

9 Transparency

Media coverage of the family courts

132. A major concern which was raised in evidence is the fact that the family courts conduct their business in private. Section 97(2) of the Children Act 1989 prohibits and makes it a criminal offence for any person to publish any material which would identify, or is likely to identify, a child as being involved in family courts proceedings. Furthermore, section 12 of the Administration of Justice Act 1960 has the effect of making it potentially a contempt of court to publish information relating to proceedings before any court sitting in private where the proceedings:

- i. Relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
- ii. Are brought under the Children Act 1989; or
- iii. Otherwise relate wholly or mainly to the ... upbringing of a minor.

133. In a recent judgment, Mr Justice Munby spelt out that the publication of any information about a child case, whether or not it would identify the child concerned, is almost always prohibited without the direct permission of the court.

Publication in that context covers almost all forms of communication whether by word of mouth or in writing.

134. The current effect of this judgment is that parents who raise issues with their constituency MP, social services department or other appropriate bodies, are unclear about their ability to access and use this information. They may well be committing an offence, and those receiving complaints are unable to examine them or take them up.

135. In a submission to the Committee, the legal correspondent 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 Meadows, that if the courts operate in an atmosphere of secrecy, injustice could occur and the public would be none the wiser. He commented that:

In general, I would argue that the courts should be open to press and public, subject only to restrictions on identifying children involved in proceedings. It is patently in the public interest that justice should be done patently and in public.

136. Mr John Sweeney, a reporter with the BBC, also criticised the current system, stating that:

Secret courts are bad courts. In rape cases, the media is not allowed to name the victim and sometimes the accused. But we are allowed to report in full the evidence. In exactly the same way the media should be allowed to write and report the evidence in a Family Court—so long as we don't identify the child. In the Family Courts, if the only evidence against a parent comes from an 'expert' then the parent suffers a grievous disadvantage if that evidence can never be brought to the public eye.

137. The Committee also received a submission from Ms Sarah Harman, a solicitor who

had been seriously criticised by Mr Justice Munby in the case of Re: B (see above) for disclosing documentation from the case to the Solicitor General (who happened to be her sister) as well as to the Minister for Children, Rt Hon Margaret Hodge MP, and members of the media. Ms Harman criticised the lack of transparency in proceedings relating to children:

I believe that this 'secrecy' prevents society having any knowledge of the workings of our family court systems, ascertaining whether or not our family courts are fair and in touch with current mores, or knowing whether our family judges are serving society as a whole in the best way possible. I further believe that users of the family courts, particularly those who feel aggrieved (for instance where diagnoses of Munchausen's syndrome by proxy, or non-accidental injury are made) are prevented from having reasonable discussions with close family and colleagues about their cases, are denied the right to obtain support from their communities, their churches and their MPs, and most importantly are denied the right to search for alternative diagnoses in difficult child protection cases

138. The judiciary proved very receptive to this criticism. In particular, they acknowledged that the lack of transparency fuelled the notion that the courts were biased against particular groups of litigants. Mr Justice Munby commented that:

The fact is, and I believe it is a fact, that the family justice system is under criticism today because it is perceived as being a secret justice system, and in that sense we are crippling public debate. As the President has indicated, a lot of the criticisms, whether they come from Fathers4Justice or the NSPCC, are necessarily anecdotal and nobody is able to see the relevant material. I think it is doing us serious harm, and I do not think that the existing system, the existing rules, are necessary.

139. The witnesses representing the judiciary were unanimous in stating that something should be done to improve transparency and offered a number of solutions. These included the possibility of giving judgment in public (subject to the usual anonymity order) and some possible disclosure of medical evidence. Dame Elizabeth Butler-Sloss noted that this issue had been considered before:

Could I just make two points? One is that this was discussed in a paper which came from the LCD about 10 or 12 years ago, and there was quite considerable consultation on whether the Family Court should be open, and then it died a death. It is quite an interesting paper and I think it would be worth, actually, looking at that. Secondly, I would not disagree with having the same system in the magistrates' court and right the way through the county court and the High Court of allowing the press in under certain restrictions.

140. This mood for change has not simply been expressed to the Committee. In a recent (public) judgment, considering international child trafficking, Mr Justice Ryder commented that:

Aside from the public interests that I highlighted at the beginning of the judgment, there is also a public interest in knowing of the work that is done in the family courts an interest that is sometimes narrowly characterised and equated with one of its components i.e. public scrutiny of the fairness of family justice. Provided the private and family lives of people are respected, i.e. inter alia their personal confidentiality is protected from prurient interest and salacious comment and that the vulnerable are protected, a greater measure of public information about the work of the family courts may go some way to engender public confidence in the sensitive balancing of people's rights and needs that is an

essential component of the social contract that is family justice. For my part I would welcome careful consideration of whether and if so in what way family proceedings should be more open to the press and to the public. The trust in the media has been amply repaid in this case and I am grateful.

141. In the course of that hearing, Mr Justice Ryder made a direction, which would protect the private and family lives of all private law litigants, whilst allowing far greater public understanding of the work of the family courts. The terms of the order were as follows:

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

142. The DCA was unwilling to commit itself to such an approach and, in oral evidence, Baroness Ashton commented that:

What the President and the judiciary are looking for is to be able to be more open about their judgments and I think there is a general view that this could be a positive move and provide greater understanding of the way that the family courts work. So the proposal that she is looking towards is that there might be able to be a presence but that the normal reporting restrictions around children would apply, but there would be a more general understanding of the way the courts work. What we have said is that we want to look at this very carefully so that we address the issues that are coming from both directions, those of anonymity, those of making sure that we do not put those who are in court into a more difficult situation where they feel unable to give the evidence and that we do not just make this such an open situation that in a sense that risks justice being done.

143. The evidence from the President of the Family Division shows that courts in other jurisdictions are able to be much more transparent when dealing with family law cases. The Scottish experience is particularly relevant, since it deals with a social background that is essentially the same as that in England and Wales. We note that the powers to admit people to the Court room who are not directly involved in the case are not even uniform in England and Wales: the powers of district judges in magistrates courts to admit people are different from those available to judges in county courts or the High Court.

144. A greater degree of transparency is required in the family courts. An obvious move would be to allow the press and public into the family courts under appropriate reporting restrictions, and subject to the judge's discretion to exclude the public. Anonymised judgments should normally be delivered in public unless the judge in question specifically chooses to make an order to the contrary. This would make it possible for the public to have a more informed picture of what happens in the family courts, and would give the courts the 'open justice' which characterises our judicial system, while protecting the parties.

Children Act 2004

145. The Government is also attempting to create greater openness. It sought to amend the Children Bill (as it then was) to change the law in respect of the criminal offence created under s97(2) of the 1989 Act and s12(4) of the Administration of Justice Act 1960 and to provide that where the rules of court specify the circumstances in which information from court proceedings can be disclosed, such disclosure would not be a contempt of

court unless anything else would make it so, such as a court order prohibiting publication.

146. That proposal would not allow the extension of disclosures of information from family proceedings to the media. The Department has recognised that some parties to family proceedings and others may have a legitimate interest, in limited circumstances, in sharing information. It has indicated that its broad policy intention is to permit the disclosure of information relating the family proceedings in order to allow:

Parties to a case to obtain appropriate advice and support;

MPs and Peers to undertake their official duties and Ministers to exercise their statutory functions;

Statutory agencies, such as the police, the Crown Prosecution Service and Social Services, to obtain access to relevant information for child protection purposes;

Complaints to be made to supervisory bodies and investigations to be carried out;

Statutory bodies to undertake their regulatory and investigative functions; and

Approved research to be undertaken.

147. A consultation paper has been issued on this subject and the Minister for Children indicated in oral evidence that she would keep the Committee informed of developments in this area and that progress was expected by the summer of 2005. The consultation itself, however, only relates to a restricted class of person and would not allow parents to discuss their case in a free and frank manner with people they chose. It seems to us that the main concern is to prevent press reporting of personal details; the Government could go much further than they have suggested if they wish to combat accusations of bias and secrecy.

148. We welcome the proposed amendments foreshadowed by s62 of the Children Act 2004. Parents must be able to seek advice from constituency Members of Parliament and make complaints to the relevant supervisory bodies. We think that this reform should go further. The current rules relating to publication also hinder legitimate research. For example, even parents who wished to respond to the Government's Green Paper consultation exercise may have inadvertently broken the law. We think that the simplest approach is that the restriction on the discussion of their cases by parents should be removed entirely (unless a specific order is made to the contrary). The press should continue to be restricted to publishing those matters which have been made public by the court.