PRESIDENT OF THE FAMILY DIVISION

Because it is the right thing to do

Talk by Sir James Munby, President of the Family Division

The 6th Annual 'Voice of the child' FJYPB Conference in Manchester

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When I spoke at your Conference last year I apologised for the fact that I had failed you. I was referring to one of the most pressing issues we need to grapple with: how the family justice system can meet the aspirations and accommodate the needs of children who want to come to court, perhaps just to see the court, perhaps to give evidence or perhaps to meet the judge. I had to tell you that, despite ***three years*** of effort ***nothing*** had been achieved. I said that, if you were kind enough to ask me back again, I would report on progress a year later.

Well here I am again. I have to tell you that ***nothing*** has been achieved. In fact, matters are even worse now than they were a year ago – the Minister has, just a few days ago, written to me to announce the Government's decision that the proposals which I and others have been pressing for cannot be implemented. This is deeply depressing news. I can only apologise again for my failure to achieve for you what is, as I believe, plainly the right thing to do.

But first, if you will allow me, a little history.

You may remember that it was some four years ago that, in June 2014, I set up the Children and Vulnerable Witnesses Working Group (CVWWG), chaired by Hayden J and Russell J, to examine 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.

As part of the latter piece of work, I asked the CVWWG to address the fact, condemned by a judge of the Family Division as long ago as 2006, that 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. This can sometimes amount, and on occasions quite deliberately, to a continuation of the abuse, as the court has to stand by, effectively powerless, while the abuse continues in court and, indeed, as part of the court process. I have repeatedly emphasised that in these matters the family justice system lags woefully, indeed, shamefully, behind the criminal justice system.

The CVWWG worked quickly, publishing its interim report in July 2014 and its final report in February 2015. 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. Ever since then, the Family Procedure Rule Committee (FPRC), with my enthusiastic encouragement and support, has worked tirelessly in its attempts to implement these recommendations.

In February 2017, I published my 16th *View from the President's Chambers: children and vulnerable witnesses: where are we?* [2017] Fam Law 151. I set out the depressing history of events since the

summer of 2014. I said that: "Progress has been slow – much too slow." I went on: "At the end of 2016 there was depressingly little to show for over two years' hard pounding." I continued:

> "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 … 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."

As I wrote that, there were signs that things might at last be changing. In the wake of pressure from the media and from Members of Parliament on both sides of the House, the then Minister announced, during the course of a debate on 9 January 2017, the Government's intention to legislate in relation to the cross-examination of the victims of abuse. Viewed from the perspective of July 2018, the Minister's words might be thought to have a hollow ring (Hansard, Vol 619, cols 25-36):

> "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 … we want to resolve the matter as soon as possible … 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 … 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."

So where did matters stand at the end of 2017? Everything necessary was *not* in place. If we had taken one step forward, we had also taken one step backwards.

At last, on 27 November 2017, the Rules in Part 3A and the new Practice Direction 3AA, took effect, implementing, in part, the recommendations of the CVWWG and the wishes of the FPRC in relation to how we should meet the needs of vulnerable witness and parties. This undoubtedly marked a big step forward, though it had taken over three years to get this far, but the new arrangements could, and, in my view, should, have gone further. The giveaway is to be found in Rule 3A.8(4): "Nothing in these rules gives the court power to direct that public funding must be available to provide a [special] measure." The inclusion of this reflected Government's concern that proper implementation of what in the view of the FPRC was desirable would cost more than Government was prepared to commit.

Moreover, and as I had pointed out in my 16th *View*:

> "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."

I went on:

> "The problem, of course, is one of resources, and responsibility lies … 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."

Since then much has been done, but much more still needs to be done. I was not surprised to read the criticisms in the Report by Queen Mary University of London and Women's Aid ""What about my right

not to be abused?" Domestic abuse, human rights and the family courts", published in May 2018, of the inadequate special measures at present available in too many family courts. Much needs to be done as a matter of priority. When we can expect decisive action?

So, advance on one front. On another there had been retreat. We are still waiting – as are the victims of this unacceptable system – for the legislation promised by the Minister. I was naturally pleased when the Government included appropriate clauses in the Prisons and Courts Bill 2016-2017. But that Bill fell at the General Election, and Government remains unwilling or unable to say when it will be reintroduced.

Commentators have, unsurprisingly, picked up the fact that the relevant clauses previously contained in the Prisons and Courts Bill 2016–17 have not been included in the Courts and Tribunals (Judiciary and Functions of Staff) Bill. No doubt clause 2 of this Bill deals with a matter of importance to some, but whether a person hearing bankruptcy cases should be called a Registrar or a Judge is surely of much less pressing concern and infinitely less priority that putting an end to this long-standing abuse in the family courts.

In May 2017 (see *Re A (A Minor: Fact Finding; Unrepresented Party)* [2017] EWHC 1195 (Fam)), a damning judgment given by a Family Division judge described this state of affairs as "a stain on the reputation of our Family Justice system," adding that "the process is inherently and profoundly unfair … it is, in itself, abusive" and adding the comment that "The iniquity of the situation was first highlighted 11 years ago … it has taken too long."

Who could possibly disagree?

The case for reform of this "stain" on our system is overwhelming. There is only one possible argument: it is the right thing to do. So why not do it?

On 31 May 2018, I wrote to the Minister seeking "an unequivocal assurance of the Government's intention to legislate and a clear indication of when the necessary Bill will be introduced." The Minister's response on 15 June 2018 stated her "personal commitment to bringing forward legislation to address this issue" but said that "I am unable to give … a timescale for this work."

On 18 July 2018 there was a Westminster Hall debate in the House of Commons when the Minister was pressed on this point by a number of Members of Parliament. Her response was unchanged: "The Government remain committed to delivering this as soon as parliamentary time allows."

Why does parliamentary time not permit this to be done now, when there is apparently time for Parliament to debate the appropriate judicial title for a bankruptcy judge?

And what, in all this time, of progress in relation to how the family justice system should meet the aspirations and accommodate the needs of children who want to come to court? ***Nothing, absolutely nothing***, despite continuing and unrelenting pressure from both me and the FPRC.

Then, on 11 July 2018, a letter from the Minister. There was a long description of how children can participate in proceedings through others, and of how their wishes and feelings can be brought to the attention of the court, but this, with all respect to the Minister, is largely beside the point. The pressing issue, to repeat, is how the family justice system can meet the aspirations and accommodate the needs of children who want to come to court themselves, whether to see the court, give evidence or meet the judge.

In parallel with its work in relation to vulnerable witness and parties, the FPRC had worked up equally detailed proposals in relation to children, based on the original work of the CVWWG – new draft rules

and a draft practice direction. The FPRC makes the rules and I, as President of the Family Division, make the practice direction; but nothing can come into effect without the approval of the Minister. The letter made clear that approval was not going to be given because (and I quote):

> "these proposals cannot be implemented at the current time given their assessed operational impacts."

You may be wondering what is meant by "assessed operational impacts." In plain English, it means it would all cost too much.

The Minister acknowledged that this decision would be "disappointing." I would use a rather blunter word.

Let me spell out the reality.

The FPRC has proposed rule changes. Why? Because it is the right thing to do.

I wish to issue a practice direction. Why? Because it is the right thing to do.

The Minister refuses to approve what the FPRC and the President propose. Why? Because of the cost.

You must continue fighting. You, the FJYPB, have a vital role to play in the ongoing struggle to improve the family justice system. You know what needs to be done. Your voice is clear and important. You must continue speaking truth to power and arguing for what is right. Like the child in Hans Christian Andersen's famous fairy tale, you must not be afraid to say that "The Emperor has no clothes." You and all our other children and young people are our future. We ignore you at our peril.

I have done my best to support and encourage the FJYPB in its work, including attending your annual conferences. As you know, I step down in a few days' time, to be succeeded as President by Sir Andrew McFarlane. He asks me to tell you that he would be delighted if invited to next year's conference and, if invited, will be very happy to come and speak to you.