

ONE BRICK COURT 1BC

The Slur of Secrecy - Article for the New Law Journal

The latest consultation paper is a disappointing reversal, argues Sarah Palin

In brief

- Open justice promotes public confidence
- No reason why a right of access by the media to family courts damages the welfare of children
- A freedom which is restricted to what judges think to be in the public interest is no freedom

"Publicity is the very soul of justice. It is it the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." The consultation paper "*Openness in family courts – a new approach*" published last month, contrary to what its title suggests, rejects that principle in favour of maintaining the old approach of secrecy in the family courts. This is a disappointing reversal from the consultation paper published last July, which proposed more openness "so that people could better understand, better scrutinise decisions and have greater confidence". Those proposals were twofold: a right for the media to attend hearings in family proceedings, subject to a power to exclude, and a right for the media to publish anonymised legal arguments and decisions.

Slur of secrecy

The rejection of greater openness is not only disappointing from the perspective of the media and family justice campaigners, judges too have expressed frustration at the slur of administering secret justice. In an interview last year the President of the Family Division, Sir Mark Potter, said he was ready to allow the press the right to attend in most cases, subject to reporting restrictions: "There is undoubtedly a need to make the family justice system more transparent, if only because it has been on the receiving end of a lot of largely unjustified criticism". This view has been echoed by Lord Justice Wall and Mr Justice Munby: "Those who without justification attack the family court system can all too easily do so by feeding the media tendentious accounts whilst hypocritically sheltering behind the very privacy of the proceedings."

The new consultation paper states that "There was little support for giving the media the automatic right to attend family courts." Yet this is a reform which, as shown by the comments above, has long-standing and eminent judicial support and where in fact a majority of responses to the consultation – including a majority of judicial responses – were in favour (if you count 61 identical responses from one magistrates' court as one submission).

Wrong in principle

David Pannick QC in The Times last month [NOTE: 17 July 2007] criticised the ministry's reversal as being "poorly reasoned and wrong in principle". Why is the latest consultation paper wrong? There are two core reasons.

Firstly, the new consultation paper assumes that a right of access by the media to family courts comes at a cost to the welfare of children. The departing Secretary of State for Justice, Lord Falconer of Thoroton said "The clear message was the media should not be given an automatic right to attend family courts as this could jeopardise children's rights to privacy and anonymity." But why would it if the reporting restrictions imposed prohibit any detail being published which is likely to identify the child? In the magistrates court, Court of Appeal and House of Lords hearings are invariably in open court with reporting restrictions imposed and judgments delivered in anonymised form, thus protecting the privacy of everyone involved.

Secondly, open justice promotes public confidence and public confidence in the family court system is essential if people affected by the courts judgment are to accept them. The ministry's new proposal is to provide "information" where the case is of public interest; but open justice is not open where the courts are entitled to set the media agenda. Nor are the media in a position to challenge what is in the public interest for the parties themselves cannot speak to the media about their case without falling foul of the law. As Lord Hoffmann once said "Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage... But a freedom which is restricted to what judges think to be in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published".

Mr Justice Munby stresses that "It must never be forgotten that, with the State's abandonment of the right to impose capital sentences, orders of the kind which judges of the family courts are typically

ONE BRICK COURT 1BC

invited to make are among the most drastic that any judge is ever empowered to make." In such an important area, this new consultation paper underestimates the damage being done to public confidence in the family courts by the slur of secrecy. Open and public debate in the media, subject to anonymity for the families concerned, is essential to restore public confidence in the family courts.

Sarah Palin

The existing law: Access to courts hearing family cases

- Family Proceedings Court (magistrates court): Press may attend proceedings subject to reporting restrictions, save adoption cases which are always heard in private
- County Court: and High Court: Proceedings usually held in private, subject to judicial discretion to open the court. Some proceedings in open court – for example decrees nisi are pronounced in open court in the special procedure used for most divorces, judicial separation and nullity (and civil partnership equivalent). Reporting restrictions may apply.
- Court of Appeal: Open to press and public. Judgments anonymised on a case by case basis. Reporting restrictions at judicial discretion.
- House of Lords: Open to press and public. Judgments anonymised on a case by case basis. Reporting restrictions at judicial discretion.

The existing law: key reporting restrictions

Section 97 of the Children Act 1989, as amended, provides:

"(2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify –

(a) any child as being involved in any proceedings before the High Court, a county court or a magistrates' court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or

(b) an address or school as being that of a child being involved in any such proceedings.

Section 12 of the Administration of Justice Act 1960, as amended, provides:

"(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say -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 maintenance or upbringing of a minor ...

(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

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