Transparency – The Next Steps

Resolution's response to the President of the Family Division

Resolution's 6,500 members are family lawyers, mediators, collaborative practitioners, arbitrators and other family professionals, committed to a non-adversarial approach to family law and the resolution of family disputes.

Our response has been prepared by members of our Children, Domestic Abuse, Property/Tax/Pensions, Standards and Legal Aid Committees.

General comments

1. We endorse the recommendation in *"Safeguarding, Privacy and Respect for Children and Young People & the Next Steps in Media Access to Family Courts"*(*Safeguarding, Privacy and Respect*)[1] that Parliament should have the opportunity to scrutinise proposals to increase media access to court documents. We agree with the conclusion of this study, and with the Children's Commissioners for England and Wales that the view of the individual child who is the subject of family proceedings is becoming lost in the debate.

2. In light of the findings of *Safeguarding, Privacy and Respect* about the views and experiences of children and young people, and the implications for all litigants in the family court, Resolution believes that there should be the widest possible consultation on, and full Parliamentary scrutiny of, any proposed changes in this area. The Final Report of the Family Justice Review acknowledged that this is a complex area requiring further consideration by government.

3. Whilst we have the recent *Safeguarding, Privacy and Respect* study and others relating to children, there is little evidence around or analysis of the attitudes of the public to transparency and media reporting of family cases; and whether those attitudes change once people are directly involved in family proceedings. The family court is viewed as a place of protection and safety by many vulnerable adult clients advised by our members, including victims of domestic abuse, forced marriage and female genital mutilation who trust that their case and whereabouts will not be made public.

4. Much of the focus of the transparency debate appears to have been on making more transparent what happens in public law Children Act. We are concerned that insufficient attention is given to the consequences for adults involved in private matters between themselves and the extent to which it is in the public interest for details of their arrangements for their children and their personal finances to be reported. The implications

[1] Dr Julia Brophy with Kate Perry, Alison Prescott and Christine Renouf July 2014

for individual rights to privacy (including those of their children) and the proper functioning of financial cases on divorce (requiring financial disclosure to facilitate agreement) deserve closer analysis, as does the position of their children who find themselves in the middle of a court case that they have no control over being involved in.

5. More also needs to be known about what the publication of judgments on BAILII has achieved (or not), including ascertaining the views of the media. What is published there is largely reflective of a small proportion of contested cases, rather than all those heard across the family court. BAILLI cannot give an overall picture of how the majority of separating families deal with their issues through other types of dispute resolution.

6. We have previously suggested that a family courts inspectorate, with power to independently review decision-making and report on consistency within the family court, is one of the other ways to improve openness and transparency.

7. Many of our members consider that the media is not an appropriate watchdog of the family court and that increased media access is not the way to maintain public confidence and give a balanced insight into family court decision-making. There is currently little confidence that the media can be relied upon to report what is of genuine legitimate interest and importance, rather than reporting what they consider to be of interest. We query whether there is any analysis of the overall level of reporting and what is already reported and whether that information should be collected. A comparison in cases that have been picked up by the media, particularly from BAILLI, in terms of the detail in the anonymised judgment and that found in media reports, would facilitate analysis of the media's ability to assimilate the anonymised information and report sensitively and accurately.

8. Solicitors acting for children are particularly concerned by these proposals; they fear that the necessity to inform children at the outset of proceedings that court documents and expert reports will or may be sent to the media, albeit anonymised, will affect their ability to act in the children's best interests. It is likely a child would withhold important information from their representative or the professionals in the case for fear of it becoming public knowledge. This could also impact on a child or adult party's willingness to engage in essential expert assessments.

9. Clarification of aspects of the current law and the rights of parties to be heard on matters dealt with by the *Practice Guidance* which took effect from 3 February 2014 would be welcome.

10. We set out below our observations and views on some of the specific issues raised in the consultation paper.

The *Practice Guidance* which took effect from 3 February 2014

11. Those Resolution members involved in the preparation of this response have not, to date, seen any direct evidence that the *Practice Guidance* or the publication of written judgments has had any detrimental impact on adult parties, children and families. But we are mindful of the findings in *Safeguarding, Privacy and Respect* on young people's views on their privacy, access to written judgments, and how failures to completely anonymise and jigsaw identification put children at risk.

12. The more judgments are published, the more the margin for error and risk of identification of individuals or a family and breach of their privacy. The making of only one error may have a life-long impact on the children and families involved, which cannot be undone. Access to information through online searches means that this information will remain available even if amended later or retracted.

13. The potential impact on a child of any age (or an adult child) without access to all the background information later identifying him/herself and their family, must also be significant depending on the circumstances and the individual concerned. And there is of course no rectifying process.

14. We are aware from our members working in local authorities that social workers seek to prepare children where a relevant judgment will be published, although this does not necessarily mean that the full detail of the content will be evident to or understood by the child. A children's guardian or the child's solicitor will discuss the judgment with the child depending on the age and maturity of that child. But where the child is not represented or is too young to receive and understand the information, it will probably be up to their adopters, foster carers or family members to decide if and when to inform them about the existence of the judgment on line, assuming they are aware of it themselves.

15. The publication of judgments relating to teenagers in secure accommodation who are the victims of sexual abuse and exploitation requires particular reconsideration in light of the extremely high risk of jigsaw identification and the likelihood of linked criminal proceedings.

16. As far as we are aware, no evidence is available about the views of parents and adult parties on the increased availability of written judgments and any impact. Parents and adult parties also need to be sensitively advised about the impact of the *Practice Guidance*, if necessary by the judge. Consideration should be given to the provision by the court of a standard information sheet for parties.

17. Careful and thorough anonymising of judgments is clearly vital to avoid jigsaw identification. There should be core standards and clear guidelines on how to correctly and uniformly anonymise judgments covering what should be edited in addition to names, including all geographical references. How much to remove in relation to the details of harm is particularly difficult to balance.

18. In reality there is no standard practice for anonymising judgments, which Resolution believes should be the responsibility of the judge. In our members' experience, some judges already anonymise their own judgments at the end of the case–this should be the standard practice. There is no mechanism for advocates to be paid for the anonymising of judgments for approval by the judge under the current legal aid Family Advocacy Scheme. Where the task falls to the child's solicitor, they report that they struggle to be paid for the work and cannot submit their final bill for payment until they have the transcript to anonymise, which can take months. Where the local authority undertakes it, the exercise can also be lengthy and cumbersome. There may also be disagreements as to what should be removed or anonymised – if this process takes place after judgment has been given, there is no mechanism to resolve this.

19. It would be helpful to both family justice professionals and others for it to be made clear on BAILII whether a judgment sets a precedent and has learning points or not, particularly if the

numbers published there continue to increase.

20. We are not in a position to assess whether there has been any overall change in the level and quality of news and reporting about the family justice system since implementation of the *Practice Guidance*.

21. There should be a formal evaluation of the impact to date of the increase in the number of judgments being published on BAILII to inform whether there is any need for further guidance and what that might achieve. We do not know whether and the extent to which the media are interested in accessing and reporting those matters on BAILII; if they have done so, whether the information helps them to make sense of court decisions and whether there have been any changes in relation to reporting, particularly in relation to the quality and accuracy of that reporting; and if they have not done so, why not.

Disclosure to the media of certain categories of document

Documents prepared by advocates

22. Resolution is not persuaded at all that all the documents envisaged would serve the stated purpose of facilitating the accredited media's understanding of the case or assist them in performing a watchdog role. They may have sight of unproven allegations pre-judgment, documents based on conflicting evidence or prepared by LiPs which would not necessarily assist them, or of Practice Direction documents which set out only one party's evidence and argument. Any documents prepared during the case are snapshot documents, prepared for a particular hearing or issue to be resolved rather than providing an objective, succinct overview of the case.

23. In any event, in our view, the purpose stated in the consultation paper is not and should not be the purpose of those documents.

24. We are concerned that the proposals say that 'advocates will become accustomed to drafting documents suitable for the media'. This seems to us to place a burden on the practitioner which creates a potential conflict of interest between their primary duty to act in their client's best interests whilst having one eye on a secondary purpose. Many advocates are working to very tight deadlines and do not have the luxury of being able to get, for example, a position statement, approved by the client before lodging it with the court. It is prepared on instructions and so is not ordinarily an issue, however, if the advocate knows that the document will be released to the press s/he will, we would suggest, be duty bound to ensure that it is approved by the client. That will put an enormous burden on those separately representing children. There is also the risk that advocates will prepare more anodyne documents and will mean hearings are longer as the 'real issues' are left to be presented orally.

25. And if implemented, we do not agree that the category (1) proposal would have no impact on the drafting of documents or costs as their purpose would become two fold. It is possible that those seeking media exposure (more likely the less vulnerable client in the case) will try to use case summaries as a tool to attract that media attention regardless of the more vulnerable party.

26. The court would have little control over LiPs, who may struggle to understand the

parameters of what information to include and omit. We assume that the documents should and would require anonymising which would require the court's close oversight and should be conducted to the standards discussed above. Or some might 'play to the gallery'.

27. It might be appropriate for the judge to decide, having heard submissions, whether a discrete and neutral anonymised document agreed by the judge should be disclosed. A judge-led exercise could provide core and balanced, sensible information taking no particular stance. Consideration would, however, need to be given to allowing sufficient court time, and to who would prepare this statement or summary and on what timetable without creating unremunerated work.

Experts' reports

28. We are unclear as to whether it is envisaged that any pilot would apply to all types of children and financial proceedings. But we do not believe that the media should have access to:

    a. medical or other expert evidence in children proceedings. To do otherwise would undermine the individual right to privacy in relation to a person's medical or psychological history; could result in less information being provided or a total lack of co-operation which would then be prejudicial to their case, undermining the value of expert evidence to the court and the right decision being made; may conflict with the needs of children and families; and delay or deny a child or adult party from receiving the treatment that they need.

    b. expert evidence and reports in financial proceedings unless allowed by the court (as these often include details of a sensitive nature) and subject to a prohibition of publication of identifying information, personal financial information and commercially sensitive information that may impact on a third party's finances or be used to enrich a third party.

29. Whatever further guidance is piloted, if at all, the project would require a clear purpose and evaluation of whether it is fit for purpose with no detrimental impact on the children and adults involved. We hope that the views of children and young people on reporters' access to court documents contained in *Safeguarding, Privacy and Respect* and previous research and consultation exercises will be given significant weight in deciding whether a pilot should proceed.

30. In relation to the questions of both disclosure of documents and hearings in public, we are also concerned about the risk of satellite litigation, creating additional opportunities for acrimony between parties and putting further pressure on court time.

Should access to documents be confined to those members of the accredited media who actually attend the hearing or extend to any member of the accredited media entitled to attend the hearing, whether or not they do attend?

31. Resolution considers that access to documents should be confined to those members of the accredited media who actually attend hearings.

32. If a media representative attends court they should apply for documents in the normal way.

This procedure enables the court to be the watchdog and determine what is genuinely of public interest.

33. If documents are to be accessible to any member of the accredited media this leads to many practical concerns. Our members have to comply with strict rules about the safeguarding of client material. How could we be assured that the documents were secured? How would they be destroyed? If they have been emailed would this use a secure email provided, and would members be expected to fund that? Clients would want to know where these documents were going and how access to them would be regulated. Our members of course also have to comply with their insurance policies.

Hearings in public

34. We are not clear whether the President primarily has in mind matters of legitimate public interest. The consultation paper does not set out the purpose of and case for the hearing in public of certain types of family case.

35. We query whether there is a known genuine demand for this amongst the public and what this would achieve.

36. We believe that any benefit to the public would be far outweighed by the disadvantage to children and the court user in relation to their privacy and ability to give their best evidence. Whether vulnerable people would in fact be reluctant to or deterred from using the family court to seek protection, and the risk of impairment of the quality of evidence, should be considered and assessed as part of any future consultation process.

37. We have found it impossible to identify or cherry pick any types of family case which might initially be appropriate for hearing in public.

38. Litigants without children in finance proceedings are no less entitled to privacy and financial privacy about their personal finances and ownership of assets. Their cases will normally be of prurient interest. Many civil hearings involving personal financial information are treated as private in the first instance.

39. If any form of pilot was to proceed, we would expect the decision to be made by the judge conducting the hearing and that if at least one party objected, that ought to be determinative. The court would need to have the power to exclude the public from an open hearing at any time.

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Resolution
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