some conscientious SFLA members replied. After about a year, we gave it further publicity. However we then gave up. We found what we were being given was not sufficiently reliable, representative or helpful. It was a great disappointment as we were certain that this information should be in the public arena.

Accordingly I was delighted to see that this was exactly what was happening in Australia and furthermore delighted to see how invaluable it was. We were absolutely right in the SFLA many years

ago to attempt this. The consequence of this present consultation on transparency and openness must be that judgments of the family courts, including the family proceedings courts, should be publicised and made available, presuming anonymity, to the public. Ideally, this should be via the family Court website and again the Australian family Court website is in my opinion the world leader in openness, communication and information. As a profession of family law solicitors, we need to have much greater knowledge of the judgments in family law cases at all levels. The public, more particularly the interested public, is entitled to have this. Australia has shown that it is possible, without material cost as far as I'm aware, and greatly helps both the profession and the respect for the family courts.

### Enforcement for breach of publicity restrictions

Finally, the relevant statute in Australia, referred to in the attached document, is very clear on what cannot be publicised. Moreover the Attorney General is vigorous in pursuing any hint of a breach, including explicitly having available injunction powers. This must be the same here. Openness and transparency including access can only go hand-in-hand in the family law arena with confidentiality and privacy of publication.

I commend these experiences, which no doubt would be shared by many Australian family lawyers, to the DCA. I venture to suggest that the Australian experience is in many ways a more reliable, comparable one than New Zealand and British Columbia.

### High profile cases

I do not seek to make a special case for high profile clients and cases. In almost all instances, the general law should apply. However these cases sometimes highlight, even exaggerate, the problems and difficulties which arise in day-to-day practice. I believe there are several issues which they show up and which must be considered as part of this consultation. I do so by reference to past examples.

### Confidentiality of the family courts

The first issue is confidentiality generally of the family court offices. There is no point in a major consultation on confidentiality if information freely and frequently leaks from the family courts themselves. This may require internal responses but equally it must be raised.

In the late 1980s, I was acting for a very high profile musician whose marriage was equally high-profile and a significant public interest. Like many high-profile individuals, his public persona was that the relationship was fine. In fact we had issued a petition. A short time afterwards, news reached me that a Sunday newspaper was intending to print the contents of the petition in the paper. Personal overtures to the owner of the newspapers fell on deaf ears. A decision was taken that an injunction would be self-defeating. Sure enough, on the Sunday the entire contents, specifically the particulars of unreasonable behaviour, appeared word for word. This was at a time when the general consensus was that divorce petitions were private. Although it was never known exactly, there was good reason to believe that a journalist, posing as a law firm clerk, had requested the file and took a copy of the petition.

As a consequence, and after considering the matter, I prepared a draft Practice Direction which would enable a party to ask for their court papers to be put in a particularly secure location and access only given to named individuals. I wrote to Senior Registrar Turner with my ideas. I received a pleasant letter in response saying that it was considered unnecessary and inappropriate. A short time later I received an informal message inviting me to meet him. It was explained to me that the Practice

Direction would not be acceptable. I understand that it would have been an admission that there was a problem of a lack of confidentiality. Nevertheless he indicated that an informal arrangement of higher security and confidentiality would be made for high profile cases and invited me to inform other lawyers in London dealing with such cases. I did. The arrangement worked very well indeed. My last involvement was about five years ago. I will not set out more details here. I do not know whether it is continuing and I would be surprised if it was not.

I do not suggest the arrangement should come to an end. It works well. Those lawyers regularly dealing with high profile clients are able to operate it. Moreover in the intervening period of 15 years, security and confidentiality at the family courts in general and the Principal Registry in specific may have changed dramatically. I don't know. But with a very intrusive media, and other lawyers sharing my experience of confidential papers finding their way into the newspaper, the family courts must make sure that there is security and confidentiality of family court papers. Of course the criminal sanctions proposed in the DCA paper are fundamental. However experience is that the exposure of a good news story, such as revelations from confidential court files, often justifies relatively low criminal penalties. I urge the DCA to reconsider this issue of internal confidentiality.

### What documents are confidential and which are public?

The second issue is what documents in the divorce process are in fact confidential. About 20 years ago, the perception was that the divorce petition itself was confidential as were all the other documents. However the 1926 legislation is very ambiguous. It was intended for a different generation and a different problem. Over the subsequent years, the perception has increasingly been that the divorce petition itself is public but the other documents in the process, such as the acknowledgement of service and affidavit in support, are confidential. What is the position? Lawyers don't know. The media don't know and fill the gap by saying that everything is public! This consultation process must result in the profession knowing what documents are confidential and which are public.

The issue was highlighted by a case where in the affidavit in support, the question referring to the impact of behaviour on health, I had referred to certain impacts including the lack of concentration on work of my music industry client, who was even then in the middle of a huge world tour. This statement in the affidavit in support was on the basis of the perceived knowledge in the profession at that stage that affidavits in support were confidential. For reasons unnecessary to detail here, the affidavit came before a district judge in draft before it was finalised. He kindly pointed out to me that I could not guarantee confidentiality and there might be an impact on my client if this became worldwide knowledge. I was incredibly grateful, as might be imagined. However this was at a time when I was undertaking substantial high-profile cases and this issue was regularly discussed between me and other similar practitioners. It highlighted the considerable uncertainty.

Therefore as part of this consultation process, the 1926 legislation should be reviewed, and where relevant almost certainly replaced by making it clear which documents are public and which are confidential, especially in the divorce process itself but also in relation to financial and children issues. I do not refer here to exceptional circumstances when the court may consider it has a duty to inform third parties such as immigration services and the Revenue. I refer here to the normal course of events as to what can be published.

### Enforcement of confidentiality non publicity provisions

The third issue I raise is enforcement of the confidentiality provisions. Who can obtain an injunction to prevent publication of material in family Court proceedings which are confidential and not open? The

consultation paper does not deal in any detail with contempt proceedings including whether to be instituted by a party or activated by government departments such as the Attorney General. It refers to an uncertain and unclear mixture of legal remedies. I endorse this conclusion. This mixture cannot remain after this consultation period.

The issue arose when there were children proceedings in England and related court proceedings in another country. There was no public figure involved but the incident giving rise to the proceedings had attracted much publicity. For reasons unnecessary to explain here, we were strongly encouraged by the Foreign Office to seek what was then known as a Spycatcher injunction against publication of certain confidential family court information. We obtained this ex-parte. We served it. It stopped the publication. And then there was the return date. I confess now that we were amazed at the battalions of leading counsel who arrived from the media to oppose us. We failed to maintain the injunction. I am sure I am not the only solicitor who has had this experience of being overwhelmed by the response of the media to restrictions on their opportunity to publish. There should be no underestimate whatsoever of the strength, resolve, funding and resources which the media are prepared to devote to making sure that they can publish as much as they want. We felt it should not have been left to my client, with restricted resources, to pursue the injunction. Individuals do not have the resources, in all bar a few cases, to oppose the media when they wish to push the boundaries of the publicity restrictions.

I endorse the essential proposals of the DCA namely opening up the courts by way of access yet restricting the publication of that access. It works in Australia. But they do not have the heavily intrusive media that we do. Moreover the government officials in Australia were, it seemed to me, exceptionally vigorous and strong on such issues. Bluntly, that is not the perception that many of us have of government law officers in England on these matters.

In their review of this consultation, the DCA must make sure that issues of breach of confidentiality are matters that are pursued by government law officers, properly funded and able to meet the resources of the media including with injunctions in advance of publication. This is separate to the criminal proceedings after publication which is a different deterrent. Public confidence in the openness and transparency of the family courts will be lost if there are not clear, active, effective and statute based opportunities to prevent breaches including in advance of publication.

The DCA should expect tussles with the media after the likely new law is introduced. Fine words in consultation papers will mean nothing unless it is supported by fine action.

### Refusal of entry to the public

This is the primary area where I disagree strongly with the DCA paper. I believe the public should be allowed entry, subject to the restrictions referred to in particular cases if against the best interests of either justice, good order or the case in hand, along the lines set out in the DCA paper.

Reference is made in the DCA paper to allowing the media to attend as proxy for the public. It is said that they are the representatives, the eyes and the ears, of the public.

This is not in practice what will happen.

The media are invariably interested in a relatively narrow number of cases and relatively narrow subject matter. They are not interested in sitting through long and, frankly, quite dreary cases. They are not interested in watching several similar cases in action. They are commercial organisations and take a commercial view on how long should be spent in court and at which particular time. Experience in other jurisdictions is that in fact the media only attend occasionally and selectively. It cannot be said

that the public have the media attending as their proxy.

I consider that there are at least three categories who want and should have access to attend the courts.

### Categories of public in attendance

The first category are close family and friends. Of course the court can at present allow them to come into court but often this gives rise to objections by one party. Yet close family and friends have an interest. The SFLA/resolution code specifically draws attention to the fact that the way we do all our work affects not just the parties but the wider family. I know that grandparents are often keenly interested in what is going on. Sometimes they sit outside court. Why cannot they sit inside court? They are often a vital parenting resource. Of course they can become a party but this is not the issue. There are an increasing number of litigants in person who seek not a McKenzie friend as technically defined but instead someone to sit with them, perhaps taking notes or getting the papers in order. They can ask for permission but it can be opposed. Last week, a husband in person in my court faced his wife who appeared with a solicitor and barrister. He asked for his girlfriend to be able to come in as she had been helping him in his preparation of the case. Perhaps an insensitive request and the wife vigorously objected, citing very personal reasons. With much reluctance, I did not allow. I'm sure he was less satisfied with the outcome and process than if she had been with him. On another case a few weeks ago, in almost identical circumstances, there was no objection and the girlfriend sat next to the husband in person and was incredibly more organised than he was, with more intelligence and gave good assistance to him, and indirectly to the court.

There should not be the burden of seeking permission. Instead the public should be able to attend and the burden should be of objection. Sometimes in quite ordinary cases there might be valid grounds for objection about the attendance of other members of the family or friends. But that is the correct way round, rather than the law initially refusing access.

The second category are those genuinely interested in the family justice process. I have referred above to lawyers, law students and similar. The DCA paper refers to government officials being able to attend. But there are many others. There are representatives of campaigning and research organisations. A good number are responsible, very concerned and respectful of the court process. I am myself involved in a number of Christian family organisations which would very much welcome seeing the court process in action. The court would have the power to eject, or refuse entry or at the least take names and details of those attending. But I can see no good reason for those genuinely interested in the court process being refused. The DCA proposal that the media will attend on the public's behalf is simply unrealistic in fact and practice.

What instead will happen is that there will be a massive number of media accreditations. A number of campaigning organisations have journals, newsletters and similar. They may not be conventional media but they distribute information. They will simply accredit whoever wants to go to court as a media representative. The court service will then have a colossal task on its hands of checking and verifying. The category of media is already hugely greater with the Web and the simplicity and low cost of media publication. It will be even greater with the organisations that will feel genuinely that they want to attend court. There will be allegations of discrimination and partiality if accreditation of any particular organisation which has a media aspect is then refused. It will do no credit to the family justice system. Australia does not limit in this way. The restrictions on media only should be removed. Then genuine professional, campaigning or other interested organisations should be able to attend, subject to other DCA proposed restrictions.

The third category is the general public, unconnected with the particular case, unconnected with any

aspect of family law. Whilst it may be a complete bewilderment to some of us why members of the public may wish to spend their days in courts watching cases which, seemingly to us, mean very little to them, the reality and experience is that some members of the public do! A number of the civil courts at the Royal Courts of Justice have a regular number of public attendees. Of course the criminal courts have particular attractions and there are a significant number of members of the public who regularly attend. Why should they be refused entry to the family courts? I see no reason in the context of this consultation and reform, with the restrictions on publication, for their non-attendance. To the contrary, the principles behind the reforms call out for the very openness of access to the public, whoever they are, for whatever motives subject to the other restrictions, and issues in particular cases.

Of course this has implications for court rooms. At the Principal Registry, the courts are a good size and no doubt half a dozen members of the public could sit in the back row. However many district judge rooms across the country are smaller than the average living room! In time, this may have to be revisited but in the short term, the simple practicalities mean that there will simply not be enough room for public access. No doubt some caveats will have to be included in the legislation. But this should not detract from the overall principle. The public should be allowed open access to all family courts, with no burden of having to apply but with the restrictions on publication and specific restrictions on a case-by-case basis where justified.

## Conclusion

I hugely commend the DCA for their paper. In as far as I have had some minor contact with the DCA in the consultation process before publication of the paper, I record that I believe that Erica Maass and Sophie Barrett, no doubt with other colleagues, have done an excellent job. The family law solicitors profession, parties in the family law process, those concerned with the family law resolution system and the general public are entitled to be very grateful.

The law is uncertain and unclear and needs much clarification on a number of key areas and consolidation in one location. This must be a key objective. I have dealt in this paper with certain areas, not picked up in the DCA paper, but under the general theme of confidence and confidentiality, which must be covered.

My experience in Australia has convinced me that we must have much greater openness and transparency. The family law justice system does not immediately go into meltdown when there are strangers in the court room! As both a solicitor and a deputy district judge I welcome the greater openness and informed comment which will inevitably come into the way we undertake our work. We should be rightly proud of the work we do and how we do it and should have an opportunity of proudly showing this to the public including media. I endorse everything said by the DCA about the importance of overcoming distrust and suspicion. I support the remarks made by our President and by several leading judges in this regard.

I am absolutely certain that we should not be limiting it to the media. It should be open to the public. There should be opportunities for restrictions on attendance and for details to be given of who is in attendance where it is considered appropriate. But the public generally should be allowed in. Otherwise the category of the media will be hugely extended and coaches and horses, if they still exist, will be ridden through the likely legislation by newly accredited media representatives. To restrict family members, friends and others interested in the family's affairs to a formal application for access is to place an unreasonable burden on one side and an unreasonable advantage on the other. This is my strongest area of disagreement and I urge the DCA to change this. If they are in any doubt, I urge them to have further consultation with those jurisdictions which allow public access.

There must be very strong, vigorous and effective criminal sanctions. There must be no pathetically low fines compared to the commercial benefit of running a story. The respect for the openness of access will only be created if there are meaningful sanctions. Moreover these must be seen to be operated, a practical consideration as to who will operate them, at what sort of level of court and similar.

As a corollary to this, pre publication injunction proceedings should be available but taken not by under-resourced parties but by the same government law officers who would be involved in the criminal proceedings.

Unless pre-and post-publication sanctions work, and are seen to work, effectively and meaningfully, it would be better that the family courts were not opened.

The process of making sure that judgments are anonymous is probably best undertaken centrally. This will produce consistency, efficiency, speed and confidence in the process. This has a cost implication but in turn will save judicial time.

With judgments in future being made public, the family courts should urgently review how these can be given publicity. Of course commercial organisations would have an interest but they may not have an interest in the wide variety of cases at all levels. The experience in Australia is that this is best undertaken by the Family Court service, then leaving the commercial organisations to pick up and highlight the more important cases and judgments. The English Family Court service has improved its web site. However I do commend hugely the Australian Family Court website, which I happen to regard as almost certainly the best of its kind in the world, and its cooperation with the primary family lawyers organisation in Australia to promote the regular access to family court judgments. Having these available to the family law solicitor's profession in England and Wales will be an incredible resource. There will be much cross. However there will be a lot of judgments that will help inform the profession and the resolution process. It has wider implications but I believe the profession will embrace these for the benefit of the process.

I therefore congratulate the DCA on this initiative, and hope that it can go forward for much-needed changes. I will gladly give further assistance in any way in this consultation and reform process.

I commend my paper to the DCA for their consideration.

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