Hearing on new child welfare act

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1 Introduction

The Norwegian Press Association (NP) is an umbrella organization for free, editor-controlled media that follows the Ethical Code of Practice for the Press (printed press, radio, television and net publications) and the Editor's Charter. The Association of Norwegian Editors' (NR) is a nationwide association of editors in all types of media. The Norwegian Union of Journalists (NJ) is the organization for editorial staff, including subeditors and freelancers, who have journalism as a profession.

We refer to the proposal that was submitted for consultation in April this year. Since this is a follow-up to NOU 2016: 16 and builds on the changes implemented through Prop. 169 L (2016–2017) and Recommendation no. 151 L (2017-2018), we also follow up our previous feedbacks from 2017.

2. Transparency in child welfare – weaknesses in the proposed legislation

As highlighted in our statement from 2017, we believe it is a weakness of this legislation that the 2016 report does not address the importance of society's knowledge and commitment to the development of child welfare. Neither does it consider the role of the media as a "watchdog" towards child welfare.

For several decades various people have highlighted the problems related to the culture of silence that is so strong in the child welfare services. Dating back to the 1960s and later, several key voices - such as sociologist Else Øyen, criminologist Nils Christie, lawyer and journalist Gerd Benneche, and journalist Arne Skouen - have questioned how comprehensive secrecy rules can prevent the debate on what are good solutions, since the public are not aware of what the problems are.

The confidentiality is important, but at the same time it must not be so far reaching, neither legally nor in practice, that it prevents critical scrutiny of the system and of individual cases. The importance of the media providing critical spotlight and disclosures, especially towards orphanages and special schools, is well documented in the Befring Committee's report (NOU 2004: 23). The committee outlines under item 1.10 the role of the press that the media "in

many cases [have] functioned as children's mouthpiece", and "helped uncover and disclose critical issues under which many of the institution's children lived". "The press played a significant role in the de-institutionalization that eventually took place," the committee concluded.

In 2015, more than a hundred professionals - such as psychologists, lawyers and researchers - signed a call that the situation in Norwegian child welfare is deeply disturbing.

in the last three years only, there have been several major cases showing the importance of critical spotlight on child welfare. We refer here to the "Glass girl case" in Stavanger Aftenblad, which was published in January 2016, which led to Norway's largest investigation of a single child welfare case. In the investigation report "They did not understand me" the County Governor concluded that several specific violations of the law had taken place, that "Ida" had not received proper help and presented 33 recommendations for system improvements to all actors in the health care system and child welfare service.

We will also highlight Dagbladet's series of article "Child Protection Angels" from 2018, which ended with the closing down of the child welfare institution Vestlundveien, and a review of several other child welfare institutions in Norway. BT's coverage of the Bergen Youth Centre (BUS) led to the institution closing down for good.

The Norwegian Board of Health Supervision's report based on 106 child welfare cases from 60 municipalities throughout the country, published in January this year, also concluded that there were serious shortcomings and failures in the Norwegian child welfare services.

Finally, it is worth recalling that the European Court of Human Rights (EMD) currently has - or recently dealt with - 26 cases, involving Norway and the child welfare service. Overall, this shows that there is a great need for a critical and investigative press in this area. A prerequisite for the media to be able to cover or even be critical at all, is access to information.

The development of the practise of law within the EMD, indicates the need to look specifically at media's access to information. In several decisions, the EMD has concluded that Article 10 of the European Convention on Human Rights (ECHR) protects not only the right of publication, but also the right to receive information. This is especially true of the media as they have a particular social responsibility. The EMD has in several cases emphasized that the media's investigation and collection phase have special protection under the ECHR art 10, for example the case Dammann c. Suisse (2006) and the Grand Chamber decision Magyar Helsinki Bizottsag v. Hungary (2016).

The Supreme Court has also emphasized this, inter alia in the Treholt ruling (Rt 2013-374), in which the Supreme Court states in section 53 that the transparency question pursuant to Article 10 (1) must be assessed according to the following instruction:

> *The more public interest there is in a specific case, there more need there is for facilitate conditions so that the press is given the opportunity to fulfil*

its' function satisfactorily. However, the question must be considered in each specific case. "

The media should inform the community and show how public services work, and exercise independent assessment of power and exercise of authority. In order to fulfil this task, access to information is important. The child welfare service has the authority to exercise coercion both on children and parents/guardians, and the need for independent control is therefore particularly strong. Thus, the right to information will thus also have extra strong protection. It is important that this is reflected in the legislation and that we do not have such comprehensive and far-reaching confidentiality provisions that it interferes with freedom of expression. Furthermore, it is important not to practice the confidentiality more strictly than necessary. Professor of Law, Elisabeth Golding Stang, has advocated for a more open child welfare service, and in a chronicle in Aftenposten gives good advice on how the child welfare services can become more open, at the same time as safeguarding the confidentiality.

The media's specific role and relation to freedom of expression should therefore be part of this legislative work. It is deeply problematic that this is not even mentioned under the chapter on basic human rights obligations, nor in the chapters on confidentiality and treatment of child welfare cases in the county board. This perspective is important both as an interpretative element for whether there is a confidentiality and where there is a confidentiality, cf. the emergency room inspection case from the Supreme Court Rt-2015-1467. It should therefore be included in the preparations as a guideline both in terms of Chapter 13 and the confidentiality, and in connection with Chapter 14 and treatment in the County Board. We will return to this below.

3. Confidentiality - Chapter 13 of the draft

As follows from what we write above, we believe the draft law should have included specific assessments of the confidentiality vs. freedom of speech. This could have contributed to a practice more in line with fundamental human rights.

Our proposal: Here we will reiterate our proposal from the hearing in 2017 for a new paragraph to the confidentiality provision:

The confidentiality under the provision here protects the personal matters of children, parents and guardians under the first paragraph, and does not include the protection of public administration employees, or in public or private child welfare services.

Rationale: Many journalists with extensive experience in this field often find that the confidentiality is (mis)used by employees to protect themselves or colleagues, either because they believe that the law can be interpreted so far, or because they believe that others do not know the limitations of the law. We therefore believe that the statutory text should specify that the confidentiality should not be used for the protection of the public service itself or their employees, as the Oslo District Court explicitly states in the Moxness case from 15.09.2015 (TOSLO-2015-51445), on the Oslo municipality's handling of the Lindeberg cases.

We know several cases where public employees being interviewed are denied by their superiors to criticize other agencies or managers in other agencies in a child welfare case, citing the confidentiality. Provisions intended to shield vulnerable people are thus abused to prevent free debate, which has never been the intention of the legislature.

Other examples are child welfare leaders and employees who want to avoid public discussion or criticism. It has happened that even with authorizations for waiving confidentiality from the people involved - a youth and their parents, and there are factual and public reasons for discussing the matter in anonymous form, neither access nor interview with/answer is provided from the child welfare service. Without pursuant or justification, the authorizations are not considered. This kind of cut-off of access and public debate makes the press' social mission difficult, prevents system criticism, and balanced discussion of child welfare. Ultimately, it weakens the freedom of speech of the children, and it weakens democratic control by the public. Therefore, it is important for all parties to make confidentiality provisions far more precise and unambiguous than is the case today.

We also propose to include a separate section on consent from children, to ensure that the entire child welfare services follow the applicable law in this area:

> *Upon consent of parents regarding the waiver of confidentiality, the child's consent shall be available when the child has reached such age and maturity that it must also give its own consent, and in all cases when the child is 15 years of age.*

We support the proposal that the provision in section 6-7 (5) of the current Child Welfare Act is not continued in section 13-1 of the draft.

4. The parties' right to access documents and exemptions to access in order to protect the child - Section 12-5 (2) of the draft

The Ministry proposes the following wording:

> *The parties can be denied access to the case documents if access can expose the child or other persons to danger or harm. The parties may be denied access to the case documents even if access can prevent the child welfare service from being able to carry out an investigation pursuant to section 2-2 of the Child Welfare Act. The restrictions on access only apply as long as the investigation is ongoing».*

We believe this should be changed to (our proposal for a change in **bold**):

> *The parties can be denied access to the case documents **if there is a probable and specific danger that** access can expose the child or other persons to danger or harm. The parties may be denied access to the case documents even if access can prevent the child welfare service from being able to carry out an investigation pursuant to section 2-2 of the Child*

Welfare Act. ***The information shall be made known to a representative of the party on request, when there are no specific reasons to the contrary.*** *The restrictions on access only apply as long as the investigation is ongoing.*

Rationale: In the preparatory work, the Ministry writes that the proposed amendment is intended to include what is entailed in section 19, first paragraph, letter d, of the Public Administration Act, but nevertheless sets a much lower threshold for when party access can be denied. To deprive any party of access is a serious infringement of a right that is one of our foremost legal security guarantees, which furthermore has protection under the ECHR art. 6. The threshold for this type of intervention must therefore be high and this must be made clear in the wording. Therefore, we propose to include "probable and specific danger". We note that the Ministry writes in the preparatory work that the risk of injury or danger must be real, and that through the indications of the situations the provision is relevant, a high threshold is specified, but we believe this is so important that it must be included in the legislative text itself. Furthermore, in the preparations it should be questioned that this is a serious infringement of an important right.

In addition, the right stated in section 19d of the Public Administration Act, that the information that is exempted on request must be made known to a representative of the party, is an important procedural right that should accompany this type of restriction. Therefore, we propose to include this in the Child Welfare Act § 12-5 (2), second last sentence.

5. County Committees - Chapter 14 of the draft

An important goal of this law revision is to strengthen the legal security of children and parents in child welfare cases (Chapter 1.1 of the consultation note). Nevertheless, the proposal continues using the provision which sets a very high threshold for the press or other outsiders to be present during the deliberation of the county board. We cannot support this.

The county board deals with cases when child services have taken over the care of a child, sometimes forcefully, which is one of the most serious interventions that can be made against human beings. This alone indicates that the need for control and the rule of law is great.

Furthermore, it is difficult to understand why not the same rules should apply to these types of cases as the ones that apply to court proceedings regarding particularly incest, where the media usually have access, however sometimes with prohibition to report, taking also into consideration the strict ethical guidelines that the media have committed themselves to follow.

The previously mentioned appeal from 2015 raised, among other things, serious concerns about the legal security of county committees, cf. the following excerpt from the petition:

A serious objection is the lack of legal certainty that many expert psychologists have too close ties to the child welfare services that are their principals. The child welfare services often use the same psychologists to investigate cases where they have made emergency decisions about taking

over the care of a child. When the parents appeal the cases to the County Council and further in the court system, the child welfare service has appointed its own experts who they know from before. These are well-paid assignments, and many experts have such cases as their sole livelihood. It is easy to imagine that the experts in too many cases prepare expert reports that support the decisions taken by the child welfare service. We are faced with a serious problem of impartiality which can lead to a serious failure in the legal security of the vulnerable families affected.

When the experts deliver their reports and witnesses in the courtroom, we often see that their own observation basis is very flimsy, and judgments are made on a weak and speculative basis. The child welfare expert is given disproportionate weight when the cases come to court. Judges leave too much to the experts to draw the conclusions. In some cases, where biological parents have the finances to do so, they can appoint their own expert psychologist to re-examine the matter. However, we see a clear tendency for judges not to attach the same weight to their conclusions. Witness statements from a private party do also not receive the same status as witnesses and experts appointed by the public party. Too often, we see that biological parents, who do not have the backing of all the world's resources, are without a chance to face a large and powerful public apparatus. We therefore see a tendency for decisions based on inadequate observation and tendentious interpretations to follow through all the courts.

It is worth listening to when so many professionals from different sectors think the same. Nevertheless, the ministry writes in the consultation note, on page 300:

The ministry believes there are good reasons for more transparency around the negotiations when the parties agree. It is nevertheless important that the Board considers what openness will entail for the individual child. The child is often not a party to the case, and the Board must therefore make an independent assessment of whether openness is justifiable on the grounds of the child. Among other things, the Board should consider whether openness can lead to media publicity that could be detrimental to the child. The consideration of the best interests of the child must outweigh the public's insight into the matter.

In the comment on section 14, the Ministry further writes that the considerations of the private parties and the child are given great importance, and that this indicates that the current rules should continue.

We believe this is a one-sided understanding of what can be a benefit to private parties and the child. The media's presence should, of course, help to strengthen legal certainty in litigation. By allowing the media to be present in litigation, the media could be able to cover the entire basis for a care-taking - everything from the child welfare assessments and documentation, lawyers' arguments, expert's assessments, other witnesses and biological parents' explanation. This will strengthen legal certainty in that they have an independent look at the courts' basis for judgments. To say that the interests of private parties and the child speak exclusively for closed doors, therefore, in our opinion gives an incorrect

picture of the situation.

The media also has an independent responsibility for assessing the consequences of media publicity for children according to the Ethical Code of Practice for the Press, section 4.8. From the same paragraph, it follows that, as a rule, children's identity should not be disclosed in child welfare cases, family disputes or litigation. By having access to the entire basis of the case, it is possible to give a completer and more correct picture, which overall benefits society. Furthermore, it becomes possible to review, for example, expert's assessments, both in individual cases and by comparing several cases.

The role of experts in a trial and the quality of their assessments is constantly the subject of debate, and many - judges, lawyers and other professionals - have expressed concern about the quality of experts. In 2018, judges in the Oslo District Court sent letters to the Court Administration and the Ministry of Children and Equality, expressing concern about just this. In this connection, the head of the Children's Rights Group at the Oslo District Court, District Court Judge Hanne Signe Nymoen stated the following to Aftenposten June 9, 2018:

> *In addition to the experts having completed the education program and following the requirements that are set to remain on the list, there is no ongoing quality control of the work being performed.*

If the media could have been present in several cases, this could have contributed to more quality control in this area. The director of the country's 12 county committees, Pernille Pettersen Smith, also has called for more transparency.

In the case from Aftenposten, she states that, to her knowledge, there is no other media than Aftenposten, which in 2018 was allowed to attend a meeting, which has ever been present and cover a case in the county board. This shows that the provision today is practiced very strictly, almost as an absolute barrier to transparency.

Lawyers have also called for more transparency.

Our proposal for a new legislative text:

> *We believe that the party or the rights of the parties must be substantially strengthened, so that the party's desire to be decisive in the question of whether the negotiations will take place in whole or in part for open doors.*

We therefore reiterate our proposal to change the wording in a new provision on the county board, § 14-16 «Meetings with closed doors», second paragraph, from

> *The Board may nevertheless decide that the meeting should be open or partially open, when the parties request it or consent to it, and the Board finds it unobjectionable.*

to:

If the parties so request or consent, the meeting shall be open or partially open, unless the county board finds that this should not be done, due to the best interests of the child.

Thus, consent and consideration of the child becomes crucial for the assessments of transparency, and not the individual committee's own assessments of whether transparency is "unobjectionable". Furthermore, a requirement that openness must be "unobjectionable" is such a strictly wording that we run the risk of presidents of the board closing the doors to be on the "safe side".

Furthermore, we propose to amend the third paragraph from:

If the parties agree and the Board finds it unobjectionable, the Board may decide that persons affiliated with one of the parties may be present during the negotiations. The same applies to people who want to be present for training purposes. The Board may, under the same conditions, grant persons the right to be present during the negotiations and at the Board's consultation meeting when it is being conducted for research purposes.

Into:

If the parties so request or consent to it, persons affiliated with one of the parties should be allowed to be present during the negotiations. This does not apply if the board thinks that this should not happen for the sake of the child's best interests. The same applies to persons who wish to be present for information, training or research purposes. The Board may, under the same conditions, grant persons the right to be present at the Board's consultation meeting when it is conducted for research purposes.

Finally, we propose to amend the last paragraph of the same provision from:

Persons who may be present under this provision have a duty of confidentiality and cannot write anything down, unless the Board decides otherwise.

Into:

When the meeting is held behind closed doors, the County Board may impose a writ of prohibition, cf. Section 129, second paragraph, letter b), cf. section 125, first paragraph, letter b), or confidentiality, cf.

Justification: In addition to our reasoning above, we would like to point out that our proposal will provide better coherence with other legislation, as this is the case in the District Court in cases involving minors, sexual abuse, family violence, etc. There is no reason why there should be stricter rules when reporting from cases that are dealt with by the county board, than those mentioned in the district court.

We also have a long-standing tradition that media representatives that is granted the right to be present, follow the instructions given by the court regarding what can be reproduced publicly and on what terms - among other things regarding

anonymization. We hardly know any cases where the courts have found that these terms have been violated by media representatives. We also refer to the Ethical Code of Practice for the Press, which will nevertheless give strict guidance on what can be published by information in this type of case, especially 4.8, as mentioned above.

6. Record keeping

The ministry writes that the committee's proposal to introduce an obligation to keep a journal for every child, received broad support in the consultation. Furthermore, that good documentation strengthens the legal security of children and parents by contributing to more thorough assessments and more correct decisions, and that supervision shows that the quality of documentation in the child welfare service varies, and that measures are needed to ensure better and more uniform documentation practices. As the Ministry also assumes, documentation in child welfare cases is often lacking or of poor quality. Therefore, we cannot understand that it refers to the special requirements introduced from July 1, 2018 for documentation of the child's participation and the child's best assessments in both the child welfare service and the county board's decision, without explicitly incorporating this into the law.

We are not convinced that skills enhancement and new digital case handling systems in the municipalities, are better suited instruments than additional legal requirements for the child welfare service to work better and more systematically with documentation in each case. As we see it, practice shows that it is precisely in the law that this type of documentation requirement must come, if they are to be taken seriously by the administration. We therefore believe that a duty to record information should be introduced for each child, as the committee suggested. This should nevertheless also be seen in the context of the work on new archive law NOU 2019: 9, which has now been submitted for consultation.

7. Partial rights – Draft section 12-3

The Ministry proposes to continue the general rule that children who have reached the age of 15 are parties to the case. Thus, they do not adopt the proposal of the Child Welfare Act Committee to lower the age limit to 12 years (section 78 of the draft). We believe it is well argued to lower the age limit to 12 years in NOU 2016:16 and believe that the Ministry places too little emphasis on legal developments in this area. We therefore do not support the proposal to continue the current rule and believe a 12-year limit will be more in line with legal developments in the area.

We support the Ministry's proposal to extend the authority to grant younger children party rights in cases involving coercion and believe this is well-founded in the consultation memorandum and a natural consequence of children's legal status both nationally and not least internationally.