WORKSHOP GROUP – RESPONSE TO PRESIDENT OF THE FAMILY DIVISION'S CALL FOR EVIDENCE FOR THE TRANSPARENCY REVIEW

INTRODUCTION

1. On 29 February 2020 a group of individuals involved in various capacities in the family justice system spent a day talking about transparency in the family courts, at an event arranged by The Transparency Project (an educational charity) and facilitated by dispute resolution specialist Louisa Weinstein.

2. This document is their submission to the President of the Family Division's Transparency Review. The Transparency Project have submitted a separate document, which has been informed by the discussions at the workshop.

3. In this document we refer to the participants on 29 February as 'the workshop group'.

4. The workshop was run on a 'Chatham House' basis, but involved participants from across the spectrum of roles and perspectives, including the judiciary, the legal profession (including both media and family law barristers and solicitors), journalists, researchers/academics (from backgrounds ranging from social work to journalism), CAFCASS and young adults who had been subject of proceedings.

5. Whilst of course there was debate and disagreement, there was an encouraging degree of unanimity and consensus as to the issues of importance, the priorities and the areas of difficulty.

6. The workshop group were keen that their collective views and work should be presented in a single coherent document in order to inform the work of the Review Panel, representing as they do a set of observations that are both multi-disciplinary and which embrace perspectives that are often thought to be irreconcilable. As was the aspiration of the Transparency Project in setting up the event, all the participants in the workshop worked hard in advance, throughout the day and through subsequent feedback to genuinely engage with the topic, and to focus on constructive responses to the various barriers to the achievement of real transparency, whilst maintaining proper protections and respect for those families the system is concerned with.

DEFINING TERMS AND SCOPE

7. The workshop group encourage the panel to approach the question of transparency broadly. Debate and discussion has often focused on specific proposals or aspects of transparency, such as the publication of judgments or the role of the media - and discussion is often framed somewhat adversarially, implicitly or explicitly placing transparency and privacy at opposite ends of a notional spectrum. Debate has often stalled or become polarized into 'for' or 'against' transparency. The workshop group firmly rejected this false dichotomy, whilst acknowledging that there are often tensions between the dual responsibilities that the court, as a public body, has with regards to privacy and freedom of expression. The workshop group acknowledges the sometimes difficult balancing exercise that must be carried out in individual cases.

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8. The workshop group approached the topic in the first instance by looking at transparency in its broadest sense, only subsequently homing in on specific ideas, projects or difficulties - and encourage the panel to do likewise. The group was keen to avoid the review simply 'tinkering at the edges' by focusing too much on specific pieces of guidance or single issues.

9. They felt that this review represented an opportunity that must not be lost, to move forward transparently across a range of fronts, and that to focus only on the role of the media would be a lost opportunity.

10. Accordingly, whilst the workshop group did consider the specific questions posed in the call for evidence, namely :

    a. *is the line currently drawn correctly between, on the one hand, the need for* ***confidentiality*** *for the parties and children whose personal information may be the subject of proceedings in the Family Court, and, on the other hand, the need for the public to have* ***confidence*** *in the work that these courts undertake on behalf of the State and society?*
    b. *if not, what steps should be taken to achieve either greater openness or increased confidentiality?*
    c. *any observations on the* Practice Guidance: Family Court- Anonymisation Guidance *issued by the President on 7 December 2018 and the* President's Guidance as to reporting in the Family Courts*, issued on 29 October 2019*

    they did not feel that these were a helpful basis for discussion, focusing as they do on guidance concerning the publication of judgments and the role of the media, and once again framing the discussion in terms of an unhelpful and often false dichotomy, and inviting respondents to the call for evidence to position themselves on one side of the 'line' or the other.

11. The workshop group did consider that the question of public confidence in the work of the family courts, as identified in the review questions, was one of several important facets of transparency. The group thought that transparency was necessary in order :

    a.to develop the trust of users (and consequent engagement) (administration of justice)
    b.to develop the trust of the public in the system
    c.to facilitate public debate (democratic accountability)
    d.to facilitate systemic learning,

    but that these aspects were distinct from and additional to Article 10 freedom of expression rights and responsibilities.

12. The group also drew a distinction between privacy and confidentiality, and saw these issues as connected to administration of justice, by facilitating confidence in and engagement with the process by children, parties and witnesses alike.

DATA MANAGEMENT

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13. During discussions a number of participants were keen to devote some energy to thinking about the ways in which information and data were captured and held by the justice system, as a prior consideration to how it might later be used or disseminated. The group thought that if information was not captured and stored in accessible, systematic and safe ways that would inevitably restrict or hamper the good use that could be made of it subsequently. The group characterized these as 'upstream' and 'downstream' issues, and specifically wanted the review to give proper thought to these upstream issues, rather than just the downstream issues of what should be permitted 'out' into the public domain, primarily via the mainstream media or publication of judgments in individual cases or stories about individual cases. The group were keen that any meaningful discussion of transparency should consider the potential of research and data sets / patterns to make the system more transparent both to outsiders and to reveal otherwise invisible patterns or inconsistencies to those working within the system, and more broadly to further the purposes set out above. The group considered that a range of downstream mechanisms could combine to produce greater transparency overall.

14. The group were particularly concerned therefore that the review should consider data management issues around the recording, storage and searchability of hearings and judgments – it was felt that a proper database of text based records of hearings (Rather than simply audio recordings) would be an invaluable resource for parties (including adults who had been the subject of proceedings post-proceedings), journalists, researchers and policy makers. The group thought that there would be a need to properly consider data security and access to such materials, and some concern was raised as to the adequacy of existing arrangements insofar as current records are difficult to search (with analogue and unreliable filing systems), and possibly not sufficiently secure given the sensitivity of their contents.

15. The young adults who attended the workshop (former subject children) were able to articulate their concerns about decisions being made about who should see their judgments or case papers (including whether they should be published) without their views being sought, and about how it might feel for a child to later find out that this had happened, particularly if they were to inadvertently identify that a judgment was 'their' judgment. It was important for these participants to feel that they had access to their own materials for their own purposes (subject access requests were generally thought not to be a user friendly or effective way for former subject children to gain access to their records), and that they had some sort of control over them. Their indication was that (hypothetically) they would be somewhat reassured if the decision making process about publication involved them, even if the judge's decision was contrary to their preference. They raised the legitimate question of how these issues of involvement and control could be managed where children were much younger at the time decisions were being made. There was a recognition that with respect to younger children and generally, decisions need to be made on a case by case basis on their behalves, considering what information should be contained in / excluded from published judgements, and planning for these children to be

supported to access and understand the contents of their judgments in an age appropriate way in due course.

16. The group acknowledged a lack of research evidence in respect of the actual impact upon subject children of their judgments being published (as opposed to hypothetical concerns or actual views expressed prior to publication).

LEGISLATIVE FRAMEWORK

17. The group's discussions of the existing legislative privacy framework played a key part in the discussions and whilst there was a consensus that existing anonymity provisions in respect of subject children (e.g. s97 Children Act 1989) were necessary and appropriate, questions were raised by some as to whether Section 12 of the Administration of Justice Act 1960 required review for the purposes of addressing the issues of transparency in the family court.

18. There was broad agreement within the group that whilst the purpose of s12 was laudable, its operation in practice was in many respects problematic. The group thought that s12 tended to have a chilling effect on the responsible, whilst failing to modify the behaviour of others whose narratives and approaches might be harmful to individual children or otherwise inappropriate (for example social media campaigns which were launched without prior court sanction and which identified children by name, image or jigsaw). The group didn't think that s12 AJA was doing what it was intended to do, i.e. to protect the administration of justice by creating a safe space, in order that they could give evidence and engage with the professionals, without the anxiety that what they said might attract media attention or result in an invasion of privacy.

19. The group saw s12 as being a significant factor in a tendency for mainstream media news reports to be usually based upon published judgments rather than attendance at court hearings. The group noted that whilst the tone and content of some mainstream media coverage could be criticized, there was a marked absence of any pattern of breach of s12 or the anonymity provisions (e.g. s97 Children Act 1989) by them. The existence of s12 (and ancillary parts of the FPR that it interacts with), alongside the absence of a systematic searchable 'upstream' database of all judgments, were also seen as making it difficult for the media to fact check anecdotal accounts and to carry out in depth work.

20. The group acknowledged that, whilst the President's review could not of itself effect statutory reform, this review was an important forum for discussion of the adequacy and utility of the existing statutory framework, and that if the President's review only approaches the issue on the assumption that the statutory framework is immutable, the consultation would be a lost opportunity. It was beyond the scope of the workshop to consider specific solutions to the difficulties associated with s12 AJA, or to reach a view on whether or how the section should be repealed, amended or what it should be replaced with, but the group did endorse the idea that the operation and effect of s12 should be considered by the Review Panel..

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ANONYMISATION AND JUDGMENTS

21. A further significant aspect of the groups' discussion was around the risk of jigsaw identification, anonymization errors in published judgments and the publication of judgments generally. There was a unanimity of concern as to the ad hoc nature of anonymization processes and the lack of dedicated resources to support judges in ensuring this work was well done. The group felt that judges were under too much pressure to be expected to reliably anonymise without appropriate support and that the provision of this was a priority, both to protect the subjects of judgments and to facilitate and encourage the publication of a more representative selection of judgments, which the group thought was an important objective. The group touched upon but did not reach conclusions on the possibility of more judgments from lower tiers of the family court being published, given that they were making a substantial proportion of decisions overall. It was noted that magistrates facts and reasons are routinely produced in writing in a short enough format to be straightforward to pre-anonymise.

OTHER IDEAS

22. In addition to the above the group encourages the review to consider the following areas of possible work or exploration :

    a. Searchable accountable basic court outcome data / recordings available for parties / researchers
    b. Systems for recording all judgements at all tiers and to produce transcripts of all judgements – possibly automatic transcripts (it was noted that technology is already in place for this e.g. commercial court and automated voice to text services that are being trialled)
    c. Fundamental review of access to records of the cases by those who are the subject of the cases and methods to systematise how data is retrieved
    d. Searchable text-based database of hearings from evidence to judgements
    e. System of Archiving listings to create visibility
    f. Systemisation of management of information
    g. System for safe anonymisation of judgements through an independent unit which would carry out anonymisation and support judges in the publication of safely anonymised judgments, such as the Australian anonymisation unit, which would develop and apply standardised cross checks and methods of redaction / anonymisation and de-identification (some manual / visual and some automated) with triple checks built in

RESOURCES

23. It was acknowledged that the proposals set out above and even the process of exploring whether they were viable carried a financial cost. However, it was also noted that the current system was potentially wasting resources without benefit to children's outcomes, because it is effectively 'flying blind', and that there are other

costs to the current lack of transparency in that the perception of secrecy can impact on parental decision making, engagement and outcomes – with knock on costs impacts both within the court system and more broadly in the social care system. There are enormous social costs in not having a full picture of the system and in the system failing to successfully engage the vulnerable families it is there to benefit.

24. The overarching view of all members of the group, as demonstrated by the commitment to the process facilitated by The Transparency Project, was that transparency was a pressing issue that needed to be substantively and broadly addressed, notwithstanding the very real need to ensure that children's privacy and wellbeing were respected and protected – and that the review was a much needed opportunity to dig deeply into a wide ranging issue of critical importance to the ability of the family courts to perform their functions on behalf of society and individual children effectively.

This document was prepared with the agreement of the project group by Lucy Reed, Chair of the Transparency Project, who organized and participated in the workshop. It has been circulated to the group and is representative of their views.

April 2020