

**Rights of Women Response to
Department for Constitutional Affairs Consultation
Confidence and confidentiality:
Improving transparency and privacy in family courts**

Background

Rights of Women is a well established and expanding not-for-profit organisation committed to informing, educating and empowering women on the law and their legal rights. We are a membership organisation, running two national confidential free legal advice telephone services for women.¹ Our activities include giving legal advice, producing publications, organising conferences and training courses and undertaking policy and research work.

General Comments

As an organisation which provides legal advice to women involved in various family proceedings, we welcome the opportunity to respond to this consultation. We know from our services users that there are many concerns regarding the current 'closed' family justice system. In particular, the current confidentiality rules mean that it is very difficult for individuals to challenge particular points in their own cases. For example we often receive complaints about child contact being ordered in cases where an ex-partner has been violent. In addition, the closed nature of the current system makes it difficult to challenge claims of bias from other lobbies and to scrutinise the system in general.

Whilst Rights of Women understands that confidentiality has been put in place to protect children, particularly from media attention, we believe that it has effectively prevented analysis of the way the family justice system operates. This in turn, has, in the experience of our service users, let down many women and their children, particularly where domestic violence is an issue, and in some cases has placed them at real risk of harm. In addition, recent concerns have been exposed about the reliability of expert witness evidence in criminal trials. Rights of Women is concerned about the potential injustices in family proceedings involving expert witnesses, given that these cases are heard in private, as opposed to publicly heard criminal cases, and parties involved are therefore prevented from raising concerns about their cases in public.

Rights of Women therefore believes it is very important to look at transparency in the family courts. We believe that it is possible to ensure transparency whilst protecting the confidentiality of both children and adults involved in proceedings.

¹ Sexual Violence and Criminal Law Legal Advice Line: 020 7251 8887 (open Mondays 11am-1pm and Tuesdays 10am-12pm). Legal Advice Line: 020 7251 6577 (open Tuesdays, Wednesdays and Thursday 2–4pm and 7–9pm and Friday 12–2pm).

Consistency in attendance and reporting restrictions

In principle, Rights of Women believes that attendance and reporting arrangements should apply consistently across family proceedings in the lower courts (as opposed to appeal courts).

Currently, the rules on media and public attendance, and what can and cannot be reported and to who, are inconsistent between the various courts in the family justice system. The inconsistencies in the current system can be confusing. In addition, a person may choose to file a case in the county courts in the expectation of privacy, only to have their case transferred to the family proceedings court (FPC) in the magistrates' court, where the media are able to attend. It is difficult to justify these distinctions between the FPC and the county courts, and in practice they do little to make the operation of the family justice system understandable to members of the public, both in general and to those who are party to proceedings. Rights of Women therefore supports consistency of attendance and reporting arrangements across all family proceedings in the FPC and county court.

However, we believe that there is a case for keeping the current attendance and reporting arrangements that currently exist in the higher courts, such as the Court of Appeal and House of Lords. Rights of Women believes there is a public interest argument for the public and media to be admitted to family cases which have made it to the appeal stage. In such cases we believe that the current convention of allowing the media and general public to attend hearings and the delivery of anonymised judgments in open court should be maintained (see below our comments below regarding attendance, reporting, and judgments).

Media Attendance

Rights of Women believes that the current system, under which the media can attend FPC but not county court cases needs to be corrected and harmonised. We cannot see a principled or reasoned argument in permitting media attendance in one but not the other court.

We believe that there are significant concerns with automatically admitting the general public to family hearings, as outlined below. In this regard, we therefore agree with the Government that the media should be able to attend family proceedings on behalf of the public. This may indeed, as the consultation paper notes, 'help reassure people that the courts are more open, and more transparent' and that it may also 'help act as an important part of the necessary checks and balances to ensure that the system is fair and effective' (page 45).

However, at Rights of Women we are well aware that the media does not exist solely to be a 'proxy' for the public, and nor is it the responsibility of the media to be part of the checks and balances system. Whilst we believe that the media can play a significant role in increasing general awareness of the family justice

system and specific cases within it, the consultation paper places too much emphasis on the media reporting both in a balanced manner. Rights of Women firmly believes that it is the responsibility of the Government to ensure that the public is fully informed about legal rights, remedies, processes and procedures. Further, as is common knowledge, there is a tendency for the media, or at least some sections of it, to sensationalise issues. Reporting is unlikely to be “unbiased” or to cover a cross-section of various types of cases rather than focussing on a minority, such as those involving “celebrities”.

In this regard, Rights of Women believes there needs to be comprehensive system of checks and sanction in place to regulate media attendance. Rights of Women believe that the system used in New Zealand² provides a useful model for which can be drawn on in devising a scheme for media attendance. We believe that an accreditation scheme, similar to that in New Zealand, may be useful as part of a system of regulation. In New Zealand, only those reporters that are employed or contracted by an organisation accredited by the Ministry of Justice are able to attend family proceedings. Those reporters with accreditation have an automatic right of attendance, and in court are required to verify their accreditation in order to gain access to the courtroom. Upon entering the courtroom, admitted reporters are identified by a sticker with the word "Media" on it, which identifies them to those in the court, including the parties involved in the proceedings. Accreditation is granted by the Ministry where that organisation is subject to a code of ethics or professional standards and has a relevant complaints procedure.

Rights of Women believe this accreditation requirement could be a mechanism to ensure reporting standards and to ensure that where a party to proceedings has a grievance over reporting they have redress to a complaints procedure. However, we are aware that there significant concerns in the UK context in relation to the operation and powers of sanction (or lack thereof) of the Press Complaints Commission (PCC), and note that this consultation process provides an excellent opportunity to re-examine that mechanism.

Therefore, whilst Rights of Women believes that an accreditation scheme which requires adherence to the PCC Code of Practice could be useful, we also believe that is important to have strict and enforceable sanctions in place for breach of attendance or reporting arrangements (see below ‘Breach of attendance or reporting arrangements’). As discussed below, there is little deterrent effect in the current penalties for contempt for breaching court ordered reporting restrictions, given the resources at the disposal of the media.

² Please note that information in the following paragraphs regarding the accreditation system is based on information available from the New Zealand Ministry of Justice’s Family Courts website, at www.justice.govt.nz/family/home.asp

In addition, in the UK context, Rights of Women believes that it is important that judges retain discretion to exclude the media in certain circumstances, for example where the case involves a particularly sensitive issue or vulnerable parties. However, we strongly believe that such discretion should be the exception not the norm, and should be exercised in accordance with guidance.

Attendance by the general public

Rights of Women agrees with the consultation paper that members of the general public should not have an automatic right of attendance in family proceedings. Rights of Women is very concerned at the effect admittance of the general public may have in cases involving domestic violence. Given the current context of polarised debates on the biased nature of the courts we believe that there is a very real risk that certain 'pressure groups' and/or family members or friends may attend court, either intending to and/or resulting in a pressurised and intimidating environment for victims of violence.

Rights of Women, shares the consultation paper's concern that admitting the general public may well influence vulnerable individuals, particularly women who have experienced domestic violence, not to pursue matters through the courts. In particular, we note the DCA has stated that in 'cases involving domestic violence, any consideration of others attending court (apart from those directly concerned in a case) must consider keeping a victim safe and free from reprisals from a perpetrator and/or other people. Victims must feel able to give evidence in court without fear of intimidation – and importantly, not be deterred from taking legal action in order to protect themselves from further harm' (p.39). In addition we note the consultation's recognition that other adults may be vulnerable, such as those with mental health problems or learning difficulties.

Further, Rights of Women believes that it is not appropriate to allow admittance by the general public and to then rely on judge's exercise of discretion to exclude certain members of the public. As Sir Mark Potter, the President of the Family Division, who has stated 'it would raise considerable difficulties in identifying and challenging "undesirables" as well as giving rise to inhibition (and on occasion intimidation) of parties and witnesses, with consequent adverse effects on the outcome of the hearing.'³

Attendance by others on application to the court

Given that we reject a right of automatic attendance by the general public, we believe it is important to allow the attendance of others by application to the court. However, we believe that guidance needs to be issued about how such discretion should be exercised, and that such guidance is subject to consultation. Rights of Women recommends that there is a presumption that a professional who has provided support to one of the parties, such as a domestic violence

³ Letter from Sir Mark Potter, President of the Family Division to Rt Hon Alan Beith MP, Chairman, Constitutional Affairs Committee, dated 25 May 2006.

worker or refuge staff member, should be admitted to the court (where they are not, for whatever reason, making an application as a McKenzie friend). We strongly oppose the use of admittance by application system being used to deny women the support they need in the courtroom. This is all the more important in the current context of instability in public funding (legal aid) for family cases. We know from our service users that ‘advice deserts’ in family law work mean that women are finding it increasingly difficult to access legal advice and representation.

Rights of Women believes that any members of the public, including those admitted to offer a party support, should be subject to the same reporting restrictions as the media; this is important as we believe it would be ineffective to impose reporting restrictions on the media but not upon others (see below ‘Reporting Restrictions’).

Reporting Restrictions

Rights of Women believes that transparency in family proceedings requires balancing openness against the confidentiality of those involved in proceedings, particularly children and vulnerable women.

Rights of Women believes that there should be strict reporting restrictions placed on the media attending family proceedings. Reporting restrictions should provide for anonymity for both adults and children involved in family proceedings and should prevent the publication of information which is intended, or likely, to identify a child or adult involved in family proceedings.

Rights of Women believes that reporting restrictions are an important part of the balance between confidence and confidentiality, and as such comprehensive rules need to be set out regarding what can and cannot be reported. We believe that these rules must contain a strong presumption in favour of anonymity in all cases. However, we are also aware that in order to comply with obligations under the European Convention of Human Rights (ECHR), the courts must be able to review attendance and reporting restrictions when requested by one of the parties in proceedings.⁴ Rights of Women believe that the rules on reporting should be subject to wide-ranging consultation and draw on the experiences of voluntary sector service providers, particularly those working with women and in child protection.

Rights of Women believes that the current limitation against publishing identifying material under section 97(2) of the Children’s Act 1989, as amended, should be extended to any new legalisation on reporting restrictions. We believe it is important that parties to proceedings can tell relevant others, such as MPs,

⁴ *B v United Kingdom* [2001] 2 FLR 261, paragraphs 39 and 40.

doctors and the police that they (or their children) are involved in proceedings without having to seek the permission of the court to do so.

Further, Rights of Women is keen that the current consultation address the current anomaly in contact cases where one party (usually a father) can publicly claim non-compliance with a contact order, but the other party (usually a mother) cannot publicly state that the contact order compromises the safety of the child or children involved. This is clearly anomalous. Rights of Women believes that there are instances where a media order may be appropriate to protect the confidentiality of parties involved in proceedings. However, we also believe that women should have the right to draw attention to their cases where, they feel an injustice has taken place or where they feel there is a real risk to themselves and/or their children.

Anonymised Judgments

Rights of Women believes that transcripts for all cases in family proceedings cases should be kept. We believe that the transcripts of all judgments should be anonymised and delivered in open court, unless there are compelling reasons requiring judgment in closed court. In this regard, we highlight the comments of the House of Commons Constitutional Affairs Committee in its 2005 report *Family Justice: the operation of the family courts*, where it stated that anonymised judgments in open court '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' (paragraph 144).

Rights of Women believes that to ensure accessibility by the general public as well those involved in the proceedings (see below with regard to children's access to information) it is incumbent upon the Government to ensure that written anonymised transcripts of all judgments are kept on file and made available, generally through publication or on request. Whilst we understand the cost implication involved in producing hardcopy records, we believe that this cost can be mitigated, to a degree, by the use of electronic, as opposed to hardcopy storage and retrieval systems. Rights of Women also note in this regard, that several other jurisdictions, such as New Zealand, provide for the publication of selected judgments on the internet. Whilst we note that some family court judgments from the higher courts are currently available on the courts service website, Rights of Women believes that this needs to be more consistent and comprehensive. It is only through access to and analysis of the judgments of the courts, reasoned critique and examples of best practice can be examined.

Expert witnesses

Rights of Women believes that the evidence of expert witnesses in family cases needs to be subject to greater scrutiny than is possible in the current system. This is particularly an issue in care proceedings, where the courts regularly note

that the powers available to remove children from their families are amongst some of the most draconian powers in the legal system.⁵

The cases of Angela Cannings, Sally Clark and Trupti Patel have clearly demonstrated the need for careful consideration and scrutiny of expert evidence. This has been possible in criminal cases because expert witnesses do not receive anonymity. Consequently their evidence is subject to public scrutiny and is therefore open to greater challenge. The need for such scrutiny in family proceedings is equally present. However, because the current family system is a closed system, those involved cannot publicly question expert evidence. Rights of Women believes that the lack of scrutiny in family cases, below the level of afforded in criminal cases, needs to be challenged. We therefore believe that the evidence of expert witnesses must not be anonymised but must be made available to public scrutiny. In regard to expert witnesses, Rights of Women notes that on the day this consultation closes the Chief Medical Officer has issued a separate consultation on the creation of NHS teams of specialist doctors and other professionals to improve the quality of the medical expert witness service, with the introduction of mentoring, supervision and peer review and a National Knowledge Service.⁶

Criminal Offence of Breaching Reporting Restricting

Rights of Women believes it is important that if the family courts are to be opened up there need to be adequate penalties where reporting restrictions are broken. The current laws on contempt of court are inadequate and unsuited to the purpose of sanctioning the breach of reporting restrictions within a newly transparent family proceedings system. Whether or not the contempt rules are engaged in a family case currently depend on the will of the individual judge in a case. We believe that if the opening up of the family courts is truly about transparency and ensuring confidence, whilst maintaining confidentiality, then sanctions for breaking that confidentiality must be subject to systematic enforcement. In addition, we believe that the fines as currently administered in contempt cases (civil and criminal), are unlikely to have the necessary deterrent effect, particularly when it is the media breaching reporting restrictions. The media, generally, have substantial resources at their disposal and there may be cases where the risk of a contempt fine is likely to be offset by the “news value” attached to breaking reporting restrictions.

⁵ For example see Mr Justice Munby ‘Access to and Reporting of Family Proceedings’ *Family Law* December [2005] p. 950, where he states “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 invited to make in public law proceedings are among the most drastic that any judge in any jurisdiction is ever empowered to make.”

⁶ *Bearing Good Witness: Proposals for reforming the delivery of medical expert evidence in family law cases - A consultation*, released 30 October 2006, available at: http://www.dh.gov.uk/Consultations/LiveConsultations/LiveConsultationsArticle/fs/en?CONTENT_ID=4140132&chk=80ulaR

Rights of Women, provisionally, agrees with the consultation's proposal to create a criminal offence prohibiting publication of information intended or likely, to identify a child or an adult party as being involved in family proceedings. However, our agreement to this must be viewed against the context of our comments on reporting restrictions and this consultation response as a whole. We are particularly concerned that parties involved in proceedings have a right to publicly raise their concerns about their case, for example where they feel there is an injustice or they or their child is being put at risk (please see above 'Reporting Restrictions').

However, Rights of Women is concerned that with the creation of a new criminal offence, there will be a difference in the sanctions for breaking the anonymity in civil and criminal cases. For example, where as breach of victims confidentiality in a civil case on sexual abuse would carry an independently enforceable sanction, breaking anonymity for the victim of sexual violence in a criminal case would not be subject to such a regime. We believe this should not be the case, and as such call on the Government to also address sanctions for violating reporting restrictions in criminal cases.

Adoption

Rights of Women agrees that adoption cases should be an exception, so that there is transparency up until a placement order is made, but thereafter proceedings are private.

HMICA and CSCI inspectors

Rights of Women believes that special provision should be made for Her Majesty's Inspectorate of Court Administration (HMICA) and Commission of Social Care Inspectorate (CSCI) inspectors to have an automatic right to attend family proceedings. We do not agree with the current system, under which the two inspectorates have to apply to be able to attend family proceedings. We believe this fundamentally frustrates the roles of the inspectorates to carry out examinations of the courts system and social services involved in such proceedings. Both the inspectorates perform vital public scrutiny role, in particular, the HMICA produced a long-needed critique of the court administration in cases of domestic violence. Whether these functions can be performed should not be based on the discretion of a judge in a particular case. Whilst we understand that parties to proceedings may not be comfortable with an additional presence in the courtroom, we believe that in the context of a more transparent system, this cannot outweigh the need for public independent watchdogs to perform their functions.

With reference to other groups mentioned in the consultation such as MPs and other elected officials, as well as others such as researchers, we believe that such groups, should they wish to attend proceedings, would be able to apply, as set out above.

Further provision of information

Rights of Women supports the right of adults to access objective information about family proceedings they were involved in as children. Currently, there is no systematic way of providing adults with such information. We believe that at the least adults in this situation should have access to the full transcript of the judgment, including copies of any orders. We do not endorse making only summaries of judgments available, as this defeats the purpose of providing fullest possible information and is likely to leave many issues unanswered.

Practical considerations

Clearly, opening up family proceeding will have many practical and financial implications. However, Rights of Women is keen ensure that any changes which are made do not comprise the safety of women and children involved in proceedings, and risks should not be created due to funding issues.

Conclusion

Rights of Women urge the Department for Constitutional Affairs to seriously consider the issues outlined above.

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