

Interim Report of the Children and Vulnerable Witnesses Working Group

31st July 2014

- 1. Introduction and aims:** The Working Group (WG) (headed by Hayden J and Russell J¹) was set up by Sir James Munby, President of the Family Division with the following aims which were set out in the 12th “View from the President’s Chambers” published on 4th June 2014:

“First, it is time to review the Family Justice Council’s April 2010 *Guidelines for Judges Meeting Children who are Subject to Family Proceedings* [2010] 2 FLR 1872, particularly in the light of the Court of Appeal’s recent decision in *Re KP* [2014] EWCA Civ 554.

Secondly, it is time to review the Family Justice Council’s Working Party’s December 2011 *Guidelines on Children Giving Evidence in Family Proceedings* [2012] Fam Law 79. Those *Guidelines* were prepared following the decision of the Supreme Court in *In re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12, [2010] 1 WLR 701. Since then we have had the decision of the Supreme Court in *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, [2014] 2 WLR 124.

Thirdly, there is a pressing need for us to address the wider issue of vulnerable people giving evidence in family proceedings, something in which the family justice system lags woefully behind the criminal justice system. This includes the inadequacy of our procedures for taking evidence from alleged victims, a matter to which Roderic Wood J drew attention as long ago as 2006: *H v L and R* [2006] EWHC 3099 (Fam), [2007] 2 FLR 162. As HHJ Wildblood QC observed in *Re B (A*

¹ See Appendix one for full list of membership of the Children and Vulnerable Witnesses Working Group.

Child) (*Private law fact finding – unrepresented father*), *D v K* [2014] EWHC 700 (Fam), para 6(ii), processes which we still tolerate in the Family Court are prohibited by statute in the Crown Court. We must be cautious before we rush forward to reinvent the wheel. A vast amount of thought has gone into crafting the arrangements now in place in the criminal courts: see for example, in addition to the Criminal Procedure Rules, the Criminal Practice Directions [2013] EWCA Crim 1631, CPD 3D-3G, the Judicial College’s Equal Treatment Bench Book, Lord Judge’s Bar Council Annual Law Reform Lecture 2013, *The Evidence of Child Victims: the Next Stage*, the Criminal Bar Association’s DVD, *A Question of Practice*, and the relevant ‘toolkits’ on ‘The Advocate’s Gateway’, funded and promoted by the Advocacy Training Council: www.theadvocatesgateway.org/toolkits. We need to consider the extent to which this excellent work can be adapted for use in the Family Division and the Family Court.”

2. In respect of the first aim the President proposed that there should be reform and further guidance of the procedure for judges communicating with children, which will provide the framework to allow a recognition of the place of children and for the “Voice of the Child” to be heard in all family court proceedings in which children are involved; and it anticipated a ministerial announcement on the subject.²

² The Minister of State for Justice and Civil Liberties’ announcement made 24th July 2014 at the FJYP conference on The Voice of the Child regarding the **National Charter for Child Inclusive Family Justice** in which he said that the Government agreed with that “*Children and young people should be given the opportunity to meet and communicate with the professionals involved with their case including workers from the Children and Family Court Advisory and Support Service (CAFCASS), social workers, the judges and legal representatives; every child of sufficient age and ability should have the opportunity of meeting with the judge overseeing their case; every child should have the opportunity through Cafcass of submitting their views directly to the judge in writing; all children should be able to communicate their wishes and feelings to the judge; children and young people should be kept informed about the court proceedings in an age appropriate manner, kept informed of the stage their case has reached, and contacted prior to the first hearing, and have the opportunity of giving feedback through email, text, telephone or written form.*”

3. The second and third tasks are intertwined. As can be seen from the guidance already available for criminal cases in the *Advocate's Gateway* toolkits - children are self-evidently "vulnerable witnesses".³

4. **Preliminary observations** As observed by the President the family courts and the advocates who appear in those courts lag behind the criminal justice system both in their approach to, and provision for, vulnerable witnesses. To reproduce or to duplicate the comprehensive and outstanding work done by the Advocates Training Council (ATC) and others contained in their report published in 2011, would simply lead to further delay when the intention is to build on the work that has already been done. The working group set up by the ATC in 2009, which produced the report in 2011, met over 20 months and heard from diverse bodies, individuals and experts in various disciplines connected with the subject of vulnerable witnesses, including intermediaries, child/adolescent psychiatrists, members of the judiciary, officials from the Ministry of Justice and the Crown Prosecution Service, police officers and social workers. Their evidence-based and consultative approach ensured that their Report and its recommendations have a sound factual and expert basis, and which broadly apply to the family justice system and on which we should build.

5. The application of the principles contained in the report has proved to be successful in the criminal justice system, and it is that practical application which this working group will adapt to use in the family justice system. In particular, the provision of training for advocates and support for witnesses who are in need of support to give their evidence. These two have substantial benefits; the optimisation of conditions in which the best evidence can be given and the more effective and efficient use of court

³ For more see the article by Professor Penny Cooper in the *Child and Family Law Quarterly* 2014 (at page 132 et seq) "Speaking when they are spoken to hearing vulnerable witnesses in care proceedings."

time. Both of those benefits coincide with, and militate for, a greater likelihood of a fair and just hearing and outcome for all the parties in each case.⁴

6. The practical application of the work of the ATC to the family justice system is already underway in the form of general guidance for family lawyers and advocates being prepared by the *Advocates' Gateway* as a toolkit for use in family proceedings. The guidance is in draft form and is due to be published this autumn (October 2014). Should the reforms suggested below be put in place the membership of Penny Cooper and Joyce Plotnikoff on this WG will assist in any modification or amendment to the family advocates toolkit as they are both instrumental in producing the guidance for the ATC.

7. In addition some judges have already taken steps to use assist vulnerable witnesses of their own initiative⁵; the use of intermediaries and of the pre-recorded oral evidence have been examples of provision of support that has been brought to the working groups attention. This further illustrates the need for the introduction of procedure and practice across the family justice system to provide for a fair hearing, allowing those who are parties, both children and adults to be able to participate in the hearing in a

⁴ The recommendations of the ATC Report of 2011 are comprehensive and while produced as recommendations for the criminal justice system have lessons for the family justice system; specifically, the accumulated knowledge behind the recommendations in respect of children as witnesses is directly applicable in the family courts; and the outcome of the pilot scheme applying s 28 of the Youth Justice and Criminal Evidence Act 1999 will be of particular use in the future. Her Honour Judge Sally Cahill QC who is leading the pilot is a member of this working group.

⁵ We are indebted to His Honour Judge Clive Heaton QC who has outlined 4 examples of action he has taken in his court to allow fair participation. Two involved children as witnesses aged 9 and 14. The former was interviewed on video by a Child and Adolescent Psychiatrist using ABE guidelines; the latter gave evidence by video link. The other two cases illustrated the difficulties when the parents (and parties to the proceedings) are themselves vulnerable; a mother in a private law domestic abuse case and a father with learning difficulties/serious mental health problems in a care case. In the latter case HHJ Heaton QC arranged for an intermediary to train and assist counsel in preparing a video recording of F's oral evidence.

manner that best meets their needs by ensuring that the evidence they give is the best evidence achievable.

8. **Work so far undertaken** The working group held its first meeting on 8th July 2014. The WG discussed the terms of reference and the time-table for taking the work of reform forward. The consultative process will not be as wide as that undertaken by the ATC working party as there is no need to duplicate their work. Once the framework for reform has been identified and provisional documents have been prepared they will be sent out for consultation by as wide a constituency as possible (see below). The proposed rule change/s will go to the Family Procedure Rule Committee (FPRC) in late October, as the aim is to have changes in place by the beginning of 2015 (see below –time table).

9. **“Vulnerable witnesses”: discussion.** There was discussion regarding the use of the term “vulnerable witnesses” and whether another description should be used. There was concern that the term brought with it implications of physical or medical vulnerability to the exclusion of other disadvantages or need for support for witnesses.

10. The WG considered whether it may be necessary to focus on reform in public law and on private law cases involving domestic abuse where the difficulties maybe most acute; for it is evident that the respondent parents in care cases are often vulnerable⁶ (many with mental health or learning difficulties and the rising number of parents who need translators/interpreters to participate in proceedings) or the potential unfairness in cases where the victims of abuse are being cross-examined

⁶ *Care profiling study: Masson et al 2008* for the MoJ and DfE found that 72% of mothers in their sample experienced one or more difficulties associated with mental illness, learning difficulties, substance abuse and domestic abuse.

by their abuser where public funding is no longer available for respondents⁷.

11. The review of the guidance for judges seeing children will take place alongside the preparation of reforms and guidance for vulnerable witnesses (and others) and children as witnesses.⁸ The review will include the Family Justice Council (FJC) guidance in respect of children giving evidence.⁹

12. On 22nd July 2014 Russell J had a very constructive meeting with Haddon-Cave J (who had chaired the working group which prepared the 2011 report on vulnerable witnesses referred to at **4** above) and Green J (who Chairs the ATC). The ATC is open to providing such guidance/toolkits and training for advocates in the family courts as is identified by the WG going forward. There will be a further meeting in respect of this in late September or early October 2014.

13. Proposals & Initial recommendations Following this initial work the following recommendations as to the progress of reform are made; these reforms are contiguously aimed at equipping judges to identify and handle vulnerable parties and witnesses and equipping advocates to handle and question such parties and witnesses;

- i.** That the reforms should apply to all family court cases from the outset.

⁷ There is a judgement on this and related issues which is due to be handed down by the President.

⁸ Members of the FJYPB on the WP drew attention to the pilot scheme in York for any child over 10 (subject to an s7 report) to be offered the opportunity to see the judge; they will keep the WP up-dated.

⁹ Including the decision of the Court of Appeal in Re B (Child Evidence) [2014] EWCA Civ 1015

- ii.** There should be a new mandatory rule in respect of Children and Vulnerable Witnesses and Parties supplemented by practice directions (PD) and guidance approved by the President.
- iii.** The term vulnerable witness should remain in use as it is not desirable for the family court procedure to become distanced or uncoupled from the practice and procedure as it has developed in the criminal justice system. The term needs to be extended to cover the parties as well as witnesses.¹⁰
- iv.** The rule/s should be inserted in the Family Procedure Rules 2010 (FPR) (as amended) at the earliest point of the rules to emphasise the importance of the role of the child and the need to identify the necessary support /special measures for vulnerable witnesses and/or parties from the start of any proceedings, or at the earliest opportunity.
- v.** There should be a new Part 4 to the FPR.
- vi.** The rule should require that court/judge will recognise the role of the children and/or needs of children at the outset of proceedings either as participants in proceedings who should be given the opportunity of communicating with the judge; and/or as witnesses and consider the how best to provide for their participation and support.
- vii.** The rule should require that the court/judge will identify whether a party or witness is vulnerable at the outset of the proceedings or their involvement in proceeding (which ever is the sooner) and make provision for such support, special measures or other

¹⁰The provision of special measures in criminal proceedings has been applied to defendants although not originally provided for in the 1999 Act; equality of arms required that the defendant was given the assistance needed to give best evidence *R. (D.) v Camberwell Green Youth Court; R. (DPP) v Same*. [2005] 2 Cr.App.R. 1, HL

assistance they may need to properly and fully participate in the proceedings and to give best evidence;

- viii.** The rule should require that all the advocates and representatives of the parties must identify and consider how best the role of the child is to be recognised and/or provide for such assistance and support they need to give best evidence.
- ix.** The rule should require that all advocates and representatives of the parties must identify if a party or witness is vulnerable and consider how best he or she can be supported and assisted to give best evidence.
- x.** There should be a requirement in the same terms for Litigants in Person.
- xi.** There should be a practice direction (4) based on the FJC guidance for judges seeing children, which reflects the Court of Appeal's decision *Re KP* [2014] EWCA Civ 554, gives consideration to the provisions of the Charter and the experience of the judiciary.
- xii.** In addition there should be consideration of the status and nature the contents of the communication between judge and child.
- xiii.** The procedure, practice and guidance for provision of special measures, support and/or assistance for vulnerable parties or witnesses; including children to give their best evidence should from part of the existing PDs where possible; such as by amendment of the Public Law Outline or Child Arrangements Programme.
- xiv.** The rule and practice direction should be drafted with reference to the existing Special Measures Directions In the Case of Vulnerable and Intimidated Witnesses, and the procedure and practice that have developed in the criminal courts pursuant to the 1999 Act and the work of the ATC.
- xv.** Particular consideration should be given to the provisions for parties and witnesses in cases of forced marriage (FM) and female

genital mutilation (FGM). In FM cases nullity hearings are in open court when the protected person is a vulnerable witness who is likely to have to give evidence of a most intimate and sensitive nature. In FGM cases the child and/or other witness are most likely to need support and special measures for the same or similar reasons and such support and assistance should be provided by the judge, court and advocates.

- xvi.** The new rule and PD and amendments to the existing PDs should be drafted by the WG in consultation with the FJC (with its interdisciplinary membership), FJYPB, the judiciary and the drafts sent for wider consultation to MoJ and HMCTS.
- xvii.** The rule change should be implemented by way of training for the judiciary and advocates.
- xviii.** Training for the judiciary should be in the form of an additional module during Judicial College training for Public and Private Law and online material both in respect of judges seeing children and regarding vulnerable witnesses.
- xix.** Advocates should be expected to attend for additional training (as criminal advocates did); the ATC will provide additional and specific guidance for advocates in family cases as part of the toolkit.
- xx.** The WG should identify the training and guidance needed in order that the ATC provide it. The WG should seek the assistance of practitioners' groups in developing the areas of training and guidance.

14. Timetable It is the aim of the WG that the rule change will be in place by January 2015. Proposed rules will have to go to the FPRC by the end of October 2014 to adhere to the proposed timetable. The WG is due to meet in early October when the draft rules can be discussed.

15. Consultation In his view the President said;

“The Working Party will need to build on the experiences of judges in the Family Division and the Family Court who have had to deal with these issues, particularly in the more recent past. But it is also vital that the Working Party taps into and incorporates in its thinking both the highly relevant and thought-provoking views of the Family Justice Young People’s Board and the inter-disciplinary expertise of the Family Justice Council.”

16. Judicial Liaison Hayden J will liaise with Family Division Judges and consult with them on both aspects of work being undertaken, children and communication with the judges hearing their cases and making the decisions about them; and vulnerable parties and witnesses.

17. Preliminary consultation as set out above will take place through the FJC (including with expert members of the Council) on the drafts after that meeting with wider consultation taking place afterwards when more refinement of the drafts has taken place. Russell J to liaise with FJC and arrange consultation with FJC experts.

AH & AHR

July 2014

Appendix I

Membership of the Working Group

The Hon Mr Justice Hayden

The Hon Ms Justice Russell

Luke Berry (FJYPB)

Her Honour Judge Sally Cahill QC

Melanie Carew (Cafcass Legal)

Alex Clark (Office of PFD/Secretary FJC)

Professor Penny Cooper (Advocates Gateway)

Rhian Davies (Cafcass Cymru)

Marie Gittins (FJYPB)

His Honour Judge Clive Heaton QC

Caroline Little (FJC solicitor)

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Rebecca Musgrove (FJYPB)

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Mr Justice Haddon-Cave

Mr Justice Green

Professor Penny Cooper

Melissa Elsworth

Appendix II

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