Association of **Lawyers for Children**

Promoting justice for children and young people

COVERT RECORDING IN FAMILY COURT PROCEEDINGS

SUBMISSIONS OF THE ASSOCIATION OF LAWYERS FOR CHILDREN (ALC)

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1. The Association of Lawyers for Children (hereafter 'ALC") is a national association of lawyers working in the field of children law. It has over 1200 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities. Other legal practitioners and academics are also members. Its Executive Committee members are drawn from a wide range of experienced practitioners practising in different areas of the country. Several leading members are specialists with over 20 years experience in children law, including local government legal services. Many have written books and articles and lectured about aspects of children's law, and several hold judicial office. The ALC exists to promote access to justice for children and young people within the legal system in England and Wales in the following ways:

   (i) lobbying in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice;
   (ii) lobbying against the diminution of such mechanisms;
   (iii) providing high quality legal training, focusing on the needs of lawyers and non-lawyers concerned with cases relating to the rights, welfare, health and development of children;
   (iv) providing a forum for the exchange of information and views involving the development of the law in relation to children and young people; and
   (v) being a reference point for members of the profession, Governmental organisations and pressure groups interested in children law and practice.

2. The ALC understands that, by order of 8th January 2016, the Court has invited the ALC *"to share your views, if you so wish, as to the appropriateness or otherwise of using covert recordings of professionals and/or any other person within proceedings in the family Court".*

3. The ALC welcomes the opportunity to contribute to the debate in relation to an issue which appears to be gaining greater prominence across the jurisdiction and in

relation to which there appears to be a lack of general guidance to assist professionals and lay parties to proceedings.[1]

4. The ALC suggests that it is appropriate, and indeed inevitable, that the issue should be seen in the context of the larger issue of transparency in the family justice system. It is unlikely to be a coincidence that the President made the following remarks in the case of *Re J*[2], in which he declined to make an injunction preventing the publication of covertly video recorded material:

> *"25. Before proceeding any further, I do, however, need to emphasise a number of critically important matters. There is nothing new in what follows but the matters to which I wish to refer are so important that they bear constant repetition.*
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> *26. The first matter relates to what it has become conventional to call transparency. There is a pressing need for more transparency, indeed for much more transparency, in the family justice system. There are a number of aspects to this.*
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> *27. One is the right of the public to know, the need for the public to be confronted with, what is being done in its name. Nowhere is this more necessary than in relation to care and adoption cases. Such cases, by definition, involve interference, intrusion, by the state, by local authorities and by the court, into family life. In this context the arguments in favour of publicity – in favour of openness, public scrutiny and public accountability – are particularly compelling. The public generally, and not just the professional readers of law reports or similar publications, have a legitimate, indeed a compelling, interest in knowing how the family courts exercise their care jurisdiction: Re X; London Borough of Barnet v Y and X [2006] 2 FLR 998, para [166].*
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> *28. I have said this many times in the past but it must never be forgotten that, with the state's abandonment of the right to impose capital sentences, orders of the kind which family judges are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make. When a*

[1] "*It is clear from the responses to the FOI requests that there is a range of quite different approaches between different local authorities. Many local authorities report having no policy on this, meaning there is a risk that responses to discovery of covert recording or to requests to record in individual cases will be inappropriate or based on a misunderstanding of the law*" Transparency Project Blog , 17th September 2015

[2] *Re J (A Child)* [2013] EWHC 2694 (Fam)

family judge makes a placement order or an adoption order in relation to a twenty-year old mother's baby, the mother will have to live with the consequences of that decision for what may be upwards of 60 or even 70 years, and the baby for what may be upwards of 80 or even 90 years. We must be vigilant to guard against the risks.

29. This takes me on to the next point. We strive to avoid miscarriages of justice, but human justice is inevitably fallible. The Oldham and Webster cases stand as terrible warning to everyone involved in the family justice system, the latter as stark illustration of the fact that a miscarriage of justice which comes to light only after the child has been adopted will very probably be irremediable: W v Oldham Metropolitan Borough Council [2005] EWCA Civ 1247, [2006] 1 FLR 543, Oldham Metropolitan Borough Council v GW & PW [2007] EWHC 136 (Fam), [2007] 2 FLR 597, and Webster v Norfolk County Council and the Children (By Their Children's Guardian) [2009] EWCA Civ 59, [2009] 1 FLR 1378. Of course, as Wall LJ said in Webster, para [197], "the system provides a remedy. It requires determined lawyers and determined parties." So, as I entirely agree, the role of specialist family counsel is vital in ensuring that justice is done and that so far as possible miscarriages of justice are prevented. But that, if I may say so with all respect to my predecessor, is only part of the remedy. We must have the humility to recognise – and to acknowledge – that public debate, and the jealous vigilance of an informed media, have an important role to play in exposing past miscarriages of justice and in preventing possible future miscarriages of justice.

30. Almost ten years ago I said this (Re B, para [103]):

> *"... We cannot afford to proceed on the blinkered assumption that there have been no miscarriages of justice in the family justice system. This is something that has to be addressed with honesty and candour if the family justice system is not to suffer further loss of public confidence. Open and public debate in the media is essential."*

I remain of that view. The passage of the years has done nothing to diminish the point; if anything quite the contrary.

31. The compelling need for transparency in the family justice system is demanded as a matter of both principle and pragmatism. So far as concerns principle I can do no better than repeat what Lord Steyn said in R v Secretary of State for the Home Department ex p Simms [2000] 2 AC 115, 126, where, having referred to Holmes J's dissenting judgment in Abrams v United States (1919) 250 US 616, he continued:

"freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. ... It facilitates the exposure of errors in the ... administration of justice of the country."

32. This takes me on to the next point. It is vital that public confidence in the family justice system is maintained or, if eroded, restored. There is a clear and obvious public interest in maintaining the confidence of the public at large in the courts. It is vitally important, if the administration of justice is to be promoted and public confidence in the courts maintained, that justice be administered in public – or at least in a manner which enables its workings to be properly scrutinised – so that the judges and other participants in the process remain visible and amenable to comment and criticism. This principle, as the Strasbourg court has repeatedly reiterated, is protected by both Article 6 and Article 10 of the Convention. It is a principle of particular importance in the context of care and other public law cases.

33. In relation to the pragmatic realities, I repeat what I said in A v Ward [2010] EWHC 16 Fam), [2010] 1 FLR 1497, para [133]:

"... the law has to have regard to current realities and one of those realities, unhappily, is a decreasing confidence in some quarters in the family justice system – something which although it is often linked to strident complaints about so-called 'secret justice' is too much of the time based upon ignorance, misunderstanding, misrepresentation or worse. The maintenance of public confidence in the judicial system is central to the values which underlie both Art 6 and Art 10 and something which, in my judgment, has to be brought into account as a very weighty factor in any application of the balancing exercise."

34. The family lawyer's reaction to complaints of 'secret justice' tends to be that the charge is unfair, that it confuses a system which is private with one which is secret. This semantic point is, I fear, more attractive to lawyers than to others. It has signally failed to gain acceptance in what Holmes J famously referred to as the "competition of the market": Abrams v United States (1919) 250 US 616, 630. The remedy, even if it is probably doomed to only partial success, is – it must be – more transparency; putting it bluntly, letting the glare of publicity into the family courts. As I went on to say:

"... where the lack of public confidence is caused even if only in part by misunderstanding or, on occasions, the peddling of falsehoods, then there is surely a resonance, even for the family justice system, in what Brandeis J said so many years

ago. I have in mind, of course, not merely what he said in Whitney v California (1927) 274 US 357 at 77:

> *"If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."*

I have in mind also his extra-judicial observation that, and I paraphrase, the remedy for such ills is not the enforced silence of judicially conferred anonymity but rather the disinfectant power of exposure to forensic sunlight."

5. It is further in the context of the need for "*other participants in the process [to] remain visible and amenable to comment and criticism*" that the issue of recording interviews/meetings perhaps most particularly arises.

6. The ALC suggests that in the event that any general guidance is contemplated, the desirability of securing agreement to recordings of meetings/interviews in an open manner is emphasised (as contemplated in the guidance note referred to below) together with the advantages to all parties that can follow from such an approach.

7. The admissibility of covert recording has, however, been considered recently within the family jurisdiction. In a case at the Family Court in Medway, HHJ Lazarus made the following observations in relation to covert recordings of a foster carer which had a significant impact on the outcome of the application[3]:

"114 Case Management…

g) LATE PROVISION OF RECORDINGS – As I have mentioned, it is unclear whether a direction made in late 2014 related to the recordings made by the parents, but it was highly unsatisfactory that they were not provided by the Father in an accessible format to his solicitor until the week before the hearing. I have not been able to clarify why this problem arose. What is clear is that these recordings were central to a proper understanding of the case. If there had been an earlier order debarring the parents from relying upon them unless they were provided by a certain date, this may have triggered their provision, but I note that

[3] *Medway Council v A & Ors (Learning Disability; Foster Placement)* [2015] EWFC B66

if I had taken that stance at the outset of a final hearing it would have resulted in a serious misunderstanding of the case. I remain puzzled as to why these recordings were not the subject of directions at the IRH.

h) BEST EVIDENCE – It is salutary and sobering to consider that there are many children in foster care, and many parents in parent and baby foster placements, and there will be occasions when parents complain about their treatment in those placements, but that it is the frequent practice in care proceedings not to require the foster carer to attend court, but to rely upon their notes and the social worker's evidence. In the light of Re A 2015 and Re J 2015, and an example such as this case, it will be all the more important to consider with a sharp focus the nature of the evidence that the court needs to consider, and best evidence in particular. In this case, the parents' allegations were frankly treated dismissively from the outset. But for this court's willingness to permit the consideration and transcription of the recordings, despite the extreme lateness that they were provided, in combination with the requirement that the foster carer attend to give evidence (which was correctly anticipated at the IRH), it would have been impossible to gain a just and proper understanding of this case."

8. Although of less direct assistance, the Court may also wish to note the approach within the employment jurisdiction, most easily summarised by the following extract from a judgment of Underhill J (as he then was)[4]:

"The law is now established that covert recordings are not inadmissible simply because the way in which they were taken may be regarded as discreditable: see in particular the judgment of this Tribunal, Mr Recorder Luba QC presiding, in Dogherty v Chairman and Governors of Amwell View School UKEAT/0243/06"

9. The ALC is aware, as no doubt is the Court, of the valuable contribution to this debate made by the Transparency Project's *'Parents recording social worker- a guidance note for parents and professionals (December 2015)'.* Specifically, the guidance note includes the following observations about the admissibility of recordings that the Court will wish to consider as part of its deliberations:

[4] *Vaughn v London Borough of Lewisham* **UKEAT/0534/12/SM**

"CAN A RECORDING MADE BY A PARENT BE RELIED ON IN COURT?

Potentially, yes – but the court would have to give permission. A court is unlikely to give permission unless it is clear that the recording is both relevant and reliable.

A court is more likely to give permission if a recording is of good audio / visual quality and is demonstrably a record of the entire meeting or interview, rather than an edited selection (a parent who wishes to rely on a recording of a meeting or conversation will need to provide a recording of what everyone present has said, not just the words of one person).

If a meeting or interview has been made covertly it may be difficult to demonstrate that the recording is complete and that something said or done is not being taken out of context.

The court is likely to require a transcript to be prepared, but the original digital or analogue recording should be made available to all participants to hear / view."

10. There is some professional guidance available to which the Court will wish to have regard, contained within the Cafcass operating framework:

"2.26 Occasionally, service users may covertly record an interview or telephone conversation with a practitioner.

2.27 We should have nothing to fear from covert recording. Our attitude should be, "I am doing my job and I have nothing to hide. I can explain why I said what I said or why I did what I did". This is within the spirit of transparency in the family courts. We should always be transparent in our work, to meet contemporary expectations, including being able to defend whatever we say or write in a court under cross-examination, because we are working to a professional standard on behalf of a child. In this sense, we should expect that everything we say or write could become public knowledge.

2.28 Some service users ask in advance of an interview whether it can be recorded. Advice on handling advance requests from service users to record interviews is available on the Cafcass Legal intranet page. In cases where no advance request has been made and the practitioner subsequently becomes aware that they have been recorded without their knowledge, they should tell the court. In some cases, however, the practitioner may not become aware of the recording until the service user presents the recording, or a transcript of it, at court. In such situations, the practitioner should make clear to the court that the recording was made without their knowledge. The practitioner may ask for the opportunity to listen to the recording or read the transcript before it is admitted into evidence, if the court is minded to take this step. It is a matter for the court to decide whether the recording or transcript can be included in evidence."

11. The tenor of this guidance is echoed in public observations made by senior professionals as part of the growing awareness of this issue:

> *"Andrew Webb, former president of the Association of Directors of Children's Services and the director of children's services for Stockport council, agrees. 'Professionals' behaviour should be good enough to be filmed at any time,' he says. 'We've known for a very long time that the best thing we can do to protect people in institutions is to be very, very open'. 'It does feel threatening; that's the feedback I've had [from social workers]. But I think we should deal with the fact that [staff] feel threatened, not refuse to do it.' Webb's main concern, which relates to covert recording, is less to do with exposing poor practice – 'because I'd be very pleased if poor practice was exposed' – and more about parents posting material on hate websites that list social workers by name. 'We've experienced that in this local authority on a number of occasions. It's a worry.'*[5]

> *"British Association of Social Workers professional officer Nushra Mansuri said there was a danger that social workers could not be sure what would happen to the recordings after the meeting. It was when parents or carers went on to share the recordings publicly that problems arose about data protection and confidentiality arose. 'It's one thing to make recordings for your own personal use but the test is whether you can then legislate against families sharing recordings on the internet', she said. She added social workers need to be confident with policy and legislation not just to protect themselves, but to be able to advise their service users where sharing recordings of a particular meeting might put them in the wrong legally. 'If it is something a parent feels gives them a little bit of power in a very difficult situation then that's understandable. But individual social workers also understandably feel they are going to be very vulnerable and may become targets.' She said the most important thing was that authorities have a consistent approach so everybody knows the legal framework and what good practice is in this area. 'The answers aren't straightforward but it is something that needs a lot more interrogation by everyone involved, rather than being defensive.'*[6]

12. Taking all of the above matters into account, the ALC would suggest that any generalised consideration of the issue of covert recording should distinguish between

[5] "Social Workers under scrutiny as parents capture sessions on camera" : Guardian 17th June 2015
[6] "Should Parents be allowed to record child protection meetings?": Community Care 10th December 2015

covert recording of children as distinct from covert recording of other adult parties or professionals involved in proceedings.

13. It is submitted by the ALC that, as a matter of public policy, covert recordings of children should rarely, if ever, be admitted as evidence in family proceedings. If any justification for this assertion is needed, it is suggested that the terms of section 13(4) Children and Families Act 2014, namely: *"Where in contravention of subsection (3) a child is medically or psychiatrically examined <u>or otherwise assessed</u>* (emphasis added)*, evidence resulting from the examination or other assessment is inadmissible in children proceedings unless the court rules that it is admissible"* implicitly support the proposition that any direct involvement of a child in the forensic legal process should only be with the permission of and under the control of the Court.

14. In relation to the covert recording of interviews/meetings with social work professionals, the Court may be assisted by the following extract from the Transparency Project's Guidance Note:

> **"*WHY MIGHT PARENTS WANT TO RECORD MEETINGS?***
>
> ● *Because they don't want to forget things and find an audio recording easier than making notes. For example, this might be the case if they have a learning disability, literacy problem or specific learning difficulty, or some other physical difficulty that affects their ability to write or concentrate. It might just be that they are forgetful generally or when they are stressed. If a parent has to write notes at the time they may find it difficult to participate fully in the meeting.*
>
> ● *Because they don't want to rely on other people's records of a meeting and want an objective record of their own. Although formal minutes of meetings are taken, they are often not available straight away, and parents can find it difficult to get corrections made where the understanding or recollection of professionals does not match their own. When social workers meet with parents outside of formal meetings they keep contemporaneous or near - contemporaneous records, and parents can feel disadvantaged if they are not able to challenge inaccuracies or omissions.*
>
> ● *Because they don't trust a particular professional or professionals generally.*
>
> ● *Because they have previously disagreed with the accuracy or completeness of a professional's record and were unable to demonstrate that their version of events was accurate.*

- *Because they want to "catch out" a professional or gather evidence for later use in court proceedings.*
- *Because they want to circulate information as part of a campaign, for example on the internet (we think most often this is not the original purpose of the recording, but individuals may subsequently decide to distribute recorded material if they feel that they cannot achieve justice through the courts). Attempts at wider circulation like this might be problematic…"*

15. In relation to the covert recording of one family member by another, it is suggested that the issues are likely to be narrower:

    a) gathering of information/evidence that is relevant to an issue on the case or,

    b) behaviour as part of a course of conduct that can be seen as designed to control and/or intimidate the other party/parties.

16. The ALC respectfully suggests that, wherever possible, the application for permission to admit the recordings is submitted in writing on a C2 application form and in good time. This would put all parties on proper notice. The recording itself should be made available to the other parties prior to any hearing to consider its admissibility. Consideration should be given by the Court to whether a transcript should also be ordered.

17. It is further respectfully suggested that the factors which the Court will wish to consider, in the context of the Overriding Objective contained in FPR 2010 r 1.1, prior to making any decision as to the admissibility of any covert recordings, will include the following:

    a) the circumstances in which the recording was made;

    b) whether the Court and parties have been given proper notice of application to adduce such evidence and appropriate detail as to the substance of what is proposed to be adduced;

c) where the recording is of, or includes, the child concerned, the ascertainable wishes and feelings of the child (there are, of course, ethical issues and implications when parents record young people without their consent);

d) whether any effort was made to secure agreement to the recording being made and if not, whether there was any reason why it would have been impracticable or inappropriate to do so;

e) whether there is anything arising from the circumstances in which the recording was made or any other relevant circumstance in the case which would give rise to the concern that the recording was made - not in furtherance of obtaining evidence that was relevant to an issue in the case, or other legitimate reasons such as those listed in para. 14 above, but with the intention of controlling or intimidating behaviour or as part of a wider course of conduct of publicising material in a way that was inimical to the interests of the child/children concerned;

f) the substance of the matters which are contained on the recording;

g) to what issue in the proceedings it is asserted that the substance of the recording is relevant;

h) whether the court can be satisfied that the recording is a 'complete' recording of the meeting/interview/incident in question or whether there is a suggestion that the recording is in some way edited or otherwise taken out of context;

i) whether any necessary investigation to satisfy the court as to f) above is proportionate and necessary to resolve the proceedings justly;

j) whether it is necessary to require the party seeking to adduce such evidence to enter into appropriate undertakings to ensure the restriction of any publication of the evidence.

18. The ALC anticipates that any generalised guidance may perhaps be qualified by the reservation that any applications of this kind are likely to be highly fact specific and also that the Court is unlikely to wish its judgment to be seen in any way as an encouragement to parties to engage in covert recording.

19. The ALC suggests that if any written guidance is to be produced, it should contain a clear warning to parties about sharing recordings (covert or otherwise) on social media, which would enable identification of children subject to proceedings.

20. Where the Court considers that the recordings have been made for the purposes of publication or control/harassment, the ALC respectfully suggests that consideration should be given to whether the party holds further recordings and whether any orders/undertakings are required in those circumstances, for example for delivery up of recordings and/or to limit publication.

23.3.16