Proposal for the Law Commission's 14th Programme of Law Reform

Proposal:

That consideration be given to a review of section 12(1)(a) of the Administration of Justice Act 1960, with a view to its repeal and, if appropriate, replacement with more focused provisions better suited to the modern world.

Reasoned submission:

The powers exercised by Family Court judges on a daily basis are amongst the most drastic that any judge in any jurisdiction is ever empowered to make. On an application by a local authority, Family Court judges have the power to order that a child be permanently removed from the care of her parents and placed for adoption thereby permanently severing the relationship between parent and child. When dealing with disputes between parents, Family Court judges' powers include, for example, the power to transfer responsibility for the day to day care of a child from one parent to the other, the power to curtail the ability of a parent to spend time with their child and the power to permit one parent to remove a child from the jurisdiction to live in another part of the world. Such powers represent a significant intrusion into family life. Human rights breaches affecting children's and families' lives for ever can and do occur.

In the latter years of the twentieth and early years of the twenty-first centuries there has been increasing public concern that such serious and life-changing decisions are made out of sight, behind closed doors, protected from scrutiny and accountability by the operation of law, in particular section 12(1)(a).

Because of the way s12(1)(a) prevents almost any description or public discussion of what takes place in family hearings, the Family Court is frequently referred to as a 'secret' court, a court that is significantly lacking in transparency. In a report published in March 2005, *Family Justice: the operation of the family courts*, the House of Commons Constitutional Affairs Select Committee concluded that,

> "Lack of transparency has been a major factor in creating dissatisfaction with the current Family Justice system on the part of those involved in cases…Some of the evidence we received was that the lack of openness prevented proper scrutiny of the work done by family judges or court officials and made it impossible to prove or disprove perceived unfairness. While there is disagreement as to whether all the criticism of Family Justice is justified, it is widely agreed that reform is needed."

The attempt to modernise the law by the enactment of Part 2 of the Children, Schools and Families Act 2010 was widely recognised to have failed. It was never implemented and has since been repealed.

In 2009 the rules were changed to allow "duly accredited representatives of news gathering and reporting organisations" to attend hearings in the Family Court. However, section 12(1)(a) of the Administration of Justice Act 1960 continues to severely restrict what the media are permitted to report even where they attend. In proceedings relating to the inherent jurisdiction of the High Court with respect to minors, proceedings brought under the Children Act 1989 or the Adoption and Children Act 2002 or proceedings which "otherwise relate wholly or mainly to the maintenance or upbringing of a minor", section 12(1)(a) prohibits:

> "the publication of information relating to proceedings before any court sitting in private".

There is now an extensive jurisprudence concerning the proper interpretation of those words. The fact that there is such an extensive and complex case-law explaining the meaning of the six words "publication of information relating to proceedings" of itself suggests that section 12(1)(a) is not fit for purpose. Indeed, it raises the question whether section 12(1)(a) satisfies the requirements of Article 6.

The complexities of interpreting section 12(1)(a) have given rise to expensive satellite litigation involving media organisations and freelance journalists wishing to shine a light on the working of the Family Court. There is cost and risk involved in mounting such challenges. More generally there is continual uncertainty for responsible reporters who wish to avoid being held in contempt of court, as to the boundaries of what can and cannot be reported in any specific case without offending against s12(1)(a). These factors, separately and combined, have a chilling effect on the responsible mainstream media and the emerging citizen journalism / legal blogging movement, which has been notably more successful in the context of the Court of Protection where (typically) the equivalent provision of s12(1)(b) does not apply due to the different arrangements for taking most hearings in public. As a result, the practical impact of section 12(1)(a) has been :

- to deter the media from attending hearings in the Family Court and to stifle media reporting of what happens in such hearings (including the reporting of good practice),
- to hamper the development of public interest journalism including legal blogging,
- to prevent parties (almost always parents, but sometimes children too) from complaining publicly about their treatment at the hands of the state,
- to prevent the correction of any inaccurate and tendentious reports which may be in circulation, and
- to prevent the judges and other professionals practising in the Family Court being held properly to account.

In these circumstances it is perhaps unsurprising that the Family Court continues to be widely regarded as a 'secret' court.

Sixty odd years ago, during the course of the Administration of Justice Bill's passage through Parliament, the Solicitor General, Sir Jocelyn Simon said:

> "We think that the law must be changed to accord with contemporary conditions…"

Self-evidently, what was 'contemporary' in 1960 (a world which had neither the internet nor social media) is not contemporary in the twenty-first century. Today, section 12(1)(a) is being deployed for a purpose for which it was never intended, typically but not exclusively by state agents such as local authorities. The provision is ostensibly justified on the basis of the protection of family and children's privacy, but in reality operates to secure the protection of the state from criticism. In consequence it is effectively shrouding family justice in a cloak of secrecy.

In its response to the House of Commons Justice Committee's Report of Session 2010 - 2012, *Operation of the Family Courts*, the Government acknowledged that:

> "whilst there are divergent views how to increase the transparency and accountability of the family courts, there is a general consensus that the status quo is unsatisfactory."

That acknowledgment has not led to Government action.

The purpose of section 12(1)(a) of the Administration of Justice Act 1960 is the protection of the administration of justice and not specifically the protection of privacy – s12(1)(a) is only concerned with privacy insofar as it impacts upon the administration of justice. The privacy of subject children is protected by the non-identification provisions contained in section 97 of the Children Act 1989, and by Article 8 of the European Convention on Human Rights. In practice, the consequence of praying in aid section 12(1)(a) as a means of protecting privacy has been the diminishment of public trust and confidence in the very thing which section 12(1)(a) was designed to protect, namely, the administration of justice. If the provisions of section 97 of the Children Act 1989 are considered inadequate to protect the privacy of children and

families involved in proceedings in the Family Court the proper course is to amend section 97.

In a speech given in Edinburgh in 2020, the immediate past president of the Family Division of the High Court, Sir James Munby said:

> "there is an urgent need to address the problems associated with section 12. It has become increasingly clear that section 12 should be repealed, to be replaced, no doubt, with much less restrictive, more narrowly drawn and more focused legislation better suited to the modern world."

We, the undersigned, are all of that same view. With the passage of time, and in the modern context in which it is now operating, section 12(1)(a) has become unsatisfactory, unfair, unduly complex, inaccessible and outdated. Repeal of section 12(1)(a) is long overdue. Until it is repealed the public's perception of the Family Court as a 'secret' court will persist. The consequences are multiple and serious. The Family Court and the law are brought into disrepute, the family justice system loses legitimacy and public trust, and highly vulnerable children and families are failed by the system that exists to protect them.

The Right Honourable Sir James Munby

President of the Family Division of the High Court from 2013-2018

His Honour Clifford Bellamy

Retired Family Circuit Judge, Patron of The Transparency Project and author of 'The Secret Family Court – Fact or Fiction?'

Lucy Reed

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