



PRESIDENT OF THE
FAMILY DIVISION

Transparency Implementation Group

Subgroup 2: Publication of judgments

Minutes of meeting on 26 January 2022 at 4.30pm

(Remote meeting via Microsoft Teams)

Attendees: HHJ Madeleine Reardon (Chair of subgroup), Jack Harrison (Co-Secretary), MoJ Policy, HMCTS Operational, DfE Policy, Judicial Private Office, Dr Natalie Byrom, Dr Julie Doughty, Charles Hale QC, Femi Ogunlende, District Judge Adem Muzaffer, Lucy Reed, Jack Cordery, Helen Lincoln, Representatives from the Family Justice Young Peoples Board.

1. Welcome and apologies.

As Chair of the Subgroup, HHJ Madeleine Reardon (MR) welcomed everybody to the first meeting of the judgment publication and anonymization subgroup and set out housekeeping rules. MR explained the purpose of the meeting, encouraged broad discussion and the sharing of views on the agenda items.

No apologies were recorded at the meeting, however, post meeting it transpired that Clare Walsh had not received a meeting invitation due to an administrative error. Accordingly, her apologies are hereby recorded after the event.

2. Development of an Anonymisation Unit

The agenda was changed to accommodate HMCTS, who had difficulties attending the entire meeting. Accordingly, MR proposed to deal with agenda item 8a first; consideration of anonymisation, responsibility for it and whether there should be an anonymisation unit within HMCTS. It was important to capture the views of HMCTS.

In consideration of anonymisation the following points were made/discussed:

- Dr Natalie Byrom opened by explaining they had done some work on this, although the software is not at a reliable stage for anonymized judgments. Work was previously done with Dr Judith Townend producing a report on how other jurisdictions approached it and she was aware Ireland have a bespoke anonymization unit. The National Archives have been given responsibility for the publication of judgments and are looking at these requirements. It was suggested that John Sheridan, who's leading on the work, be included in these discussions.

- HMCTS support the Judges in dispensing justice, although within a finite budget. They are stretched to capacity. Whilst they do not object to be an anonymisation unit they do not have either the expertise or resources. Resources would need to have a dedicated ring-fenced funding from the MoJ, or decisions would be needed on HMCTS work priorities.
- It is important that this work is not viewed as separate from the reform programme. There are concerns that both this and the data collection stream have been in gestation for the last 10 years and why they have not been scoped into the design and delivery of the reform programme.
- The spending review settlement is yet to be decided, however, this is an issue which has been recommended by both the President and Domestic Abuse Commissioner. HMCTS and Lord Wolfson have made commitments on this and resources need to be provided.
- Whilst accepting HMCTS may not have funding it will need to take charge of the anonymization of judgments. It cannot be an independent body. It needs to be in the control of the court system with possibly a ring-fenced budget from another department.
- Judges have always done the anonymisation and uploaded on Bailii and there have been some issues with the anonymisation. HMCTS accept it is a responsibility to take on the work and it that it needs to be done right.
- In context, Judges have done the anonymisation, however, it is one of the reasons judges do not follow the 2014 guidance because they either do not have the time or the commitment, or they fear making an error.
- Since the Transparency Review was published, at least three very serious anonymisation breaches have been identified. These are either as a result of a judge, court staff or a lawyer making errors because they do not have either the time, proper guidance or proper regularised process of checking and cross checking. It must be either HMCTS, the Judicial Office or the MOJ to take responsibility for assisting judges to carry out their function in a safe way.
- There are suggestions about the legal aid agency paying lawyers to do the anonymisation. It is not a lawyer's role; they are responsible primarily to their individual client.
- Lawyers have no more time available than Judges and a specific fee for lawyers is not the answer; it needs dedicated people to develop safe ways of working.
- There will be great discontent, particularly for District Judges, if the burden falls to Judges. It will not be invested in. There is likely to be inconsistency and Judges should not have to deal with the accountability aspect if errors are made. It needs to be viewed as part of the reform programme with funding.
- Although judges approve the anonymisation, often it is lawyers who do the anonymisation for free; certainly, from District Judge to High Court level. Judges check.
- HMCTS accept all the points made, however, it is a new function being asked of them and within a finite budget. They will look to MoJ colleagues to support.

3. Publication

MR explained that in considering publication thought was needed about which judgments are expected to be published. Current guidance essentially indicates those of public interest. Moving towards a broader transparency-based publication requires to review the guidance again and decide what judges are supposed to publish. In consideration, the following points were made / discussed:

- Dr Julie Doughty lead a research project which gathered a database of all the judgments that were published following Sir James Munby guidance for the first two years from 2014. She will make the database available to all. Fact finding judgments in private law cases should be published.
- There was resistance to the idea that publishing cases in the public interest means just publishing important cases.
- There is a parallel stream of work in the Financial Remedies Courts, following consultation and various judgments from Mr. Justice Mostyn. This suggests an increase in publication of financial remedies judgments; however, it is debatable whether financial remedies judgments hold any or much public interest. Newspapers are only interested in celebrity issues.
- All cases, irrespective whether they involve the intervention of the state holds public interest because the work of the court is of public interest; this should include small money cases, private law cases, private law cases without major welfare issues (ie: without domestic abuse). All should be published to see the pattern of work overall and it is important that judgments from all tiers of judiciary are published.
- The magistrates deal with a vast volume of work, including public law work. From a statistical point of view, in terms of patterns of behaviour, the records of their reasons and outcomes are important to build up a picture of patterns in the family court; a broad scope is needed.
- Local authorities learn much from reading judgments, what is happening in other cases, and what works well for families; which can be shared wider. There is concern not to just publish the sensational bits or anything that assists jigsaw identification.
- There are serious concerns about the digital legacy of children and to ensure children don't come across their cases when they are adults. They should not be able to search and find it, although it can be easy for people to identify a child or family.
- AI or tech anonymization is not the solution. Techniques to reconstitute the identities of people are developing constantly.
- In the President's evidence that he gave to the Justice Select Committee, he suggested a random sample of judgments; 10%. It is unclear how to operationalize and enforce this, however, the linkup between case management systems and understanding the process is critical. One suggestion would be for the case management system to be adapted to develop a flag to randomly identify a case where the judgment will be published. It all needs careful thought linked to work about data collection.
- Without serious administrative support this will not work. Judges will not be on board with it. It may be judgments are referred to a department to anonymize them and returned.
- Gisting judgments should be considered, particularly tiers of judiciary, such as magistrates, who deal with high volumes. They could gist their decisions for publication with short reasons.
- Magistrates reasons are always brief and in written form. It is easier to do a randomised sample; one in 10 almost numerically. Other than anonymisation there are few difficulties in making them available.
- A recent judgement was published in a difficult long running private law case involving parental alienation, experts and children. There had been a contest over the analyzation of the judgment. It must be borne in mind that lawyers' responsibilities are to their clients and even in the anonymisation process there is an issue of client interest. In this instance, the judge anonymised it over two months as the Judge was so busy. It was published on Bailii with track changes that

had been agreed to be removed to prevent Jigsaw identification. This example was a real-life perspective. It should not be Judges or lawyers to do judgments or write orders.

- District judges are likely to have the biggest burden and will need much assistance. Circuit judges do not usually have permanent clerks. High Court judges have clerks but on occasions still ask practitioners to anonymise judgments and via their clerks the judge approves it.
- There must be a percentage of judgments published across the board and not just public interest only. People should be able to investigate the data and select any case.
- The real deficit is in the lower courts. They are rarely published. Most people commence at the magistrates in private law dispute. There's an argument for more percentages at lower levels given this is where people are more likely to learn more about the process.
- Anonymisation for the magistrates will be problematic if both parties are in person as there is no lawyer to assist. Magistrates reasons are shorter and there is likely to be a larger burden. Reasons may get longer if subjected to some scrutiny.
- All levels will require resources, dictated by the amount of judgments that can be produced and how they are produced.

4. Focus groups

MR sought views on running some focus groups with those directly engaged in the process; such as judges and practitioners. The aim was to examine the barriers preventing more publications and how to address them. In consideration, the following points were made / discussed:

- The research of Dr Julie Doughty of 2015 to 2016. She had engaged with all the family court judges across the country. Many responses were from High Court Judges with a wide range of views. Some did not respond but provided reasons why they weren't going to respond, which was helpful.
- We need to ensure when seeking judicial views that there is co-ordination across the four subgroups of TIG to check the same questions are not being asked.
- A need to consider what we are asking people in the focus groups to avoid delay by reopening questions, such as whether we should be aiming at 10%. Other barriers for delays are where following long gaps between delivering judgments and transcript; often funding certificates are discharged.
- A need for judges and practitioners to demonstrate how they do it. Do they use checklists? Are there ways of saving time and reducing the burden? What is it that enables Judges to do it?
- Some judges type fast and some prefer preparing their judgments in writing because they can prepare them on an anonymized basis. There's a need to gather the transparency process and guidance in more granular detail.
- As judiciary and practitioners are overstretched because this exercise was completed recently trying to identify the barriers and good practice; is it better reflecting that experience to a broad group as opposed to a focus group.
- To consider engaging at an early stage with the anonymization team in Ireland to understand how they go about it and how they measure success?

- To prioritise the keynote effective solutions that other jurisdictions have developed on which to base models. A need to flesh out some top tips before engaging others.
- For focus groups we must consider the fee paid judiciary of DDJs, Recorders, DCJs and DHCJs and their views.

5. Anonymisation

- As we move into the world of social media and the internet, there is need to consider how much information people can put together in a jigsaw identification to find a child or family. Children want their information to be protected and not to be in the public domain.
- Current publications of judgments are a concern. If a place is named, people can work out the story. There are the same serious issues about publications of serious case reviews. We need to agree what the jigsaw is in order to meet the challenge.
- This is an increasingly technical area of research worth engaging with the Alan Turing Institute. It is not only about publication of judgments but placing them online. Once data is available in a digital format it opens it up to all new types of opportunities.
- In other jurisdictions they have legislated against the harm and recognise anonymization is difficult; particularly as technology advances.
- There is a need to draw on best practice and the best available science about how to do this properly. Given the way technology is advancing, it's difficult to produce meaningful anonymized judgments that strike a balance between privacy and openness. What are the options open to deter people from jigsaw identification in the future?
- There is also a risk of misidentification to consider. In some cases, children have been wrongly identified as the child; especially if using alternative names.
- Local press coverage needs to be considered; people making assumptions that it's a local child.
- Even if the volume of published judgments in the lower levels of court increases, it does not decrease the risks of children being identified or eliminate the risk of identification.
- There is a need to look at further recommendations in terms of guidance and work with children who may be able to search the internet independently. There's a tension between the interests of children and the benefits of it.
- Children react to finding information online because no one had informed them it was online.
- There is a role to prepare children and families who are involved in decisions and explain sensitively the reasons why a judge's judgment should be shared. If it were that all children's views were considered and not to share their details, then there would no judgments published, however, publishing needs to be that children are not identifiable.
- An important question is around what we are trying to achieve? Why is having judgments so important; this dictates the level of detail that needs to go into judgments and understand how judges deal with different facts. Accordingly, work around data, judgments and reporting need to be considered together.
- Thought is needed around who should not be able to identify children. Whilst there are risks to children of inadvertently identifying themselves in a judgement, they need help to be prepared if a decision is made with or without their support; either way some Judges will consider it appropriate to publish. Children and adults need to be prepared so that they are aware of the

material and the content and it is managed as best as possible; children may possibly have some life story work.

- There is a role for children's solicitors and guardians to prepare children and families for any publishing
- The risk of Jigsaw identification is also around joining up with information in related criminal proceedings with a family judge, as children might be identified within the community.
- In managing jigsaw identification with children, it may mean that much information has to be redacted from a judgement so that it's not too traumatic, inappropriate or too invasive to allow it to be published.
- Dealing with volumes, if the purpose is to let people understand the system and how decisions are made, you can anonymise, but it increases the workload. However, it also has more scope for greater anonymisation, which is likely to reduce the risk of children being identified. A balance is needed.
- The idea of judgments being selected randomly is questionable and should perhaps be representative. Any publication of any judgement must be considered by a judge on its specific facts; there must be an article 8 evaluation.
- A proportionality evaluation is suggested looking at the specific facts of a case. You can have a general approach to the sorts of judgments that might be published, but in each case, part of the proportionality evaluation is considering what information to remove in order to find the balance between public interest and the child's and parents article 8 rights.
- Whoever is completing the anonymization on behalf of the judge, it is the judge that must check and authorise it and the parties are entitled to make representations about it. It is not article 8 compliant without this process.

6. Workflow timetable:

There were no disagreements to the draft work plan. The main aim for the next meeting in March will be to confirm the relevant strands, membership of each workstream and revise plans. The workstreams will be looking at the anonymization guidance, guidance for judges as to what and when to publish. Beyond this, further focus groups will be needed with HMCTS and other people about funding.

The MoJ transparency team, is responsible for working on the project with *The National Archives* (TNA) to start publishing judgments from April when the contract with Bailii ends offered to investigate and engage with TNA. MoJ will update separately on some of the agenda questions. MR will liaise with MoJ on the issue of when and where to publish.

MR updated the group that the financial remedy transparency group will be brought within the umbrella of the TIG as a fifth workstream by HHJ Stuart Farquhar, who is leading on financial remedies.

Dr Natalie Byrom expressed that there is some urgency to representations around the spending review discussion and it would be helpful to expedite it given that Lord Wolfson was personally supportive of this report in representations to government.

