Family courts should be led out of the dark ages

Ministry of Justice consultation paper on family law fails to meet proposed new approach to openness David Pannick, QC

Jeremy Bentham believed that “Where there is no publicity there is no justice”. To open up the courts promotes high standards because it “keeps the judge himself, while trying, under trial”. And “in the darkness of secrecy, sinister interest and evil in every shape have full swing”.

The consultation paper Openness in Family Courts – a New Approach, published last month by the Ministry of Justice, adopts a different principle. The “new approach” to “openness” is to maintain the extensive secrecy that afflicts family law.

This is a depressing story of loss of nerve by the departing Secretary of State for Justice, Lord Falconer of Thoroton. Last July, he published a consultation paper that recognised that greater openness is required in family court proceedings “so that people can understand, better scrutinise decisions and have greater confidence”. The document proposed that the media should be allowed, “on behalf of and for the benefit of the public”, to attend proceedings as of right, though the court would have a discretion to exclude them if appropriate to do so in the particular circumstances. Others could apply to the court to be permitted to attend. Reporting restrictions would ensure anonymity for the witnesses and parties.

Last month, the new consultation paper reversed direction. Lord Falconer explained that “children, young people and the organisations which protect, support and represent them were strongly opposed to allowing the media into the family courts as of right”. So because “children must come first”, the Government believes that the “openness” of family courts will be improved “not by the numbers or types of people going in to the courts, but by the amount and quality of information coming out of the courts”. This latest consultation paper is poorly reasoned and wrong in principle. There are four main defects.

First, it proceeds on a false assumption that to give the media a right of access to family law courts would damage the welfare of children. But if there are clear restrictions on reporting any details that may identify a child or the family, why is “the welfare of children at stake”? In the Court of Appeal, hearings of family law cases are almost always in public, with reporting restrictions imposed. In magistrates’ courts, the press is currently permitted to attend family proceedings, again with restrictions on reporting any information that could identify those involved. The document presents no evidence to suggest that this has caused any damage to the interests of children.

Secondly, the new consultation paper fails to recognise the strength of the case for allowing the press to attend. Family courts exercise extensive powers over the lives of those who

come before them: they may order a child to be taken into care, or which of two separated parents should have custody of a child, and what financial provision should be made on a divorce. On such important issues, the very highest standards of justice are required, and the spur of publicity advances that goal. Secrecy is a breeding ground for complacency and injustice. It also promotes rumour and speculation, which inevitably damage public confidence.

Thirdly, the ministry's conclusion that the media were seen "as only interested in reporting on certain types of (often high profile) case" shows a fundamental misunderstanding of the function of a free press. It is for the media, not the Government or children's organisations, to decide which cases to attend and why. And the existence of a right to do so, however often it may be exercised, would itself improve public confidence and promote higher standards in those courts.

Fourthly, the suggestion that transparency and confidence will instead be promoted by the publication of more official information confirms the inability of the ministry to understand the issues. There needs to be access to courts by an independent press so it can see, hear and report what is being done in our name. It is no substitute that those in positions of authority consider which additional items of information they are prepared to reveal.

The consultation period on these new proposals runs until October 1. The new Secretary of State for Justice, Jack Straw, should read his Bentham and decide that the interests of children (though not necessarily the interests of the organisations that represent children) are best protected by opening up the legal system in order to foster informed debate and improve standards. As Justice Louis Brandeis, of the United States Supreme Court, pointed out: "Sunlight is said to be the best of disinfectants, electric light the most efficient policeman." It is high time for family law to be led out of the dark ages.

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