Transparency in the Family Court

I am very grateful to the President for giving me this opportunity to address the panel. My written submission consists of a book published last March: 'The Secret Family Court' – Fact or Fiction?' I understand that members of the panel have been provided with copies of the book. It runs to over 250 pages. Having written the book, you may be relieved to hear that I don't have much to say this morning. My main message is: read the book!

I served as a Circuit Judge from 2004 to 2019. For most of those years I was a Designated Family Judge – in Coventry from 2006 to 2012, in Leicester from 2012 to 2016 and in Derby from 2016 to 2019. Throughout all of those years the media repeatedly referred to the Family Court as a 'secret' court. I have never accepted that the Family Court is a secret court. However, I do understand why that description has been used so frequently.

In my opinion, the repeated use of the description of the Family Court as a 'secret' court has undermined trust in the Family Court. Donald Trump's repeated assertion that the recent Presidential election was rigged and that the Presidency was stolen from him has persuaded hundreds of thousands of Americans that the election was indeed rigged. The repeated description of the Family Court as a 'secret' court has had a similar effect amongst parents and journalists. There is one important difference. The message Donald Trump has promulgated is a lie. The media's description of the Family Court as a 'secret' court has at least some basis in truth.

Over the last 20 years there have been repeated attempts to open up the Family Court. With one exception, all have failed – and even the exception has proved to be not much of a success.

In 2005 a report by the House of Commons Constitutional Affairs Committee acknowledged that

> "Lack of transparency has been a major factor in creating dissatisfaction with the current Family Justice system on the part of those involved in cases…A greater degree of transparency is required in the family courts."

In my opinion we haven't moved on very far from that position.

With one exception, every initiative intended to improve transparency has failed. The Family Court Information Pilot achieved nothing. The Children Schools and Families Act 2010 was passed in haste and repealed at leisure. It achieved nothing. In 2011 the then President of the Family Division, Sir Nicholas Wall, and Bob Satchwell, then Executive Director of the Society of Editors, convened a group to try to find a way forward that would increase transparency. Over time the group lapsed without achieving any notable changes. Its one helpful contribution was the publication of guidance on the current state of the law written by Adam Wolanski (now Adam Wolanski QC) and Kate Wilson. That was in 2011. That guidance is now long out of date.

In 2014 the then President, Sir James Munby, issued Practice Guidance concerning the publication of judgments with the intention of increasing the number of Family Court judgments that were published. Despite initial success, this initiative did not achieve its objective. In 2015, Family Court Circuit Judges published 222 judgments on Bailii. In 2020 only 58 judgments were published, a reduction of almost 75%. I accept that that may have been heavily impacted by the effects of the pandemic though even in 2019 there were only 87 judgments published, a drop of more than 60% on the 2015 figure. In August 2014, Sir James published a consultation paper on ‘Next Steps’ proposing, for example, that the media should be able to have access to case summaries and some expert’s reports. The results of that consultation were never published. The reason is obvious. The response was hostile.

I don’t want to depress you at the very beginning of your deliberations, but the truth is that the history of attempts to improve transparency in the Family Court is something of a graveyard. I can point out where the bodies are buried. It is difficult to be more positive. Achievements have been scarce. I very much hope that the results of your deliberations will fare better.

I said earlier that amongst the catalogue of failures, there has been one partial success. On 27 April 2009, new rules came into force which permitted accredited representatives of news gathering and reporting organisations to attend hearings in the Family Court without obtaining prior permission either from the parties or from the court. Initial media euphoria that journalists had at last managed to breech the walls of this hitherto heavily guarded citadel quickly evaporated when they discovered that

although they could attend court hearings they couldn't report what they saw and heard. The legal editor of The Times, Frances Gibb, described it as a con trick. She was right.

For the last 20 years, Sir James Munby has repeatedly emphasised the need for the repeal or amendment of section 12 of the Administration of Justice Act 1960. The repeal of that section is in my opinion the single most important step that needs to be taken in order to move forward the transparency agenda. It is the first of the recommendations I make at the end of my book.

Whilst I do not hold out hope that section 12 will be repealed in the near future, that should not dim our enthusiasm or our commitment. I fully appreciate that the repeal of section 12 is not in the President's gift and that it may not be high on the list of priorities of the present government. However, I am in no doubt that we should make a determined effort. A Private Members Bill may be one way forward. At the very least, we should be signalling our intent. Such a change would be likely to have considerable support from the media, from parents' groups, from Members of Parliament and, I suspect, from many judges. Although there have been calls for repeal during the last 20 years, at no point has there been a concerted effort to bring about that change. If that were to be one of your recommendations, I and many others would be very pleased.

In preparing for this morning, I have re-read my book. There is one important section that I would wish to change. In January 2020, Ms Justice Russell allowed an appeal against a decision of HHJ Tolson QC in a finding of fact hearing within private law Children Act proceedings. The judge was excoriating in her description of Judge Tolson's handling of the finding of fact hearing and of his decision.

Writing in the Guardian in January 2020, journalist Louise Tickle said:

> "The fact that the family law system in this country is hidden behind a veil of secrecy means that these offensively vintage attitudes to rape and domestic violence can persist in courts that tens of thousands of separating couples must pass through every year. And it raises the question: what other outrageously sexist decisions are being made by out-of-touch judges behind closed doors?"

Not surprisingly, Ms Justice Russell's decision received a great deal of media attention. It was widely talked about on social networking platforms such as Facebook and Twitter. 46 Members of Parliament signed an Early Day Motion. I hope you will permit me to set out the full text of the Early Day Motion. It reads:

> "That this House welcomes the overturning by the High Court of Justice Tolson's ruling in the Central Family Court that a sexual assault did not constitute rape because the woman had taken no physical step to encourage the man to desist; notes with concern the High Court's findings that Justice Tolson failed to apply the definitions of domestic abuse and coercive and controlling behaviour, dismissed or ignored reports from the police, failed to allow the Appellant to make her full submission and repeatedly interrupted her; further notes with concern the High Court's findings on Justice Tolson's judgment that the real risk of the appearance of a partisan approach in that judge's conduct was self-evident and that the fact that the judge preferred the Respondent's case was patent throughout his judgment; highlights the High Court's further findings that Justice Tolson's reasons for dismissing the evidence of the Appellant were wrong, specifically, that he made a finding regarding the Appellant's psychological state of mind without any forensic expert evidence; further highlights that the High Court found that Justice Tolson's approach towards the issue of consent was manifestly at odds with current jurisprudence, concomitant sexual behaviour, and what is currently acceptable socio-sexual conduct; notes with concern that Justice Tolson continues to preside over cases involving domestic abuse and rape in the Family Courts; and calls on the Government to take steps with the Judicial College to ensure that training is made mandatory for family court and criminal court judges on the legally correct and appropriate approach to take when hearing domestic abuse and sexual assault allegations."

In my book, I rather lamely said that that case was 'exceptional'. Two weeks ago, I spent three days in the virtual public gallery of the Court of Appeal watching four conjoined appeals in cases involving domestic abuse and issues of coercive control. Two of the decisions appealed were by Judge Tolson. The other two were by His Honour Judge Richard Scarratt and Her Honour Judge Jane Evans-Gordon.

In a half page spread on the second day of that hearing, The Times reported on the appeals, in particular those involving Judge Tolson, noting that, to put it colloquially, he has form. I also noted on Twitter that at the end of the second day of the hearing the Guardian ran a substantial report by journalist Hannah Summers. Again, it is appropriate to quote a short passage from her article. She wrote:

> "A family court judge has come under fire for "wholly inappropriate" comments made to a young mother during a private hearing on child contact arrangements.
>
> Judge Richard Scarratt made the mother "fearful" and put pressure on her to accept that the child have contact with her father…
>
> A landmark hearing – featuring four linked appeals concerning domestic abuse cases in the family courts for England and Wales – was told on Wednesday how the mother sobbed as Scarratt told her that if the case kept "going on and on" the child could be taken from her, put in care and adopted.
>
> An audio recording of Scarratt's remarks on 18 March 2019 was heard by appeal judges…"

In the light of those four appeals, I now think I was wrong – or at the very least too optimistic – in describing the earlier decision of Judge Tolson as 'exceptional'. It is clear that there are other judges whose understanding of and approach to the various forms of domestic abuse and, in particular, coercive control, is flawed. In my book I said that,

> "Tickle's question…about what else is happening in the Family Court in private which the public does not get to hear about is, I regretfully accept, a reasonable question."

I stand by that comment. The sobering truth is that but for the appeal against Judge Tolson heard by Ms Justice Russell in December 2019 and the four appeals heard by the Court of Appeal in January 2021, none of the concerns about the attitude and behaviour of these three judges would ever have come into the public domain. There were no journalists in court at the original hearings in any of those cases. Why not? One of the reasons is likely to be because journalists don't know what cases are coming before the Family Court on a day by day basis. Even if they knew what cases were being heard and were able to attend the hearing, section 12 of the Administration

of Justice Act 1960 severely limits what they can publish. Unless, in those cases, the judge publishes his or her judgment on Bailii the journalist , even if present in court, may be completely unable to write a meaningful article about the cases they observe. With respect to the cases recently before the Court of Appeal, neither Judge Tolson, Judge Scarratt nor Judge Evans-Gordon had published their judgments. It was only at the direction of Ms Justice Russell that Judge Tolson's judgment from August 2019 was published.

In addition to my book you have also been provided copies of an article I wrote last year published by Family Law in November 2020. That case, too, is deeply worrying but for different reasons. In June 2017 His Honour Judge Hess made a care order and a placement order in respect of a 5-year-old girl. The mother appealed. By the time she appealed she had married. Because of her husband's financial position, the mother was not financially eligible for legal aid to bring her appeal. It cost her £20,000. Few parents would be able to raise that amount of money. Had this mother been unable to fund her appeal the decisions of Judge Hess would have stood and the child would probably have been adopted. It was not until the case came before the Court of Appeal that journalists picked the case up. But for the appeal, the public would not have known about this case and, in particular, would not have known how close this mother – and her daughter – came to being the victims of a gross miscarriage of justice.

In cases such as those I have just referred to the media has a very important role to play as watchdog. Yet in those cases it was only able to play that role because there had been an appeal and the case had moved from what is effectively a closed courtroom to a public courtroom.

Tickle is surely right to ask what else is happening in the Family Court in private which the public does not get to hear about. This is a really serious issue. At its heart it is an issue of transparency – or perhaps I should say an issue of lack of transparency. Surely the time has come when we need to say 'Stop. Enough is enough.' We have to be able to reassure the public that cases such as these are not the tip of an ugly and dangerous iceberg, that they are not an indication of serious systemic failings but that they are exceptions. I would suggest to you that that can only be properly achieved by

greater transparency – the kind of transparency that Camilla Cavendish and other thought they were getting in 2009.

Tin 2017, the report of the Review Group on Family Justice in Northern Ireland made the point that,

> "There are few more difficult issues in family justice than the matter of open justice and the reporting of cases. There is a tension between concerns about 'secret justice' and legitimate expectations of privacy and confidentiality for the family. Both standpoints are valid and the question is whether they are irreconcilable."

Although I do not say this in terms in my book, I have come to the view that these two standpoints are indeed irreconcilable. Cases such as those I referred to earlier are likely to cause damage to the reputation of the Family Court and to public confidence. Whilst I accept that all reasonable steps must be taken to protect children's privacy, that cannot be allowed to justify a cloak of secrecy being thrown over the work of the Family Court. That is too high a price to pay. Jeremy Bentham is reported to have said that,

> "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place an any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice."

I respectfully agree.

I accept that even if you were to recommend the repeal of section 12 that section, anachronistic and unhelpful though it is, is likely to be with us for the foreseeable future. So, in my opinion, we need to find a workaround, a way of neutralising some of its effects. That is the subject of some of the other recommendations at the end of my book. Though I stand by all of them, I don't intend to go through each of them this morning. I do, though, want to highlight two of my recommendations.

Whilst writing my book I discovered that for some years Nova Scotia has had a Media Liaison Committee. The judiciary and the media are both well-represented on this committee. The committee publishes guidance on Media and Public Access to the Courts of Nova Scotia. Whereas the committee set up in 2011 by Sir Nicholas Wall and Bob Satchwell was organised on a very ad hoc basis – no doubt one of the

reasons why it fizzled out – the Media Liaison Committee in Nova Scotia is clearly organised on a more formal basis. To have such a committee in England and Wales would not require legislation. It simply requires commitment and good will. I accept that there may be some costs involved – for example in providing administrative support for such a committee. I doubt whether the cost would be prohibitive. At the very least, this is a step that could easily and swiftly be investigated and costed. Such a committee could help to bring down some of the barriers which currently exist between the judiciary and the media. Through such a committee, decisions could be made (or proposed) concerning, for example, the provision of anonymised copies of case summaries and experts' reports and the publication of judgments.

Practice Direction 12G of the Family Procedure Rules 2010 permits parties to Children Act proceedings to communicate information from those proceedings to certain specified third parties. That does not include the media. Why not? This is utterly illogical. Any journalist receiving information or documents from a parent would not be able to use that information in any article written for publication. The information is protected by section 12 of the Administration of Justice Act. There is no reason why parents should not be able to discuss their cas2e with journalists and show them the case papers. We all know that this rule is honoured more in the breach than in the observance. It makes no sense to expose parents and journalists to the sanction of committal. The position needs to be changed. We should be concerned to make it easier for parents to share their concerns, not more difficult. I have no doubt that changing the rule would be welcomed both by the media and by parents.

I promised you I would be brief so that is probably an appropriate point at which to stop. I wish you well in your endeavours. I hope you find my book helpful. Even if you don't agree with any of my conclusions I hope the book provokes thought. I hope you manage to come up with proposals which avoid the fate of so many of those well-intentioned but unsuccessful proposals from the past. Above all. I hope you will resist the temptation to try to please everyone. In my opinion, this is a time for bravery and decisiveness.

Thank you for listening.