VIEW FROM THE PRESIDENT'S CHAMBERS (16)

Children and vulnerable witnesses – where are we?

Sir James Munby, President of the Family Division

The related issues of how the family justice system accommodates the needs of children attending court to give evidence or to visit the judge, and the needs of vulnerable witnesses and parties, are amongst the most pressing we need to address. It is time for an up-date. Progress has been slow – much too slow. These are problems that can no longer wait. We can and we must solve them this year. This requires – demands – urgent action by all, including ministers and officials. I do not want to have to start 2018 with a further call to action.

A historical survey

In my 12th 'View from the President's Chambers, published in June 2014, [2014] Fam Law 978, 981, I announced the setting up of a Children and Vulnerable Witnesses Working Group (CVWWG) chaired by Hayden J and Russell J. I envisaged that there would be three strands to their work. In relation to the third, I said this:

> "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 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 … We need to consider the extent to which this excellent work can be adapted for use in the Family Division and the Family Court."

The interim report of the CVWWG was published in July 2014: [2014] Fam Law 1217.

I returned to this problem in a judgment I handed down on 6 August 2014: *Q v Q, Re B (A Child), Re C (A Child)* [2014] EWFC 31, [2015] 1 WLR 2040, [2015] 1 FLR 324. I referred (paras 27-30) to what Roderic Wood J had said in *H v L and R* when confronted with an unrepresented father in private law proceedings facing an allegation of having sexually abused a 9½ year old girl. He pointed out that if an issue of rape or other sexual offence was before a criminal court the alleged perpetrator would be prohibited by section 34 of the Youth Justice and Criminal Evidence Act 1999 from cross-examining the alleged victim in person. He was concerned to explore what solutions there might be to these problems in the case of private family law proceedings. He canvassed the possibility that the judge might assist in such cases by taking over the questioning. He continued (paras 24-25):

> "… For my part, I feel a profound unease at the thought of conducting such an exercise in the family jurisdiction, whilst not regarding it as impossible. If it falls to a judge to conduct the exercise it should do so only in exceptional circumstances … I would invite urgent attention as to creating a new statutory provision which provides for representation in such circumstances, analogous to the existing statutory framework governing criminal proceedings as set out in the 1999 Act. Such a statutory provision should also provide that the costs of making available to the court an advocate should fall on public funds. I can see no distinction in policy terms between the criminal and the civil process. Logic strongly suggests that such a service should be made available to the family jurisdiction. If it is

> inappropriate for a litigant in person to cross-examine such a witness in the criminal jurisdiction, why not in the family jurisdiction?"

Despite the call for "urgent attention", nothing was done. My observation on this in *Q v Q* (para 31) was pointed:

> "Indeed! And that was over seven years ago."

I referred to section 31G(6) of the of the Matrimonial and Family Proceedings Act 1984, set out in Schedule 10 of the Crime and Courts Act 2013, which came into effect on 22 April 2014:

> "Where in any proceedings in the family court it appears to the court that any party to the proceedings who is not legally represented is unable to examine or cross-examine a witness effectively, the court is to –
>
> (a) ascertain from that party the matters about which the witness may be able to depose or on which the witness ought to be cross-examined, and
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> (b) put, or cause to be put, to the witness such questions in the interests of that party as may appear to the court to be proper."

As I observed (para 33), "It can be seen that this falls far short of what would be required in a criminal trial and far short of what Roderic Wood J had called for."

I turned to consider whether the problem was amenable to a non-legislative solution. I posed the question (para 70): "what if the party, though unable to examine or cross-examine effectively, insists upon doing so himself? And what if the party is the alleged perpetrator, is "able" to cross-examine his alleged victim all too "effectively" and demands what he says is his 'right' to do so?"

I sought to answer these questions (paras 71-75). This judicial pronouncement was inevitably expressed, for the reasons given, in very cautious language. But reading between the lines the point was fairly clear: primary legislation was required.

In the case of those who wanted but were unable to obtain legal representation, whether or not as a result of the changes in public funding following implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, I concluded (para 79) that:

> "In the ultimate analysis, if the criteria in section 31G(6) are satisfied, and if the judge is satisfied that the essential requirements of a fair trial as required by FPR 1.1 and Articles 6 and 8 cannot otherwise be met, the effect of the words "cause to be put" in section 31G(6) is, in my judgment, to enable the judge to direct that appropriate representation is to be provided by – at the expense of – the court, that is, at the expense of HMCTS."

Subsequently, in May 2015, the Court of Appeal held that I was wrong on this point: *Re K and H (Children)* [2015] EWCA Civ 543, [2015] 1 WLR 3801. But the Master of the Rolls added (para 62) that:

> "In order to avoid the risk of a breach of the Convention, consideration should be given to the enactment of a statutory provision for (i) the appointment of a legal representative to conduct the cross-examination and (ii) the payment out of central funds of such sums as appear to be reasonably necessary to cover the cost of the legal representative, i.e. a provision in civil proceedings analogous to section 38(4) of the Youth Justice and Criminal Evidence Act 1999 and section 19(3)(e) of the Prosecution of Offenders Act 1985."

I had ended my judgment in *Q v Q* (para 92) by saying that "The Ministry of Justice … may wish to consider the implications." Whether or not it did, there was, so far as I am aware, no public response.

I returned to this topic in my speech at the annual dinner of the Family Law Bar Association in February 2015, [2015] Fam Law 386:

> "… there is the wider issue of how we treat the vulnerable, whether they come before us as parties or as witnesses. Vulnerability comes in many forms. In our understanding of these issues, and in the practices and procedures which are in place to enable the vulnerable to participate fully and fairly in our courts, the family justice system lags woefully, indeed, shamefully, behind the criminal justice system.
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> The working party I appointed under the leadership of Hayden and Russell JJ to examine all these issues, has published its interim report. The final report is due any day now. There is much to be done."

The final report of the CVWWG was published later the same month: [2015] Fam Law 443. The report was comprehensive and detailed in its analysis and recommendations, in particular as to the detail of the new rules and practice directions that were proposed and which, it was contemplated, would be in place by the end of 2015.

On 25 June 2015 I delivered at Swansea University the annual lecture of The Wales Observatory on Human Rights of Children and Young People. It was entitled *Unheard voices: the involvement of children and vulnerable people in the family justice system*: [2015] Fam Law 895. I repeated what I had a few months before:

> "I have to tell you plainly that in these matters the family justice system lags woefully, indeed, shamefully, behind the criminal justice system."

I referred to what Roderic Wood J had said in 2006, namely that, as I put it:

> "in the family justice system we are obliged to tolerate what in the Crown Court would be forbidden: the cross-examination of an alleged victim by an alleged perpetrator, a process which can sometimes amount, and on occasions quite deliberately, to a continuation of the abuse."

I went on:

> "… the problem remains. Legislation is required, like the legislation which was required to put a stop to such practices in the Crown Court. We are still waiting – as are the victims of this unacceptable system."

2015 came and went. The rule and practice directions recommended by the CVWWG were not in place; indeed, though it is now 2017, they still are not. Those intrigued as to why this is so may care to read, and read between the lines of, the minutes of the various meetings of the Family Procedure Rule Committee – documents that are available to anyone who asks.

This maddening lack of progress prompted a more sombre note when I spoke at the annual dinner of the Family Law Bar Association in February 2016: [2016] Fam Law 316. Commenting that "progress has been much less rapid than I would have wished" I said:

> "I spoke last year about the need to re-appraise our entire approach in the family justice system to involving children in the process, both in the individual cases that affect them but also more widely in the realms of policy and reform. I also drew attention to the fact that the family justice system lags woefully, indeed shamefully, behind the criminal justice system in the practices and procedures which are in place to enable the vulnerable to participate fully and fairly in our courts. Implementation of the recommendations of the Hayden / Russell working party, as of the subsequent proposals of the Family Procedure Rules Committee, has been delayed as we await decisions by officials and Ministers on various funding and

other resource issues. I live more in hope than expectation. My ambition is that the new rules and practice directions will be in place by the autumn."

They were not and they are not.

In January 2016, Women's Aid published a report, *Nineteen Child Homicides*, calling on the Government to review the treatment and experiences of victims of domestic abuse in family law courts. The report included this important passage:

> "Allowing a perpetrator of domestic abuse who is controlling, bullying and intimidating to question their victim when in the family court regarding child arrangement orders is a clear disregard for the impact of domestic abuse, and offers perpetrators of abuse another opportunity to wield power and control."

Who could possibly disagree?

In response to the report I issued the following statement on 20 January 2016:

> "I welcome the publication of the 'Nineteen Child Homicides' report by Women's Aid. This is a valuable report on an important issue which I take very seriously. I will consider the report with the care it deserves and identify the lessons that the judiciary can learn from it. I believe that other agencies in the family justice system may also benefit from the report and I look forward to discussing its conclusions with them and to taking joint action to address the findings of the report."

On 21 April 2016, the All-Party Parliamentary Group on Domestic Violence published a Parliamentary Briefing, *Domestic Abuse, Child Contact and the Family Courts*. It makes for chastening and disturbing reading. It drew attention to the importance of Practice Direction 12J, *Child Arrangements and Contact Order: Domestic Violence and Harm*, and what it claimed was its "inconsistent implementation."

According to the Briefing:

> "The APPG was alarmed to hear that if a survivor of domestic abuse is a litigant in person, it is far from unusual for them to be cross-examined by their perpetrator or in turn have to cross-examine their abuser. Women's Aid's 2015 survey of survivors of domestic abuse found that a quarter of women had been directly questioned by the perpetrator. This practice is unheard of in the criminal courts and as already noted, family court cases involving child contact can be used by the perpetrator as an opportunity to continue persistent, coercive and controlling behaviour - so it is wholly inappropriate in the family courts too."

Further:

> "The family courts often lack the special measures that are in place in the criminal courts, which provide victims with fair access to justice and protect their safety and well-being when they are on the family court estate."

The APPG made seven recommendations, which it urged "the Government and the family court judiciary" to implement as soon as possible:

> "1. The Ministry of Justice, and the President of the Family Division must clarify that there must not be an assumption of shared parenting in child contact cases where domestic abuse is a feature, and child contact should be decided based on an informed judgement of what's in the best interests of child.

2. The Government must put an immediate end to survivors of domestic abuse being cross-examined by, or having to cross-examine, their abusers in the family court.

3. The Ministry of Justice must urgently set up an independent, national oversight group overseeing and advising upon the implementation of Practice Direction12J – Child Arrangements and Contact Order: Domestic Violence and Harm.

4. The Ministry of Justice and President of Family Division must ensure that special measures, such as dedicated safe waiting rooms for vulnerable witnesses and separate entrance and exit times, are available throughout family court proceedings and any subsequent child contact, to ensure the safety and well-being of both vulnerable women and children.

5. The Ministry of Justice, President of the Family Division and Cafcass must ensure Judges and court staff in the family court, Cafcass officers and other frontline staff in other related agencies receive specialist face to face training on all aspects of domestic violence, particularly coercive and controlling behaviour, the frequency and nature of post-separation abuse, and the impact of domestic abuse on children, on parenting and on the mother-child relationship.

6. The Ministry of Justice, President of the Family Division and Cafcass must ensure expert safety and risk assessments in child contact cases are carried out where there is an abusive parent involved and they must be conducted by a dedicated domestic abuse practitioner who works for an agency accredited to nationally recognised standards for responding to domestic abuse.

7. The President of the Family Division must ensure family court judges never order child contact in support contact centres where a risk assessment has found that the abusive parent still poses a risk to the child or non-abusive parent."

On 28 April 2016, Women's Aid wrote to me, drawing attention to the APPG's briefing and recommendations. The letter continued:

> "I am writing to ask that you please consider these recommendations and how we can work together to make the family courts safer for survivors of domestic abuse and their children. We are looking forward to meeting later in the year to discuss these matters further and the progress that the Family Division has made on this important issue."

In my reply dated 15 June 2016 I made clear my "wholehearted support" for recommendations 2, 4, 5, and 6, while also making it clear that none of these recommendation was within my gift to deliver.

In relation to recommendation 2, I said that I had been arguing for a similar bar in the Family Court to that in the Youth and Criminal Evidence Act 1999 "but without success to date." I observed that "There are clear resource implications so this is properly a matter for ministers." I added, "I have yet to detect any firm sign that ministers are prepared to extend the criminal arrangement to family proceedings." I went on:

> "Last year the Ministry of Justice conducted research into private law cases where the court was faced with the prospect of an alleged perpetrator seeking to cross-examine an alleged victim of domestic violence. I look forward to the publication of this research as I find it inconceivable that it could suggest that the current powers at the disposal of the Family Court are adequate to deal with this problem. It may be that the publication of this research will be the catalyst for a change of policy."

The research remains unpublished. I understand that publication is likely to be very shortly.

In relation to recommendation 4, I said "there are similar financial implications and the responsibility for making decisions on these matters lies with HMCTS and, ultimately, with ministers."

In relation to recommendation 5, I said this:

> "With regard to the training the judiciary receive on domestic violence, that is the responsibility of the Judicial College. I would expect the judiciary to receive high quality and up-to-date training in domestic violence and it is the responsibility of the Judicial College to deliver this. As is appropriate for an independent judiciary, the College controls the content and delivery of training for the judiciary but must do so within a budgetary allocation that is, ultimately, the responsibility of ministers."

In relation to recommendation 6, I said:

> "I wish to see the Family Court benefitting from high quality risk assessment in order to have the best information on which to make robust decisions on safe contact. Again, where there are resource implications about the training and accrediting of staff at Cafcass, or other agencies, this is not something that I am responsible for."

I went on:

> "Recommendations 1 and 7 are matters which can be addressed best in judicial guidance. To this end I have asked Mr Justice Cobb, who chaired the Working Group which drew up the Child Arrangements Programme in 2014, to review Practice Direction 12J to examine whether further amendment is needed in the light of the recommendations made by the All Party Parliamentary Group on Domestic Violence and by [Women's Aid] in its 'Nineteen Child Homicides' report."

In relation to recommendation 3 I was blunt:

> "In my view recommendation 3 is, with respect, misconceived. It is not for the executive to set up a committee that seeks to 'advise' the judiciary how to implement a practice direction. That would be incompatible with the principle of judicial independence. The interpretation, use and implementation of a practice direction is a matter for me to give guidance upon in my judicial leadership role. When Mr Justice Cobb has reviewed Practice Direction 12J, I will consider whether amendments and fresh guidance on its application are required."

On 15 September 2016 the issues raised by Women's Aid and by the APPG were debated in the House of Commons (Hansard Vol 614, Col 1081. The debate makes disturbing and distressing reading. It should be read, and re-read, in full, particularly by the complacent and those who doubt the importance, the magnitude and the severity of the matters being discussed. Here I focus on just one issue. Mrs Maria Miller, the Conservative MP for Basingstoke, put the point plainly (Col 1086):

> "… more victims – not just women but children – are now being cross-examined by perpetrators of abuse in family court proceedings. Women's Aid estimates that one in four women are directly questioned by a perpetrator, and the same can happen to children. Victims should be protected when giving evidence in court. Few Members in this place can be content to see alleged abusers cross-examine those affected by domestic violence. This has to be re-examined urgently. We need to put an end to survivors of domestic abuse being cross-examined by their alleged abusers in court."

Peter Kyle, the Labour MP for Hove spoke forcefully on the same point (Cols 1097-1100). He concluded with this:

> "Progress has been made, but it has been glacial. We have not seen the transformation that is desperately needed. The abuse and brutalisation of women and families is being perpetuated via our legal system. To abusers, the family court is simply another tool through which to extend their hate, their violence and their control of extremely vulnerable women – exactly the kind of people the state exists to protect. Every day that these practices are allowed to continue, shame is heaped on our system of justice, on this House and on our Government, because we have the power to stop this happening and yet it continues."

Sir Keir Starmer, Labour MP for Holborn and St Pancras, and a former Director of Public Prosecutions, put the point more generally (Cols 1109, 1110):

> "Then there are special measures. When I went along to the all-party parliamentary group on domestic violence and heard some of the evidence about family courts, I was struck by the fact that what I was hearing simply would not be tolerated in the criminal courts any more. Special measures are a norm in the criminal courts, and it would be thought to be the duty of the prosecution, the defence and the court to ensure that they are in place … Real change has already happened in the criminal sphere; it can happen in the family courts as well, and it need not take 15 years if lessons from one jurisdiction are borrowed by the other."

I entirely agree.

Responding to the debate, the Parliamentary Under-Secretary of State for Justice, Dr Phillip Lee, voiced his concerns (Cols 1116-1119) and indicated action: "We are not complacent. We know that there is room for improvement, and we are working closely with the judiciary in particular to consider what additional protections may be necessary for vulnerable victims and witnesses in the family justice system (Col 1118)." "We are working with the judiciary to consider what additional protections for vulnerable victims and witnesses may be necessary (Col 1119)." Conspicuous by its absence was any expressed intention to legislate.

On 29 September 2016, following a meeting I had had with him on 15 September 2016, just after the debate, I wrote to Dr Lee. I rehearsed what I had previously said in public about the need to legislate. I said:

> "In my view, tolerating this state of affairs amounts to a continuation of the abuse in court and is unconscionable."

Coincidentally, on 30 September 2016 Dr Lee wrote to me setting out the Government's decision in relation to the draft practice directions proposed by the Family Procedure Rule Committee to implement the work of the CVWWG. The decision was, to say the least, disappointing.

Dr Lee's letter was considered by the Family Procedure Rule Committee at its meeting on 10 October 2016. Since it appeared in the light of the Government's decision that it would be possible to proceed on a quicker timetable with the practice direction in relation to vulnerable witnesses than with the practice direction in relation to children, the Committee agreed that the two practice directions should be separated and proceed on separate timetables.

The Government's public response came on 27 October 2016, when Dr Lee, as Minister for Victims, Youth and Family Justice, addressed the Family Justice Young People's Board 2016 *Voice of the Child Conference*. In relation to the work of the CVWWG he said this:

> "Since last year's conference, the Vulnerable Witnesses Working Group has produced draft rule and judicial guidance on children's participation in proceedings, and vulnerable witnesses. I am very grateful to the working group for its careful work. The drafts have now been considered by the Ministry of Justice and by me.

> Guidance on children's participation in proceedings is key to the voice of the child agenda. It is vital that we get this right, so the judiciary, Cafcass and Ministry of Justice are working carefully on this. We need to explore ways to balance children's stronger involvement in proceedings about them, while also making sure the system continues to operate effectively at this time of increasing demand and pressure. We will, of course, listen to your views in getting that balance right.
>
> On vulnerable witnesses, one of my priorities is to improve protections in the family justice system, and I made this clear when I spoke recently in Parliament. Consultation should begin shortly on the draft vulnerable witnesses rule amendments and practice direction, and include certain measures for children within it. We will then take time to further consider the children's practice direction and how it can provide important, wider, protection when children and young people are involved in proceedings."

The careful reader will note the intention to proceed first in relation to vulnerable witnesses and only later in relation to children. It will also be seen that the Minister intended that consultation in relation to vulnerable witnesses should "begin shortly." The consultation has not yet begun; indeed, the draft consultation paper has not yet, so far as I am aware, reached the Family Procedure Rule Committee.

At its meeting on 7 November 2016 the Family Procedure Rule Committee endorsed various drafting amendments to the draft rules and practice direction in relation to vulnerable witnesses.

Cobb J delivered his report to me on 18 November 2016. I must return to it below. Here I merely note that he considered (paras 13-17) the issue of the cross-examination of the alleged victim by an unrepresented alleged perpetrator. His conclusion was clear and emphatic (para 18):

> "In light of comments which I have highlighted in this section of the report, from all sides of the political and social debate, I very much hope that the revisions to PD12J will coincide with some decisive action to cure this deeply unsatisfactory situation."

The response to the letter I had written to Dr Lee on 29 September 2016 came from his successor, Sir Oliver Heald QC, Minister for State for Justice, in a letter dated 21 November 2016. It contained welcome news, indicating that improving protections for vulnerable witnesses "is a priority for this Government" and that "urgent advice" was being sought from officials. There was still, however, no expressed intention to legislate.

On 23 December 2016, the Guardian newspaper published a hard-hitting article on its front page headed "Revealed: the secret abuse of women in the family courts." The first strap-line read "Violent former partners allowed to take part in cross-examination." The second read "Call for changes in law to bring 'torture' in civil cases to a halt."

On 29 December 2016, the Judicial Office was contacted by the BBC radio programme Woman's Hour, which said that it would be running an item the following morning and inviting my comments. I authorised the Judicial Office to release the following statement:[1]

> "The President of the Family Division has been raising since 2014 the pressing need to reform the way in which vulnerable people give evidence in family proceedings. He has made clear his view that the family justice system lags woefully behind the criminal justice system. He has expressed particular concern about the fact that alleged perpetrators are able to cross-examine their alleged victims, something that, as family judges have been pointing out for many years, would not be permitted in a criminal court. Reform is required

[1] Later on 30 December 2016 this statement was re-issued, expressed in the first person but otherwise unchanged.

as a matter of priority. The President would welcome a bar. But the judiciary cannot provide this, because it requires primary legislation and would involve public expenditure. It is therefore a matter for ministers. The President is disappointed by how slow the response to these issues has been and welcomes the continuing efforts by Women's Aid to bring these important matters to wider public attention.

The President is currently considering the review of Practice Direction 12J undertaken by Mr Justice Cobb, who met with Women's Aid during the course of his review. The President expects to make decisions on the review early in the New Year."

I understand that the Ministry of Justice gave Woman's Hour the following statement:

"A Ministry of Justice spokesperson said:

"We have a generous legal aid system that provides support to a range of cases. Last year we spent in excess of £1.5bn on legal aid.

"Legal aid is a vital part of our justice system. While we consider longer-term options, we have more than doubled the time limit for domestic violence evidence. We have also introduced a provision that will allow the Legal Aid Agency to grant legal aid if they are satisfied an application demonstrates financial abuse.

"We recognise that representing yourself in court can be challenging. We have invested a further £1.45m this year in a strategy to increase support to litigants in person, led by the advice, voluntary and pro bono sectors. We are seeing significant progress, with increased provision of face-to-face, phone and online support."

Guidance

- Protecting vulnerable people is of utmost importance.

- Family judges have a range of powers to make sure difficult courtroom situations are handled sensitively for vulnerable witnesses and can intervene to prevent inappropriate questions.

- We continue to work with the judiciary to consider what additional protections may be necessary."

There was no suggestion of legislation.

The item broadcast in Woman's Hour on 30 December 2016 centred on a discussion between Polly Neate, the chief executive of Women's Aid, and Elspeth Thomson, a solicitor. Most of what I had said in my statement was read out on air. The story was picked up the following day by both the Guardian ("Judge supports ban on victims facing abusers") and the Times ("Ban abusers from questioning their victims, says top judge"). On 5 January 2017 a number of newspapers carried reports to the effect that the Government had ordered an emergency review of family courts to stop alleged abusers cross-examining their victims. The same day the Solicitors Journal quoted Bob Neill MP, chair of the Justice Select Committee, as suggesting that I might be invited to a one-off session "to set out [my] concerns and possible solutions in more detail."

Peter Kyle MP put down an urgent question, "To ask the Secretary of State for Justice to make a statement on the emergency review to determine how to ban perpetrators of domestic violence from directly cross-examining their victims within the family court." It was answered by Sir Oliver Heald in the House of Commons on 9 January 2017, following which there was a short debate (Hansard Vol 619, Cols 25-36). Sir Oliver said:

> "The Lord Chancellor has requested urgent advice on how to put an end to this practice. This sort of cross-examination is illegal in the criminal courts, and I am determined to see it banned in family courts, too. We are considering the most effective and efficient way of making that happen. That will help family courts to concentrate on the key concerns for the family and always to put the children's interests first, which is what they are supposed to do. This work, which is being fast-tracked within the Department, is looking in particular at the provisions in the criminal law that prevent alleged perpetrators from cross-examining their alleged victims in criminal proceedings, and we are considering how we might apply similar provisions in the slightly different circumstances of family proceedings.
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> Members will appreciate that such a proposal requires thought, but we want to resolve the matter as soon as possible. We will make further details available shortly, once the work is complete."

In answer to further questions from Peter Kyle (Col 26), Sir Oliver said (Col 27):

> "Is it necessary to change the law? The answer is yes it is. Primary legislation would be necessary to ban cross-examination. I also think there are related ancillary matters that would require primary legislation. Clauses, therefore, are required. Is work being done? Yes, work is being done at a great pace to ensure that all these matters are dealt with in a comprehensive and effective way—the urgency is there. I became the Minister responsible for these matters in October, and I have chaired the Family Justice Board, which has become very concerned about this issue over that period. The Lord Chancellor shares that concern, which is why we are moving at speed to try to tackle it."

Later in the debate Sir Oliver said (Cols 35-36):

> "My view is that this is a narrow issue … on which I think we all agree … I do not think that this is a complicated matter. It is a simple one that needs urgent action."

Later the same day there was a similar short debate in the House of Lords (Hansard Vol 777, Cols 1791-1795). Lord Marks of Henley-on-Thames made an interesting point (Col 1793):

> "Will the department also establish a procedure to ensure that in future, when a judge in a position such as that of the President of the Family Division presses for a change, as Sir James Munby has pressed for a change in this area since 2014, they are listened to? We should not have to wait for a newspaper campaign, however creditable, to ensure that change happens."

Where are we now?

At the end of 2016 there was depressingly little to show for over two years' hard pounding. It seems that things may now be changing. My ambition is that everything necessary is in place by the end of 2017. This is do-able – if, but only if, there is the appropriate sense of urgency and commitment.

Cross-examination

I understand Government to be indeed moving forward with the speed and urgency indicated by Sir Oliver. That is very welcome. A crucial stage will be when draft clauses for a Bill are published.

PD12J

I have referred above to Cobb J's report. It is being published at the same time as this 'View'. It must be read, in full, by everyone involved in the family justice system. I am very grateful to him for his work. Subject only to one point I accept all his recommendations and wish to see them implemented, in full and as soon as possible.

Cobb J's recommendations fall into two parts. One relates to the amendments to PD12J which he proposes. The other deals with a number of the other issues raised by Women's Aid and the APPG.

So far as concerns the proposed amendments to PD12J, I have only one reservation, which relates to the final amendment proposed to PD12J para 28. Whilst no-one can quarrel with the vitally important principle to which this is directed – the need to prevent alleged perpetrators cross-examining alleged victims – I have to question whether the prohibition recommended by Cobb J is something that can properly, indeed lawfully, be achieved by a practice direction: see the discussion in *Q v Q* (para 74). As will be appreciated from what I have said above, the view which I have expressed extra-judicially is that primary legislation is required. That legislation is now promised. In the circumstances I propose to omit this particular amendment to para 28. Subject only to this, I propose to invite the views of the Family Justice Council at its next meeting on 23 January 2017 and of the Family Procedure Rule Committee at its next meeting on 6 February 2017. Immediately after that I will invite the Lord Chancellor to approve the amendments so that an amended PD12J can be issued as soon as possible.

Cobb J's report contains some especially important recommendations to which I wish to draw particular attention. In para 21 of the report, Cobb J said this:

> "Given the obligatory nature of the PD12J it is essential that judges at all tiers of the Family Court are familiar with the Practice Direction, and apply it as they are obliged to do, and conscientiously. The APPG reports a clear consensus from its Parliamentary hearing as to the "patchy" operation and/or implementation of PD12J throughout the family courts; the APPG felt that if PD12J was always put into practice and strictly followed, a number of the pressing concerns raised in the Parliamentary hearing would automatically be addressed, "and the safety and well-being of women and children would be far better protected"."

I wholeheartedly and emphatically agree. I repeat and emphasise Cobb J's key message: "*it is essential that judges at all tiers of the Family Court are familiar with the Practice Direction, and apply it as they are obliged to do, and conscientiously*."

In para 24, Cobb J picked up and developed this point in the context of judicial training:

> "By this report, I wish to highlight the concerns raised by Rights of Women, Women's Aid and others about importance of applying and implementing PD12J conscientiously and effectively; I invite the Judicial College to ensure that the content of its private family law induction and continuation courses highlight the risks which are being addressed by this Practice Direction, satisfy themselves that these risks are properly understood by the judiciary, and reinforce to the judiciary the importance of applying PD12J conscientiously."

Again, I wholeheartedly and emphatically agree. The Judicial College has a vital role to play. I am pleased to be able to say that it has been expanding its courses to provide an even greater focus on vulnerability. I am sure that as soon as the amended PD12J has been finalised it will be given all appropriate emphasis by the Judicial College.

Vulnerable witnesses

Indications are that we may be able to make progress with the proposed consultation at the next meeting of the Family Procedure Rule Committee on 6 February 2017. I very much hope so. We must embark upon the consultation as soon as possible. We must approve the necessary rules and practice direction without further delay. I repeat: we must have this in place by the end of 2017.

Children

What timetable is now envisaged by ministers is not as clear as might be wished. Work on this is just as pressing and urgent as the corresponding work on vulnerable witnesses. What timetable do

ministers have in mind? Why can we not have the necessary rules and practice direction also in place by the end of 2017?

Special measures

None of this will work, as it should and must, unless our courts are fitted out with the necessary facilities and have the necessary 'kit'. The simple fact is that they are not and do not – and they must be. In too many courts the only available special measure is a screen or curtains round the witness box. What, for example, about the safe waiting rooms for which the APPG has justifiably called? The video links in too many family courts are a disgrace – prone to the link failing and with desperately poor sound and picture quality. The Royal Courts of Justice in London – surely the flagship – is a case in point. My own court – Court 33, the court of the President of the Family Division – has no such facilities and no video link. When, recently, I needed a screen in my court, the only workable solution was found to be the careful placing in the jury box – relic of the days when divorce suits were tried before juries – of a vast and very heavy wooden screen which required a number of porters to install it. On one recent occasion when, having moved to another court in the RCJ, I used a video link, everyone and everything appeared on screen in such a bright blue shade as to remind me of Avatar. On another recent occasion everything on screen appeared bathed in that green translucent glow one associates with underwater photography. This might be amusing if it is not so serious. These were directions hearings which could properly proceed despite the appalling quality of the link. It would have been a very different matter if we had been trying to hear evidence over the link.

The problem, of course, is one of resources, and responsibility lies, as I have said, with HMCTS and, ultimately with ministers. More, much more, needs to be done to bring the family courts up to an acceptable standard, indeed to match the facilities and 'kit' available in the Crown Court.

Non-molestation and other without notice orders

Finally, I should mention that on 18 January 2017 I re-issued, in amended form, the *Practice Guidance: Family Court – Duration of Ex Parte (Without Notice) Orders* originally issued on 13 October 2014.

James Munby

19 January 2017