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# OPENING UP THE FAMILY COURTS – WHAT HAPPENED TO CHILDREN’S RIGHTS?

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## **Introduction**

The principle of open justice underlies public accessibility to courts and accountability of decision-making through publicity and freedom of information. This is modified in family proceedings, especially where children are involved and we shy away from the idea of ‘trial as a public spectacle’.<sup>1</sup> In the leading early 20th century case upholding the principle even in matrimonial disputes, matters affecting children were excepted as ‘truly private affairs’.<sup>2</sup> However, the law is now in the process of being reformed to bring family courts more into line with other types of courts in England and Wales. The consultation process that led to the changes included commitments to take the views and interests of children and young people into account. Not only do these commitments remain unmet, but the proposed changes pose a number of new challenges to children’s rights and welfare.

In December 2008, the Secretary of State for Justice and Lord Chancellor, Jack Straw, announced to Parliament that court rules would be changed to allow representatives of the media to attend family court proceedings, as of right, which they had previously been unable to do.<sup>3</sup> This announcement coincided with the publication of *Family Justice in View: Ministry of Justice Response to Consultation*.<sup>4</sup> The decision on media attendance came as some surprise to observers, because it contradicted an earlier decision in June 2007 against allowing the media into any tier of family court as of right, when the Ministry explained:

‘In line with overwhelming evidence from children and young people and the groups that support, protect and represent them ... we do not believe that allowing the media into family courts as of right would improve public confidence while at the same time safeguarding confidentiality ... We do not believe that allowing the media in to the family courts as of right is consistent with the principle that children must come first.’<sup>5</sup>

In accordance with the revised policy in December 2008, court rules were subsequently amended, with effect from 27 April 2009, to allow journalists with press cards the right to attend family court hearings unless the court made a specific decision to exclude them.<sup>6</sup> More far-reaching changes are to be included in a Bill to be introduced in the 2009-2010 Parliamentary session. This will allow the press and broadcasting media a right to publish details of the evidence given, although in anonymised form and still subject to potential veto by the court.<sup>7</sup> The meaning of these changes will be explored in this article. Initially, the obvious question is: what happened between June 2007 and December 2008 to bring about this *volte face*?

According to commentators writing for *The Times*, the Secretary of State attributed his decision to them. On 16 December 2008, in a story portentously headlined: 'Family courts: What changed in the long walk to freedom', Camilla Cavendish wrote:

'Talking ahead of his announcement in the House of Commons, Mr Straw credited *The Times* with bringing the issue to his attention "more graphically than it would otherwise have done". He said: "You have to deal with shedloads of issues in jobs like this ... if something isn't a particular issue at the time, you don't go searching around for it. I commend *The Times* for running such a professional campaign."'<sup>8</sup>

According to this report, the Secretary of State was unaware of the issue until drawn to his attention by *The Times* in 2008, despite his department and its predecessor having been consulting on it for over two years.

This article will argue that both the premise and the consultation process on these reforms have ignored and infringed a range of children's rights. The background to the proposed reforms will first be explained, and the relationships between concepts of secrecy, privacy, transparency and openness. Drawing on the literature on moral and legal rights to privacy leads to a question as to whether children are or should be accorded a different level of privacy rights than adults. The development of the law that protects privacy in family courts will be set out, followed by the effects of the changes. Analysing the reform process, and the particular nature of cases heard in family courts, it is concluded that children's rights have been overridden by adult interests.

### The problem of publicity in family courts

'Family justice: the secret state that steals our children: Every year thousands of children are taken from their parents, largely on the say-so of 'experts'. It is a secret and sometimes unjust process and the system must change.'<sup>9</sup>

The campaign to 'open up' the family courts has two main strands, both of which have gained momentum over the past six years. First, the fathers' rights movement has attained a high profile that makes it influential in any policy change regarding post-separation parental disputes about residence and contact arrangements for their children.<sup>10</sup> Secondly, in some cases where the state becomes involved in child protection matters, there are allegations that parents are unjustly threatened with having their children permanently removed from them in care proceedings.<sup>11</sup> (An associated aspect is separately identified by Brophy and Roberts as concerns expressed about some court users' understanding of processes and decisions.<sup>12</sup>)

In 2006 the Department for Constitutional Affairs (the predecessor to the Ministry of Justice) began a consultation to address what it called a 'crisis of confidence' in family courts that stemmed from perceptions of secret justice being meted out.<sup>13</sup> While it is true that there were complaints, the 2006 paper hardly presents evidence of a crisis, in the sense of a breakdown of the family justice system. It might be more accurate to conclude

that factors were converging to leading to some disquiet about the law. The media understandably object to any type of reporting restrictions, and were able to key into a number of issues that were attracting public comment. The fathers' rights movement, which featured significantly in the media through publicity stunts by Fathers 4 Justice, was alleging systemic gender bias in the courts, hidden from public view. Concerns about private law cases were not confined to the fathers' rights movement; there were claims that the court's role in cases where children were killed by their fathers on contact visits could not be properly scrutinised.<sup>14</sup>

With regard to care proceedings, social workers are generally treated with distrust by the media. This became even more apparent in 2008 in the vitriolic attacks in media reports of the death of 'Baby P', Peter Connelly, which has led to calls to improve the image of child protection social workers. Instances of allegedly poor social work practice are seized on, whereas good practice is not newsworthy.<sup>15</sup> Social work practitioners who provide court reports through Cafcass also get a bad press, especially when parties are unhappy about the outcomes of their case.<sup>16</sup>

Some of the most vocal complaints relate not to judges, lawyers or social workers, but to the nature of expert evidence given to family courts by medical witnesses. Claims are made that children can be permanently removed from their birth families and adopted solely on the basis of flawed evidence given by one expert witness. The reality is that large volumes of evidence from the parties and the independent Cafcass children's guardian are considered. Nevertheless, critics have conflated findings on expert evidence in criminal courts, notably *R v Cannings*,<sup>17</sup> with the role of the medical expert witness in care proceedings, although the situations were clearly differentiated when addressed by the Court of Appeal.<sup>18</sup> As another campaigning journalist, John Sweeney, wrote in the *Guardian* on 14 December 2003:

'Until the Government unlocks the doors on the closed world of the Family Courts, the damage caused by Professor Sir Roy Meadow and his Munchausen's label cannot be assessed.'

This was echoed by the *Daily Telegraph's* legal correspondent in 2005:

'Mr Joshua Rozenberg suggested that there should be greater public access to the family courts. In particular, concerns have been expressed, following the recent case involving Professor Roy Meadow, that if the courts operate in an atmosphere of secrecy, injustice could occur and the public would be none the wiser.'<sup>19</sup>

Finally, a further factor contributing to disquiet about the closed nature of proceedings is that it is difficult for courts and local authorities to refute these allegations when they cannot publish their own versions of events.<sup>20</sup>

It was not until the summer of 2008 that the campaign entered its most vociferous phase, with *The Times* devoting daily space for a week to the series of articles that the Secretary of State is reported as crediting with bringing the matter to his attention. Despite the subsequent relaxation of the law on media attendance at court, with effect from April 2009, some journalists have continued to cite expert witnesses as the primary target of their concerns, with Cavendish, for example, stating that she also needs to

be able to read psychiatric reports on mothers if she is to fully report on court decision-making processes.<sup>21</sup>

Therefore, the first part of the problem of access to family court proceedings is the way traditional privacy of family court proceedings is now described and criticised by the media and pressure groups, as 'secrecy'. This article will argue that the purposes of secrecy and privacy are different, and that individuals involved in family court proceedings have a moral claim to privacy which is reinforced by a legal right under Article 8 of the European Convention on Human Rights. More recently, the value of privacy to children and young people has also been recognised and this article will examine how this might be supported by reference to the United Nations Convention on the Rights of the Child.

The second part of the problem of publicity in the courts is a valid complaint that the law is confusing. There are varying legal provisions for: different tiers of courts; for closed hearings; on reporting restrictions and sharing of information; involving a mix of potential civil and criminal offences. The current law will be summarised after an exploration of the continuum of secrecy through to openness.

### **Secrecy; privacy; transparency and openness**

Open justice is almost universally hailed as a pre-requisite to a democratic society, with the converse perception of secret justice as symbolic of tyranny.<sup>22</sup> Bentham's early 19th century warning that 'In the darkness of secrecy, sinister and evil in every shape shall have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate', still represents a recognisable description of our fear of the consequences of institutional secrecy.<sup>23</sup>

However, secrecy is not essentially evil. The renowned ethicist, Sisella Bok, argues convincingly that secrecy has a moral value. The privacy of individuals might on occasion entail an additional shield of secrecy to guard central aspects of identity. But the dangers lie in group secrecy. A group can develop an enlarged sense of privacy which creates its own identities and boundaries with collective secrecy using the language of privacy, personal space and sanctuary, to personalise collective enterprises. It is corporate and institutional secrecy that are dangerous and have the potential to exclude and oppress.<sup>24</sup> Certainly an individual might experience the court as a closed system, facing ranks of professionals who use their own codes. To media commentators, the family court system has taken on a cloak of concealment and obfuscation for its own protection. If the reality is that institutional secrecy is indeed obscuring justice, then this cannot be justified. But what is meant by 'openness', and is it the solution?

Openness is exemplified by the drive in western-style democracies for open government and freedom of information. Writing on the imperatives behind freedom of information legislation, Patrick Birkinshaw echoes Bok in differentiating between protection of an individual's confidentiality and privacy, which promotes their identity and integrity, and over-protection of government information, which can have the opposite effect.<sup>25</sup>

The government consultation papers tend to use the words 'openness' and 'transparency' interchangeably, although the latter is a relatively recent term originating in European Union law, and has a narrower meaning than openness. The elements of transparency are: access to documents or information; knowledge about who makes decisions and how; comprehensibility and accessibility to the structures of the decision-making framework; public consultation; and a duty to give reasons.<sup>26</sup> Policies advocating transparency derive from attempts to bestow legitimacy on decision-making processes which had been unacceptably opaque. The purpose is to combat complexity, disorder and secrecy.<sup>27</sup> But transparent procedures do not require opening up every meeting to allow us to be present to witness every detail. Consequently, the public could accept the courts as legitimate if they could be confident that they know how and why decisions are made. In other words, active citizenship does not necessitate our being apprised of every fact that was presented in a case, but being vigilant about clarity of process. Brophy and Roberts' comparative work refers to transparency through educating the public about family courts, and gives examples of how the processes can be clarified in a more structured and considered programme than would be available to a journalist.<sup>28</sup>

We must consider what 'openness' might mean to people who find themselves in court. For them, privacy and secrecy will be difficult to distinguish. Research amongst university students in the US found that their most commonly kept secrets related first to sexual and romantic relationships and secondly to things that the respondents thought would make them look maladjusted, including mental illness; personal inadequacy and feelings of loneliness or failure.<sup>29</sup> These are matters that any of us would prefer to keep private, or if we felt under threat, deliberately secret. Young, frightened parents cannot be easily persuaded to co-operate with the court in conceding their own inadequacies in parenting to work toward a negotiated solution for the child. A recent profiling study of families in care proceedings found a high incidence of multiple social problems and vulnerability, mental illness, domestic violence and learning disabilities amongst the group of parents, of whatever age.<sup>30</sup> There will now be concerns about how parents who struggle to engage with the court process will react to the knowledge that journalists may be accessing the evidence.

Neither parents nor children will know where or when details in the public domain might still be found, years later. Immediate publicity may also be damaging. Psychologists see some secret-keeping as stressful, but they believe these stresses are relieved by confiding in a non-judgmental confidant, either personal or professional.<sup>31</sup> Sudden exposure to the public gaze may provide short-term validation through, perhaps, acknowledgement of suffering and vilification of the perpetrator, but such cases would need to be dealt with sensitively.<sup>32</sup> Such an approach may not fit with the timescales of the 24-hour media.

Condemnation of secrecy in courts is founded on claims that it protects lax, biased or malicious individuals and systems from public exposure, and hinders reform, redress and remedies. There are three reasons to justify the exception of family courts from open justice: to protect vulnerable individuals; to protect the public from distressing or corrupting details of

intimate relationships; and to prevent the administration of justice from being undermined by a lack of full and frank evidence being given. There is therefore a complex relationship between respect for protection of individual privacy and dignity and policies about what is in the public good.

It may be not be possible to differentiate between protection of, say, a vulnerable witness and the quality of the judgment that was based on their evidence. However, comment on reported cases from the higher courts keep personal details of the witness confidential while rigorously evaluating the judgment. The media argues that it is paradoxical that such an arrangement is not legal in a county court and that as ‘the eyes and ears of the public’ they are better placed than politicians and lawyers to judge what the public should know. However, there is a distinct lack of confidence in the motivation of the media, and fears that exposure will not be confined to scrutiny of systems but extend to interference with individual privacy.<sup>33</sup>

Privacy as a moral value, claim or right has been discussed extensively by philosophers and lawyers for over a century. One strand includes a utilitarian approach, that privacy is an essential aspect of humanity required to develop relationships of love, friendship and trust. Some take a Kantian view that privacy safeguards the individual’s development toward moral autonomy and rational choice. Most of this literature emanated from the US following the famous definition by Warren and Brandeis of privacy as ‘the right to be let alone’, subsequently becoming established as a tort.<sup>34</sup>

There was however no corresponding right at common law. Before the legal status accorded to privacy by the Human Rights Act 1998 incorporating Article 8 of the European Convention on Human Rights, it was relevant only in the law of defamation, breach of confidence and specific statutory offences (some of which will be discussed below).

Personal privacy is topical.<sup>35</sup> There is a widespread view in western society that privacy is a fundamental value because of its capacity to protect individuals from scrutiny, prejudice, conformity, and exploitation. This value is now protected, at times controversially, as a legal right.

## The legal right to privacy

All individuals, including children, have a qualified right to respect for their privacy under European Convention on Human Rights, Article 8. Consequently, arguments can be made on behalf of children, parents and witnesses that their respective Article 8 rights will be breached by publication of details about their case. These are balanced with other arguments by parties to a fair trial under Article 6, respect for their own family life under Article 8 and to freedom of expression under Article 10. The latter is also argued by representatives of the media, although it is often freedom of information, rather than expression, that they are really seeking.<sup>36</sup> Unlike most proceedings involving children, their welfare is not the court’s paramount consideration when making decisions regarding publication. A complex process of evaluating the arguments to balance competing interests has therefore been undertaken in the leading cases on publicity heard since the advent of the Human Rights Act 1998.<sup>37</sup>

A child who is a party in public law proceedings, and one who is not a party but whose welfare is being considered in private law proceedings, has a right to respect for their private and family life under Article 8. However their interests are considered at the same level as all the other competing interests, possibly even less when they are not as vocal or powerful as adults or news corporations.

Some writers on human rights feared a tendency for courts to fall back on the welfare principle in their anxiety to protect children.<sup>38</sup> Instead, it soon became evident from *Re S* that children’s interests in these cases take no priority over those of adults. In *Webster*, a five-month-old was considered too young to be affected by his full name being published, despite an enormous amount of publicity engendered by his parents, which continues three years later.<sup>39</sup> Now that all this information is preserved indefinitely on the internet, it seems odd that the judicial view of an infant freezes him in that time-frame, as if he still lived in the age when yesterday’s news is today’s fish and chips wrapping. There are signs of a more child-centred approach in the later cases such as *Clayton* and *Re Child X (Residence and Contact – rights of media attendance)*,<sup>40</sup> albeit relating to primary-school age children.

It is not just children subject to court proceedings who are vulnerable to unwelcome media attention of course, although normal exercise of parental responsibility would protect their privacy, and even a child of a celebrity has a reasonable expectation to be let alone (if they are fortunate enough to have parent who will support this).<sup>41</sup> Instances where children are deliberately exposed to the media by their parents for profit have also generated public discomfort.<sup>42</sup>

Media barons condemn the growth of a right of privacy that they see as restricting their ability to name and shame the rich and famous, with one even singling out a specific judge for criticism – ‘inexorably, and insidiously, the British Press is having a privacy law imposed on it’.<sup>43</sup> It is worrying, however, that where identities of non-celebrities are exceptionally restricted in criminal proceedings, there is little awareness demonstrated of the potential impact on children. For example, reports on lifting the bar on naming Peter Connelly’s mother featured virtually no reflection on how this would affect planning for his surviving siblings.<sup>44</sup> Similarly, demands to name the young brothers convicted of attempted murder of two others of a similar age in Doncaster paid little attention to the repercussions for their siblings or their victims.<sup>45</sup>

Most children who are subject to care proceedings are aged under five years.<sup>46</sup> They may have rights under Article 8, but they are not in a position to articulate an informed view on what should or should not be publicised about them. At present, even the court’s reliance on young children’s interests being conveyed by lawyers and guardians is slipping away, as legal aid and Cafcass’ organisational priorities reduce the level of representation.<sup>47</sup>

In order to focus more closely on how rights to privacy could be interpreted with regard to children caught up in these situations, we can turn to the United Nations Convention on the Rights of the Child, which although

not binding on English courts, is becoming increasingly persuasive and influential in the UK and 'regarded as the touchstone for children's rights throughout the world'.<sup>48</sup> The most relevant articles are:

*Article 3:* 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

*Article 12:* 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body...

*Article 13:* 1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information...

*Article 16:* 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence..

When considering the extent to which court proceedings relating to a child are to be considered private, Article 3 would make the child's best interests the primary consideration in all the court's actions. The extent of evidence presented about the child and family's home life will necessarily be wide in order to make the best-informed decisions. The law has developed in a piecemeal fashion to assure children that all the detail will remain confidential to the professionals who were involved in the case, who will also be bound by their respective codes of practice. Article 12 would ensure that children were enabled to participate as appropriate and were aware of how decisions were being made. Importantly, Article 13 gives them the right to find out more about the process. Article 16 reflects their European Convention rights.

While this might appear a template higher in aspiration than reality, it will serve as an important benchmark when considering firstly, how the law is now being changed and, secondly, what the impact might be. Before that, it is important to consider how a child's right to privacy differs from an adult's, in the context of it being necessarily limited by economic and social factors.

### What privacy means for children and young people

Philosophical, sociological and legal concepts of privacy have been greatly refined since Warren and Brandeis' 'man and his castle' construct, to become universalised and less patriarchal.<sup>49</sup> Feminist theorists have made the debate on a private/public dichotomy central to women's freedom to participate in society and to autonomy over their own bodies.<sup>50</sup> Here, we are narrowing the issues to those aspects of privacy and publicity that impact on children but there is a link with feminist arguments. The poten-

tial of privacy to oppress and isolate women and children was explored from the mid-1980s by critical legal theorists who recognised that privacy could be used as a device to hide oppression within families.<sup>51</sup> They challenged the views of Goldstein, Freud and Solnit that parents' and children's interests could be merged in a family unit resistant to state interference.<sup>52</sup> Power relations within families do not always follow an 'ethic of altruism and caring' and non-intervention in family life in the name of privacy is an ideological construct: a decision not to redress power imbalances or abuse.<sup>53</sup>

Psychologists have established that children can conceptualise privacy at quite a young age and that it is meaningful in their lives.<sup>54</sup> It is possible to discern elements in the classic essays on privacy that point not just to children's need for privacy but to an enhanced need. Fried and Parker widened the 'right to be let alone' to a right to have control over the amount of information others have about us and what they can do with it.<sup>55</sup> These control-centred definitions cover both rights to be free *from* interference and spread of personal information, and rights *to* self-regulation of communication and disclosure of information in one's own terms. Children who have been abused and neglected are particularly conscious of the lack of control they have over their own lives.<sup>56</sup> If there is a fundamental right to privacy as control of information, then children whose details are before the courts are surely in a special situation, not of their own making, where extra precautions are required to assure their sense of retaining privacy. There are signs that the judiciary are aware of the benefits of empowering young people to present their own version of events. This is however based firmly on the premise that these young people have reached an age of maturity and competence.<sup>57</sup> In contrast, young children are deemed to be immune from damage by publicity.<sup>58</sup> But although privacy may be sensed differently at different ages, all children have a valid claim.

Awareness of privacy is an essential element of developing identity and autonomy. While young people are developing their own identities, they will be less resilient to this type of assault. Where children are unable to enforce their own rights, they must be able to rely on adults to promote and enforce them. Otherwise it can be argued that attributing rights to younger children is meaningless.<sup>59</sup>

Some writers also see covert invasion of privacy as an assault on the dignity of the subject even if they are unaware of it, with an individual being compromised if they can be ambushed at any time by knowledge held by others emerging without warning.<sup>60</sup> Experienced social workers know that information about why children were subject to court orders when they were too young to participate needs to be disclosed to them in a timely and sensitive manner.<sup>61</sup> When decisions have to be made by adults about children to keep them safe, the subject of those discussions may be too young to be aware of them and thus their privacy is breached, but these theories remind us that we owe it to children to restrain our power, keeping our discussions about them to a proportionate level.

Privacy is significant in children's development of a sense of themselves as separate from and connected to individuals and groups, to 'feed back into their sense of self-esteem and help define the ranges, limits, and consequences of individual autonomy within our society.'<sup>62</sup> While young, their capacity to set their own level of privacy is minimal but as they get older, privacy takes on meaning as active choice and is consequently an important marker of self-determination.<sup>63</sup>

These ideas follow Piaget's theories of moral development that young children will not yet be in a position to make meaningful choices. However, it is not just a matter of short-term protection; we must consider the long-term impact on children who will be affected in later life by the way they discover their life-story, and possibly by the effect publicity had on planning for their care.<sup>64</sup>

Jaclyn Moriarty's analysis of the law in anticipation of the Human Rights Act 1998 saw an outdated *parens patriae* jurisdiction which she proposed replacing with an approach based on children's rights to privacy alongside their rights to participation.<sup>65</sup> Her work is the only in-depth study combining media law and child law, which she saw at that time as operating separately and potentially in conflict, with the basis of media law's freedom of expression failing to engage with child law's welfare principle and the inherent jurisdiction pre-dating children's participation rights.

Moriarty concluded that children do have a peculiar need for privacy, which should be acknowledged as a right, rather than being based on the court's welfare jurisdiction and what she termed the 'publicity power' of the inherent jurisdiction. She believed that this right could be balanced with competing interests in open justice by delivering anonymised judgments in open court.<sup>66</sup> She recommended an independent post holder who would act on behalf of children whose lives were or were likely to be exposed in the media. Moriarty's solution has the attraction of being available to any child being exploited by adults in breach of their privacy and/or participation rights, whether within or outside any court proceedings. As events have transpired, the half-hearted approach Government took to establishing the office of Children's Commissioner for England does not suggest that such a role would appeal to policy-makers.

There is, however, increasing awareness of the implications of details of children's lives being encapsulated on the internet, even by well-meaning parents or by trying to keep them anonymous. Several newspaper columnists write about their own family lives, and ethical questions arise as to what their children will make of this when they become aware. Suggestions include allowing young people to have items removed from the internet versions once they are older, or automatic removal when they are 16.<sup>67</sup>

Turning from the secrecy/privacy dilemma to the second part of the problem, the complexity of the current law, it will be seen that there are long-held assumptions about the special position that children in family proceedings occupy. Unfortunately the piecemeal and confusing nature of regulation has led some observers to suspect it is instead designed to protect the system.

## The law on access to family courts

A detailed examination of the status of matrimonial proceedings in *Scott v Scott* in 1913 concluded that, however distasteful, matters must be heard in open court, but excluded wardship from this principle as 'truly private affairs; the transactions are truly transactions intra familiarum; and it has long been recognised that an appeal for the protection of the court in the cases of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs'.<sup>68</sup> At the other end of the social scale, domestic proceedings in the magistrates courts were open, but there were restrictions on public attendance in the juvenile courts, where cases of both youth crime and protection were heard.<sup>69</sup>

The traditional approach to children who are caught up in proceedings largely through the action of others is exemplified in *Re M and N* where Lord Donaldson MR ascribed a child centred objective to the legislation prohibiting publication of cases:

'The family is essentially a private unit and this is particularly the case in relation to the children of the family. The accident that, usually through no fault of their own, outside agencies, whether the courts or local authorities, are called upon to intrude into the family unit in the interests of the welfare of the children should never of itself be allowed to deprive the children of the privacy which they should and would have enjoyed, but for that intrusion. This is recognised by Parliament and led to the enactment of s. 12 of the Administration of Justice Act 1960.'<sup>70</sup>

Moriarty observed that there were two reasons for keeping children's cases private – to protect them, and to facilitate the smooth administration of justice by encouraging candid evidence.<sup>71</sup> There is a third historical reason, less influential today, of protecting public morals.

There has been a gradual accretion of legislation since the Judicial Proceedings (Regulation of Reports) Act 1926, the background to which is entertainingly described in Stephen Cretney's essay "*Disgusted, Buckingham Palace ...*" *Divorce Indecency and the Press*<sup>72</sup> As the title suggests, the Act was initiated by a moral panic about the impact of too much detail on the public, rather than respect for individual privacy. Children's interests did not feature in the debates, which centred on salacious details of divorce and nullity cases (other than concerns about the corrupting influence on the young of reading these.) This third motive, identified by Lord Atkinson in *Scott*, of protecting the moral welfare of the population at large, can be traced back to the 18th century when it was feared that the

natural order could be disrupted if the working class learnt too much about the misbehaviour of those who were meant to be members of the superior classes.<sup>73</sup>

The 1926 legislation restricted publication of details of divorce cases but has been largely ineffective as most divorce proceedings are not in themselves of much interest.<sup>74</sup> Since then, the law became increasingly tangled, and took ten pages to summarise, relatively briefly, in the 2006 Consultation Paper.<sup>75</sup> One approach to understanding it is to deal separately with who can attend court and what can be reported. This will help to explain the present quandary following the change in April 2009.

### **Attendance at court**

Proceedings affecting children are commonly categorised as either public law, which involves state intervention in the form of local authorities initiating proceedings because of child protection issues of abuse or neglect, or private law, which involve disputes between family members. Either type of application is most commonly made under the Children Act 1989 to either a family proceedings court, which is part of the magistrates court, or to the county court. More complex cases are heard by the High Court, and some go on appeal to the Court of Appeal or reach the Supreme Court.<sup>76</sup> The rules on who can attend the hearings differ between these different levels of court.

The media have always been able to attend family proceedings courts, unless the magistrates decide they should be excluded in the child's interests. Otherwise, only parties, witnesses and relevant professionals can attend, and the public at large is excluded. Even when family courts are in the news, however, it is very rare for a journalist to attend a court at this level, which tends to hear the more routine cases. In contrast, prior to 27 April 2009, all county court and High Court Children Act 1989 applications were heard in private unless the court directed otherwise.<sup>77</sup> The judge and barristers do not wear formal wigs and gowns, to try to keep matters less formal and intimidating, and only the parties, witnesses and professionals attend. The judge could exercise discretion to allow attendance by a journalist on application or, for educational reasons, law or social work students might be allowed in if the parties did not object. Since the clamour about secret courts began, it became more common for judges to allow press attendance (and also limited reporting) because many judges believe that this can present the public with a picture of how courts work. Furthermore, some cases have already attracted so much publicity that the judge believes press attendance or at least a public judgment will put the matter straight, or do less harm than uninformed speculation.<sup>78</sup>

The change effective from April 2009 specifically allows representatives of the media who hold a press card to attend Children Act cases in county courts and the High Court, unless the judge takes a specific decision to exclude them; thus, the default position has reversed. The law position has not changed regarding the Court of Appeal or Supreme Court which will normally give anonymised judgments in open court which can

be reported. However, appeals are decided on the basis of documentary evidence and advocacy; parties and witnesses are rarely present and there is no oral evidence. There is probably therefore little more to hear by being present than will be available in the official law reports.

This brief outline of who can attend court indicates that processes could have been simplified by making the law more consistent. The rule change in April now means that journalists (but not the public) can attend a court at any level unless excluded by the judge or magistrates. However, there are further layers of complication. Even those who are able to attend court are bound by a set of rules regarding what information they can then share about the proceedings.

### **Reporting or publishing court proceedings**

There is a raft of legislation governing what can be reported from family courts. The most significant regarding cases involving children are:

#### ***Section 12, Administration of Justice Act 1960 (AJA 1960)***

This section states that 'The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except ...under the Children Act 1989 ...' This provision remains unaffected by the rule change in April 2009, and consequently even where a journalist attends a hearing, he or she must obtain specific permission from the court in order to publish anything other than very basic information about the case. The fact that the media might be attending has not altered the meaning of 'in private'.

The word 'publication' in section 12 was given a very wide interpretation in a High Court judgment by Munby J in 2004, to cover any form of verbal or written communication of any information relating to the case. He ruled that a solicitor who had passed on her concerns about medical evidence in a case where she was acting for a mother to the Attorney General (who was her sister) who then passed it on to the Minister for Children, was in contempt.<sup>79</sup>

It is odd that some 40 years after section 12 was introduced as a piece of enabling legislation to limit potential contempt to a narrow band of proceedings, it was given this troublesome interpretation. The implications of the judgment were far-reaching. Members of Parliament who were legitimately pursuing cases for their constituents might be acting illegally in using information about the constituent's court case; there was confusion about access to court papers by researchers and McKenzie friends; perhaps parties could not even confide in counsellors or friends. Once these dilemmas had been highlighted, the Department for Constitutional Affairs issued a consultation paper in December 2004, discussed below.<sup>80</sup>

Section 12 applies to courts at all levels. As was highlighted at the beginning of the article, the rule change announced in December 2008 was heralded by the media, and *The Times* in particular, as a victory for free speech. It was not until Mr Justice McFarlane pointed out in a speech to the lawyers' group, Resolution, in late March 2009 that unless section 12 was amended (requiring Parliamentary time) a journalist attending the hearing was still bound to silence on anything they heard, unless they obtained the court's explicit consent.<sup>81</sup> This is the current position, pending the Bill due in autumn 2009.

### **Section 71 Magistrates Court Act 1980**

This restricts reporting of cases in the family proceedings courts to basic details. A breach is liable to prosecution and fine.

### **Section 97(2) Children Act 1989**

It is a criminal offence to publish any material likely to identify a child who is subject to proceedings under the 1989 Act. This applies to courts at all levels and effectively prohibits even the basic details publishable under s 12 AJA. In *Clayton*, the Court of Appeal held that s 97 protection extended to the child only while a case was ongoing, so that at disposal stage court would need to impose an injunction against future publicity if this was decided to be necessary. This judgment did feature consideration of the child's standpoint with regard to the campaign her father was bent on pursuing, and imposed restrictions on him in her interests. Unfortunately, by confining the section to the proceedings only, it also left the impression that it was a court process that s 97 protected, not a child's future well-being.

It should be borne in mind that any of these restrictions can be modified or lifted at the discretion of the court. However, this does not allay the fears of those who think the legislation can be used to keep proceedings secret.

Writing prior to the Human Rights Act 1998, Moriarty concluded that the law accorded children no right to privacy, but only to protection.<sup>82</sup> The cases suggested to her that the wardship jurisdiction was not viewed as 'justice' because it was considered paternal jurisdiction over the ward, and therefore the concept of 'open justice' did not apply, and that AJA s 12 codified the common law to protect proceedings, not children.<sup>83</sup>

In a review of *Re W (Wardship) (Publication of Information)*<sup>84</sup> Moira Wright had also suggested that the accepted practice of keeping wardship cases out of the public gaze might be to safeguard the jurisdiction rather than the individual child. In that case, the court took the view that the weight of public interest in local authority policy outweighed the possible harm to a boy of details of his past being publicised. Balcombe LJ was anxious to narrow any imposition, saying that the 'freedom of the press to publish matters of genuine public interest should not be restricted ... any more than is essential to protect the ward from clear and identifiable harm.'<sup>85</sup> The court was not prepared to grant an injunction on the basis that

the ward would be harmed by reading press reports himself, despite his age and history of psychological harm. Restrictions on publicity were imposed not solely to protect children but also to uphold public confidence in the wardship jurisdiction, because excessive publicity might deter reliance on its capacity for protection where required.

This is an important point. Although wardship is rarely used now, too much publicity about current cases could reduce, rather than enhance, public confidence in the welfare jurisdiction. At least one 'celebrity' couple were reported shortly after the April 2009 rule change to have settled after the court ruled that it would not exclude the press.<sup>86</sup> One effect of the prospect of publicity may be to reduce the numbers of cases started, which would be welcomed by some over-stretched agencies like Cafcass. The concern must be that it will also deter carers and other witnesses whose evidence may be needed to reach the best outcome for the child.

The obscurity and inconsistency of the legislation, and the lengthy judgments interpreting it, do not help combat the perception of systemic secrecy.

## **Government attempts at reform**

### **1993**

A 135-page consultation paper was issued as long ago as 1993, a *Review of Access to and Reporting of Family Proceedings*.<sup>87</sup> Its author is not named and there is no trace of any responses to it although it is mentioned approvingly by the Court of Appeal in 2002, Thorpe LJ lamenting that its potential for clarifying the law had been lost.<sup>88</sup> In 2005 the (then) President of the Family Division, Dame Elizabeth Butler Sloss said she did not know what had happened to it.<sup>89</sup> The 1993 paper differs from the later documents by setting out the contemporary law in extraordinary detail, but gives no sense of urgency for change. There are no references to secrecy, but an assumption of 'generally accepted wisdom' that publicity is harmful to children's welfare.<sup>90</sup> A few brief paragraphs on 'The need for change' draw on the Calcutt Committee report's recommendation for a single set of rules for the media,<sup>91</sup> and the fact that the new Children Act 1989 created a concurrent jurisdiction that made the range of legislation even less logical. The paper expressly concluded that there was no significant dissatisfaction with the current balance between openness and privacy and no need to make change for its own sake.<sup>92</sup>

The pressure for change therefore emerged after 1993. The most recent factors have been mentioned, but in the longer term the fact that pre-Children Act 1989 it was very unusual for children in care to be considered by a court at a higher level than the local magistrates must be a major contributing factor.<sup>93</sup>



## 2005

As already discussed, the purpose of the consultation paper issue in 2005 was to resolve issues from *Kent CC v B* on sharing information amongst professionals.<sup>94</sup> It specifically excluded the question of wider public or media access to the courts. The rules were amended from October 2005 to permit some limited sharing of information between parties, professionals, regulatory bodies, researchers and MPs.<sup>95</sup>

In the same year, a Select Committee reported on the operation of family courts, including amongst its recommendations that the press and public should be allowed into family courts subject to certain restrictions, but that only matters made public by the court should then be published.<sup>96</sup>

## 2006–2007

The Department for Constitutional Affairs (succeeded by the Ministry of Justice) issued three documents: a consultation on proposals in July 2006;<sup>97</sup> a response, with new proposals in March 2007;<sup>98</sup> and another consultation on a third set of proposals in June 2007.<sup>99</sup> The 2006 consultation paper stated that there had been a loss of public confidence in the family justice system.<sup>100</sup> There is however no evidence about the numbers of people who do complain about their experience of family courts.<sup>101</sup> Nevertheless, the Department aimed to end secrecy by implementing a series of proposals to make the law more consistent by lifting some of the restrictions on access to the courts. The most radical proposal was to allow, with some safeguards, media attendance and reporting of cases at all levels of court, as ‘proxy for the public’.<sup>102</sup> Overall, the impression was given of an attempt to address adult grievances, with little weight being given to the impact on children who are the subject of proceedings. For example, the section headed ‘Protecting the privacy of families, especially children’ in fact makes no reference at all to children.<sup>103</sup>

The then Minister for Justice, Harriet Harman, stated categorically on several occasions that the family courts would be ‘opened up’ to the media.<sup>104</sup> Surprisingly, the 2007 response to the consultation set out proposals to rationalise the law, *without* giving the media rights to attend court. Lord Falconer, then Lord Chancellor explained that the 2006 paper had invited participation by young people, and that the media would not be given automatic access to family courts because most responses, especially from young people, were against it, and ‘children must come first’.<sup>105</sup>

As noted above, awareness of the ongoing debate was evident in proceedings themselves and the judiciary tried to make information available as appropriate and processes more transparent. In *Rochdale* it was apparent that social workers could not rely on the court to keep their identities protected many years after they had worked with children who were now adult and wished to speak to the media about their experiences.<sup>106</sup> This judgment emphasised that such protection was accorded to social workers only where it was still necessary to prevent identification of children. The court noted the argument that there was a shortage of experienced social

workers throughout the country and that unwelcome publicity might be a further disincentive to working with children, but was not prepared to look more widely at the interests of those children.

In a second inquiry, the Constitutional Affairs Committee heard evidence from senior judges as to their wish for more public knowledge about what actually happens in court. They felt that this would educate the public about the routine nature of most cases, the good work that was being done and even justify more resources being put into the system. However the district judge at the busiest family proceedings court, where the press could legally attend, commented that despite his willingness to allow attendance it was very rare, an occasion ‘flurry’ when court were in the news, that died down after few days.<sup>107</sup> Reading this evidence, one can sense some frustration on the part of judges who believe professionals, on the whole, do a valuable and difficult job well, working toward the best outcomes for children, but are unable to defend themselves against ill-informed criticism.<sup>108</sup>

## December 2008

As set out in the introduction to this article, the Secretary of State announced in *Family Justice in View* that he was taking a ‘balanced view’ and would, despite previous policy statements, change court rules to give media access.<sup>109</sup> Although the paper refers to the Ministry taking into account 200 letters received, there is no analysis of this correspondence, unlike the breakdown given of respondents to the actual consultation questions in earlier publications. Apart from these 200 letters of unknown provenance, the only reason given by the Secretary of State for his having to re-balance his view was the campaign by *The Times*, which consisted of parents’ complaints about social workers and medical expert witnesses. Thus, policy on media access changed between 2006 and 2007, and back again in 2008, when the following proposals were made:

- To change the law so that the media will be able to attend, unless the court decides against this. (This was achieved by way of the rule change in April 2009)
- To improve public information about how cases are decided
- To pilot anonymised family proceedings court and county court judgments on-line.<sup>110</sup> To give parties copies of the judgment at the end of the case
- To make reporting restrictions consistent across all family courts
- To protect children’s identity, unless lifted by the court. (This is a restatement of the present law).
- To reverse the *Clayton* judgment (although Mr Straw has subsequently stated that he has ‘taken time to reflect and reconsider [his] position’ and will not ‘disturb the effects’ of this judgment.)<sup>111</sup>

- Enable more access to support and advice by easing restrictions on sharing case details
- Consult on whether adoption hearings should also be open

The next section will examine the extent to which the consultations took account of children's rights.

### Children's rights: the consultation process

'Q: Will children's views really make any difference?

A: You bet. When you read through this guide you will see just how keen Government have been to hear what children themselves have had to say.

REMEMBER: You are experts ... "Experts by experience"<sup>112</sup>

This quotation is taken from a glossy 'Young People's Guide', replete with photographs of cheerful teenagers, that was published with the 2007 Response by the Department for Constitutional Affairs, which did indeed incorporate views from more than 200 young people. Only 30 per cent felt that the media should be allowed into family courts.<sup>113</sup> In retrospect, it can only be concluded that not only were these views ignored, the views of other young people will soon be overlooked with potentially serious consequences.

It has been acknowledged throughout this article that the privacy rights of adult parties and witnesses have been accorded legal protection, in accordance with moral concepts of privacy, as well as the administrative requirements of the courts. It has emerged that there is less certainty in asserting these rights for children and young people. The classic Warren and Brandeis definition led to ideals of privacy embodied in the US political system for adults. Children, who could not be assumed to be autonomous, were subject to the state as *parens patriae*. Indeed, when the views of Goldstein Freud and Solnit prevailed in the 1980s, it was acceptable to merge the child's interests with the parents in a family unit resistant to state interference.<sup>114</sup> Recalling that privacy rights consist both of being shielded (which can come within the child protection and welfare paradigms) and being in control of one's own personal information (which raise problems about children's participation), there are particular obstacles to enforcing children's rights. One might argue that when the state interferes with family life because parents and their children's rights are in potential conflict, it takes on a heavy responsibility for ensuring that the correct balance is reached.

In a wider context, there is increasing awareness of the technological potential to invade children's privacy in a society which has been described by Eileen Munro as one of 'over surveillance and under protection'.<sup>115</sup> Even in the 1960s, Goffman commented that new methods of data storage posed a threat to privacy in that it is possible to make readily accessible information about a person's remote past, meaning that we are unable to change our definitions of ourselves and others as we once were.<sup>116</sup> Perhaps as young people grow up in what is increasingly termed a 'surveillance society', they will become accustomed to the idea that they

have little control over their personal data. However it must be remembered that children and young people in general are less resilient to embarrassment than adults; 'children have their own standard for humiliation'. The US Supreme Court in the 1990s recognised that young offenders and young victims required more protection because psychological damage from publicity could harm the rehabilitation process.<sup>117</sup> Recent research in the UK found that young people faced an additional barrier if they were labelled as 'care leavers'.<sup>118</sup>

Consequently, it must be unsafe to make assumptions about the capacity of children now subject to court decisions to cope with the knowledge, at whatever stage, that their lives are being exposed to, and discussed by, not only social workers, psychiatrists and lawyers, but to people they have never met and have no connection with their lives. This is clearly reflected in the 2007 government summary of 245 formal responses,<sup>119</sup> where the only group of respondents which had a majority in favour of media attendance were media organisations themselves.

Young people were, however, receptive to the idea of themselves being able to access more information about how decisions were made about them. This proposal has not re-surfaced since the 2007 consultation paper.<sup>120</sup> The current organisational problems within Cafcass means guardians are no longer being appointed to all care cases, and new style fragmented reports reduce the options for individuals to access full records in later life.

There is no indication that any young people or organisations representing them had submitted any new evidence since 2007. The only conclusion that can be drawn is that the findings of the initial consultation had been discarded either because it was later discovered that they were not valid or were not expedient. Neither alternative suggests that the views of young people were accorded any respect. In conclusion, we can see that this consultation process on 'transparency' has been conspicuous in its own breach of the guiding principles of transparency in consultation a decision making. Children's rights to participate and express their views in the consultation have been overridden. Now we need to find a way to protect these rights in the court arena.

### Conclusions: Children's rights and the public benefit

The voice of the child has been notably lacking in the debate on open justice in family courts. Instead, adults have made claims about what is in the public interest, although it is questionable how much interest there will be in court proceedings.

The first and most startling decision taken at the end of 2008 was to allow media attendance, despite children's views in the consultation. The second objection that can be made to these proposals is the assumption that simply anonymising a child's details will be sufficient protection. The NSPCC has pointed out that anonymising some cases will be so difficult that skilled professionals will have to be taken on by the journalist to ensure this is done.<sup>121</sup> The dangers of 'jigsaw identification' are manifest.<sup>122</sup>

Furthermore, as vividly expressed by child psychiatrist Claire Sturge, children's knowledge that details about them are 'out there until they die' can be likened to the responses of abused children whose images have been posted as pornography on the internet.<sup>123</sup>

Lawyers and social workers must be prepared for media attendance. Minimising delay is a fundamental principle of the Children Act 1989. When parties and their representatives have to present cases for and against media presence and/or reporting, delay and cost will be increased. But most children in care cases are under five years old and will not be in a position to put their own views. Moreover, organisational difficulties within Cafcass in England currently mean that many cases proceed without a guardian being appointed to instruct the child's lawyer to resist inappropriate media attendance. The separate proposal to give all parties copies of the judgment will be another call on scarce resources.

The proposal to consult further on whether adoption hearings should also be open is another surprise, as under the Adoption and Children Act 2005 contested matters are disposed of before the adoption hearing, which functions as a family celebration, and can be of no public interest.

Nothing in the 2008 proposals enhances the participation of children and young people in decisions to be made about publicity in their own cases. The extra costs and delays will add to the burden on the family justice system, already described as 'in crisis'.<sup>124</sup> This is all contrary to UNCRC Arts 3 and 12. Children's right to information under Art 13 is threatened by the limited access to lawyers and limited capacity of Cafcass. We have seen that the courts have a restricted view on the rights of children to privacy (Art 16) if they are too young to protest.

It is too soon to evaluate the advancement of the public interest by the rule change in April 2009. Yet, it appears that the media are not turning up. Journalists always work to deadlines, but in the era of 24-hours news, they are under increased pressure. Most national and some local papers featured reports from the family courts in the week beginning 27 April, but this only lasted a few days. There is already anecdotal evidence that journalists cannot wait while advocates and social workers negotiate at court, and drift away before the matter actually come before the judge. It seems unreasonable to expect them to be able to produce a viable story after the matter has been through lengthy analysis and re-writing to exclude all identifying features. With no pilots and no training before the rule change, there were soon complaints that different courts were behaving differently. The President of the Family Division had to take time to issue a series of detailed Practice Directions.<sup>125</sup>

A view is often expressed that the media will only want to attend cases involving celebrities.<sup>126</sup> The President has clarified that although such cases are due no special consideration, where a child had expressed her distress about publicity through the guardian and a psychologist, he excluded the media because even anonymised reporting held potential risks.<sup>127</sup> Although there are codes of practice applicable to the media about the extent of publicity given to the children of celebrities, there was previously no explicit distinction made by the court between the child of

unknown parents and those of famous parents. In *Re Z*, Ward LJ had controversially resorted to the welfare principle of the Children Act 1989 to make a prohibited steps order preventing the daughter of a government minister from being filmed in a documentary about her health and education needs.<sup>128</sup> An indication of greater judicial sensibility toward children's rights was shown in *Murray v Big Pictures (UK) Limited* where the Court of Appeal held that it was at least arguable that the small son of a famous children's author had a reasonable expectation of privacy, as would a child of a parent not in the public eye, and that the High Court judge had not paid sufficient attention to the fact that the appellant was a child. The law should protect children from intrusive media attention, in this case from being photographed in a public place.<sup>129</sup>

The announcement that s 12 AJA 1960 will be amended to make all court papers available to the media exacerbated concerns. Clinicians who owe a professional duty of confidentiality toward their clients already have to follow a careful line in combining this with their duty to the court. They fear that in future they will not be able to offer any confidentiality at all if they are then to report to the court. No consultation has taken place with professional regulatory and ethical bodies about this.<sup>130</sup>

Many family cases are not even hearings as such but recorded agreements after negotiation. Brophy and Roberts' comparative work raises many questions as to how far it is possible for the press to accurately present such complex situations.<sup>131</sup> There is a danger of 'synecdoche', where we remember one salient feature and confuse that with the whole identity, where not all the facts or the context are presented to us, or our small attention span prevents informed judgments.<sup>132</sup>

The fathers' rights movement has been influential in other jurisdictions in getting the law changed to publicise family proceedings.<sup>133</sup> Australian law changed in the 1980s to make the Family Court of Australia open to the public and press, but it continued to be subject to vast amounts of criticism. In New Zealand the law was changed in 2004 to allow accredited journalists into family cases. An evaluation in 2007 found that virtually no cases had been publicised.<sup>134</sup> Unfortunately, the unlikelihood of a journalist appearing does not diminish the duty on lawyers and professional witnesses from advising parties of the possibility.

Until we can agree what public benefit there is in diverting energy and funds into controversial and ill-prepared change, we can at least try to observe the rights of vulnerable young people to a court service which dedicates all its resources to their interests.

???please expand – i.e. Senior lecturer / Professor etc JCardiff University

1 Jaconelli, J, *Open Justice: A critique of the public trial* (Oxford: OUP, 2002) at 355.

2 *Scott v Scott* [1913] AC 417 Lord Shaw 1 All ER Rep at 33.

3 Hansard HC Vol 485 Col 980 16 Dec 2008.

4 Ministry of Justice CP(R) 10/07 Cm 7052 (London:TSO, 2008).

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6 Family Proceedings Rules 1991 r 10.20A.

7 Improving Schools and Safeguarding Children Bill, Draft Legislative Programme 2009/10.

- 8 A re-working of the article appeared the next day headlined as ‘How The Times helped to right a wrong’ 17 December 2008.
- 9 Cavendish, C, *The Times*, 6 July 2008.
- 10 The term ‘fathers’ rights movement’ (see Collier, R and Sheldon, S (eds) *Fathers’ Rights Activism and Law Reform in Comparative Perspective* (Oxford: Hart, 2006)) will be used in this article to refer to a range of groups that claim to represent the interests of fathers who are involved in family court proceedings, although this does not imply that the author attributes their views or activities to fathers as a homogenous group.
- 11 See, for example, the Justice for Families ‘Public Family Law Reform Coordinating Campaign’ established by John Hemming MP <http://justice-for-families.org.uk/>.
- 12 Brophy, J and Roberts, C ‘*Openness and transparency in family courts: what the experience of other countries tells us about reform in England and Wales* (Oxford: University of Oxford, 2009).
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- 21 BBC Radio 4 *Today* 25 June 2009.
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- 25 Birkinshaw, P, *Freedom of Information: The Law, the Practice and the Ideal* 3rd ed. (London: Butterworths, 2001) at 454.
- 26 Chalmers, D, Hadjemmanuil, C, Monit, G and Tomkins, A, *European Union Law: Text and Materials* (Cambridge: CUP, 2006) at 317-18.
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- 30 Masson, J, Pearce, J, and Bader, K, *Care Profiling Study* Ministry of Justice Research Series 4/08 (2008).
- 31 Kelly, A E, *The Psychology of Secrets* (New York: Kluwer Academic, 2002) at 136.
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- 33 Minutes of a meeting of the Family Justice Council, 6 July 2009.
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- 35 See for example, HL Constitution Committee, *Second Report: Surveillance, Citizens and the State* (HL 18-1, 2008-9).
- 36 Birkinshaw, P, ‘Freedom of information and openness: Fundamental human rights?’ (2006) 58 *Administrative Law Review* 177.
- 37 *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47 [2005], 1 FLR 591; *Kent County Council v B* [2004] EWHC 411 (Fam), [2004] 2 FLR 142; *Norfolk County Council v Webster and others* [2006] EWHC 2733 (Fam); [2007] 1FLR 1146; *Clayton v Clayton* [2006] EWCA Civ 878, 2007 1 FLR 11.
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