JUDICIARY OF ENGLAND AND WALES

Report of the Vulnerable Witnesses & Children Working Group

February 2015

1. **Introduction** This is the final report and recommendations of the Working Group (WG) (headed by Hayden J and Russell J[1]) set up by Sir James Munby, President of the Family Division with the aims which he 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.
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> 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.

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

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 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. As set out in the interim report of the WG the President's proposal there should be reform and modernisation the current guidance for judges communicating with children predated a ministerial announcement on the subject[2]. It is the intension of the WG that this will provide part of a

[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*

modernised family court which recognise and facilitate the inclusion children and young people in all family proceedings in which directly concern them.

3. **Consultation** The President said that "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."

4. The WG has consulted with these and other interested bodies and parties and has received comments and written evidence from professional bodies, individuals and others[3]. In addition the WG has had the opportunity of considering practice in Wales; Russell J attended the Stakeholder event held in Llandudno on the 29th January 2015 which provided some further input from a Welsh perspective.[4] Views expressed in this report on matters of wider Government policy are those of the Judicial and Practitioner members of the Working Group alone.

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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] Please see appendix II for details of the contributors.

[4] Arranged by The Family Justice Network for Wales/gan Rwydwaith Cyfianwnder Teuluol Cymru it was attended by the Minister for Health and Social services, Professor Mark Drakeford, David Norgrove, members of the FJYPB and senior managers of children's and social services throughout Wales as well as the outgoing Children's Commissioner for Wales, Keith Towler.

5. The role of children and young people The observation in the interim report that the second and third aims as set out by the President in June 2014 are inextricably linked led to further consideration of how to ensure that the voices of children and young people could be brought further to the fore in the family courts. As seen from the guidance already available for criminal cases in the *Advocate's Gateway* toolkits children are self-evidently "vulnerable witnesses". [5] Thousands[6] of children and young people go through the criminal justice system every year but the direct evidence of children is seldom heard or rarely available in the family courts.

6. Vulnerable witnesses and parties The need for a more effective and fairer approach to vulnerable and intimidated witnesses in criminal cases was set out in four cases in the CACD 2010/11[7]. In the case of *Barker* Lord Judge CJ presided over a specially constituted court in the Criminal Division of the court of Appeal which considered how very young children may give evidence. In *R v Wills* the court endorsed the approach taken by the report of the Advocacy Training Council (ATC) in its report *"Raising the Bar: the Handling of Vulnerable Witnesses, Victims and Defendants in Court"* [8]and the use of the toolkits to assist advocates. The toolkits represent best practice and it is this approach which the WG recommended; some of the recommendations regarding training for advocates have already been put in place (see below).

[5] 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."
[6] 48,000 children and young people went through the criminal courts in 2008/9 and 33,000 in 2012 (source: Joint Inspectorate Report CPS & Witness Service) as witnesses.
[7] *R v Barker* [2010] EWCA (Crim) 4; *W & M* [2010] EWCA (Crim) 1926; R *v Wills* [2011] EWCA (Crim) 1938 and *Edwards* [2011] EWCA 3028.
[8] Reference was made to this report in the Interim Report of this WG.

7. The proposal that the development of best practice and the approach taken in the criminal courts to vulnerable and intimidated witnesses and parties can be utilised in the family courts, with some modification, to great effect is unarguable. There is also much to recommend the approach to the direct evidence of children, some of them very young indeed. The Criminal Practice Directions can provide the basis for practice directions in the Family Court.[9]

8. The treatment of vulnerable witnesses was considered by Lady Justice Hallett in *R v Lubemba & Ors* [2014] EWCA (Crim) 2064. The development of the approach to the treatment of vulnerable and intimidated witnesses is set out in her judgment, as is the need for training for advocates and judges. We reproduce it here as it makes instructive reading (particularly paragraphs 41 and 42).

[38.] The treatment of vulnerable witnesses has changed considerably in the last few years. In R v Barker [2010] EWCA Crim 4, a specially constituted court of the Court of Appeal Criminal Division, presided over by Lord Judge CJ, considered the circumstances in which very young children may give evidence. Having referred to section 53 of the Youth Justice and Criminal Evidence Act 1999, the court observed at paragraphs 38 to 43:

> "38. These statutory provisions are not limited to the evidence of children. They apply to individuals of unsound mind. They apply to the infirm. The question in each case is whether the individual witness, or, as in this case, the individual child, is competent to give evidence in the particular trial. The question is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court, and the witness need not understand every single question or give a readily understood answer to every question. Many competent adult witnesses would fail such a competency test. Dealing with it broadly and fairly, provided the witness can understand the questions put to him and can also provide understandable answers, he or she is competent. If the witness cannot understand the questions or his answers to questions which he understands cannot themselves be understood he is not. The questions come, of

[9] Cf. Criminal Practice Direction (General matters) 3D [2013]; CPD (General matters) 3E [2013] & CPD 3F [2013]

course, from both sides. If the child is called as a witness by the prosecution he or she must have the ability to understand the questions put to him by the defence as well as the prosecution and to provide answers to them which are understandable. The provisions of the statute are clear and unequivocal, and do not require reinterpretation. (R v MacPherson [2006] 1 CAR 30: R v Powell [2006] 1 CAR 31: R v M [2008] EWCA Crim 2751 and R v Malicki [2009] EWCA Crim 365.)

39. We should perhaps add that although the distinction is a fine one, whenever the competency question is addressed, what is required is not the exercise of discretion but the making of a judgment, that is whether the witness fulfils the statutory criteria. In short, it is not open to the judge to create or impose some additional but non-statutory criteria based on the approach of earlier generations to the evidence of small children. In particular, although the chronological age of the child will inevitably help to inform the judicial decision about competency, in the end the decision is a decision about the individual child and his or her competence to give evidence in the particular trial.

40. We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence.

41. The judge determines the competency question, by distinguishing carefully between the issues of competence and credibility. At the stage when the competency question is determined the judge is not deciding whether a witness is or will be telling the truth and giving accurate evidence. Provided the witness is competent, the weight to be attached to the evidence is for the jury.

42. The trial process must, of course, and increasingly has, catered for the needs of child witnesses, as indeed it has increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries. In short, the competency test is not failed because the forensic techniques of the advocate (in particular in relation to cross-examination) or the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give the best evidence of which he or she is capable. At the same time the right of the defendant to a fair trial must be undiminished. When the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child's credibility. Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources. Notwithstanding some of the difficulties, when all is said and done, the witness whose cross-examination is in contemplation is a child, sometimes very young, and it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well-rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension, and therefore likely to be derived from another source. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence.

43. The competency test may be re-analysed at the end of the child's evidence. This extra statutory jurisdiction is a judicial creation, clearly established in a number of decisions of this court (R v MacPherson: R v Powell: R v M: R v Malicki; see to the contrary effect DPP v R [2007] EWHC 1842 (Admin)), where it was emphasised that an asserted loss of memory by a witness does not necessarily justify the conclusion that the appropriate level of understanding is absent). If we were inclined to do so, and we are not, it would be too late to question this jurisdiction. This second test should be viewed as an element in the defendant's entitlement to a fair trial, at which he must be, and must have been, provided

> with a reasonable opportunity to challenge the allegations against him, a valuable adjunct to the process, just because it provides an additional safeguard for the defendant. If the child witness has been unable to provide intelligible answers to questions in cross-examination (as in Powell) or a meaningful cross-examination was impossible (as in Malicki) the first competency decision will not have produced a fair trial, and in that event, the evidence admitted on the basis of a competency decision which turned out to be wrong could reasonably be excluded under section 78 of the 1984 Act. The second test should be seen in that context, but, and it is an important but, the judge is not addressing credibility questions at that stage of the process any more than he was when conducting the first competency test."

39. In R v Wills [2011] EWCA Crim 1938, [2012] 1 Cr App R 2, the court endorsed the Barker approach and the approach of the Advocacy Training Council (the "ATC") as set out in their report entitled "Raising the Bar: the Handling of Vulnerable Witnesses, Victims and Defendants in Court".
40. Experts in the field responded to the ATC's recommendations and produced Toolkits on how to treat vulnerable witnesses fairly and to get the best from them, without undermining the accused's right to a fair trial. The Toolkits may be downloaded at no cost from the Advocates Gateway Website. They provide excellent practical guides and are to be commended. They have been endorsed by the Lord Chief Justice in the Criminal Practice Directions Amendment No2 as best practice. The Directions include at 3E.4 the following:

> "All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can. In relation to young and/or vulnerable people, this may mean departing radically from traditional cross-examination. The form and extent of appropriate cross-examination will vary from case to case. For adult non vulnerable witnesses an advocate will usually put his case so that the witness will have the opportunity of commenting upon it and/or answering it. When the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the advocate 'putting his case' where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions. Where limitations on questioning are necessary and appropriate, they must be clearly defined. The judge has a duty to ensure that they are complied with and should explain them to the jury and the reasons for them. If the advocate fails to comply with the limitations, the judge should give relevant directions to the jury when that occurs and prevent further questioning that does not comply with the ground rules settled upon in advance. Instead of commenting on inconsistencies during cross-examination, following discussion between the judge and the advocates, the advocate or judge may point out important inconsistencies after (instead of during) the witness's evidence.

> The judge should also remind the jury of these during summing up. The judge should be alert to alleged inconsistencies that are not in fact inconsistent, or are trivial."

41. Further, considerable progress has been made in terms of the provision of training for judges and advocates. The aim of the training, which all judges who try cases involving vulnerable witness are expected to undergo, echoes the aim of the Toolkits.
42. The court is required to take every reasonable step to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process. To that end, judges are taught, in accordance with the Criminal Practice Directions, that it is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a vulnerable witness. We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances. If there are any doubts on how to proceed, guidance should be sought from those who have the responsibility for looking after the witness and or an expert.
43. In general, experts recommend that the trial judge should introduce him or herself to the witness in person before any questioning, preferably in the presence of the parties. This seems to us to be an entirely reasonable step to take to put the witness at their ease where possible. The ground rules hearing should cover, amongst other matters, the general care of the witness, if, when and where the witness is to be shown their video interview, when, where and how the parties (and the judge if identified) intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked. So as to avoid any unfortunate misunderstanding at trial, it would be an entirely reasonable step for a judge at the ground rules hearing to invite defence advocates to reduce their questions to writing in advance.
44. Considerable emphasis is also placed in judicial training on the role of the judge at trial. The trial judge is responsible for controlling questioning and ensuring that vulnerable witnesses and defendants are enabled to give the best evidence they can. The judge has a duty to intervene, therefore, if an advocate's questioning is confusing or inappropriate.

9. The need for the judiciary to meet the witnesses described in [34] above is a matter to which this report will return when considering the difficulties that are present when children meet judges in family cases. It is worth noting here that there is a wealth of experience in the criminal courts of judges meeting children given the number of children that pass through the courts every year.

10. In family cases, particularly in public law, the adult parties (the parents) as well as children are frequently "vulnerable witnesses"[10]. The family courts have grappled with and been [11] exercised with the needs of vulnerable witnesses over the past two years and the need for the use of intermediaries to assist vulnerable and intimidated witnesses. As was said in the interim report "it is evident that the respondent parents in care cases are often vulnerable[12] (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 by their abuser where public funding is no longer available for respondents[13]." The high proportion of parents who are parties to public law proceedings who have multiple difficulties and disabilities, including mental illness, is well known and has been recognised for some years (as can be seen in the research carried out by Masson et al for the MoJ eight years ago – see footnote).

11. The issue of funding intermediaries to assist vulnerable witnesses has been considered by the President, the Court of Appeal and the

[10] See 7 below

[11] The President's Decisions on Intermediaries and Legal Aid: *In the Matter of D (A Child) (No.2)* [2015] EWFC 2; *In the Matter of D (A Child)* [2014] EWFC 39; *Q v Q* [2014] EWFC 31 and on Legal Aid: *Re C (A Child) (No.2)* [2014] EWFC 44. Some other decisions include *A Father v SBC and Others* [2014] EWFC 6 (Baker J); *F and M v Swindon Borough Council and D* [2014] EWFC B77 (HHJ Marshall); *In Re C (A Child) (Care Proceedings: Deaf Parent)* [2014] EWCA Civ 128 (CA); *Re A (Vulnerable Witness)* [2013] EWHC 1694 (Fam) (Pauffley J); *Re A (Vulnerable Witness: Fact Finding)* [2013] EWHC 2124 (Fam) (Pauffley J); *Re K and H (Children: unrepresented father: cross-examination of child)* [2015] EWFC 1 (HHJ Clifford Bellamy) – which has now gone to the court of appeal; HHJ Bellamy made reference to the decision of the President in the case of *Q v Q(ibid). Re M (A Child)* [2012] EWCA Civ 1905 (CA); *Re X (A Child)* [2011] EWHC 3401 (Fam) (Theis J); and *Wiltshire Council v N* [2013] EWHC 3502 (Fam) (Baker J)

[12] *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.

[13] There is a judgment on this and related issues which is due to be handed down by the President.

Administrative Court. [14] The President's judgments set out a detailed analysis of the law and we shall not rehearse it in this report. It is not intended to be a legal treatise as its purpose is to make recommendations to further modernise the family courts and family justice system but will refer to some recent decisions such as *In the Matter of D (A Child)* (No.2) [2015] EWFC 2; *In the Matter of D (A Child)* [2014] EWFC 39; *Q v Q* [2014] EWFC 31 and *Re C (A Child) (No.2)* [2014] EWFC 44as illustrative of the difficulties encountered by vulnerable witnesses/parties in family proceedings.

12. In the cases of *Q v Q* [2014] and in *In the Matter of D (A Child)* [2014] the President described the shocking and stark predicament facing parties who would be considered vulnerable witnesses, but did not qualify for public funding, *echoing* those of Lady Justice Rafferty regarding the accused in the case of *R (on the Application of OP) v The Secretary of State for Justice and others* (see footnote 9).

13. Cases such as Re *A (Vulnerable Witness)* [2013] EWHC 1694 (Fam) (Pauffley J), *Re A (Vulnerable Witness: Fact Finding)* [2013] EWHC 2124 (Fam) (Pauffley J), *Re M (A Child)* [2012] EWCA Civ 1905 (CA), *Re X (A Child)* [2011] EWHC 3401 (Fam) (Theis J), *Wiltshire Council v N* [2013] EWHC 3502 (Fam) (Baker J) *In Re C (A Child) (Care Proceedings: Deaf Parent)* [2014] EWCA Civ 128 (CA)and last month *Re K and H (Children: unrepresented father: cross-examination of child)* [2015] EWFC 1 (HHJ Clifford Bellamy) illustrate the problems which arise in dealing with vulnerable witnesses and add further emphasis to the need for a coherent approach and a recognised procedure to be followed in the family courts.

[14] The judgment of Lady Justice Rafferty in *R (on the Application of OP) v Sec of State for Justice and others* [2014] EWHC 1944 (Admin); intermediaries in criminal cases for vulnerable witnesses are supplied by the National Crime Agency Witness Intermediary Team. The MoJ's position is that the matching scheme does not cover defendants because it is only in place to provide for witnesses covered by legislation; defendant's legal representatives have to find an intermediary for the accused and obtain public funding.

14. The difficulties extend beyond the provision of support and assistance for vulnerable witnesses themselves encompassing the difficulties encountered when litigants in person seek to cross-examine witness who are often vulnerable and victims of abuse.

15. **Update & Advocates Training Working Group** Since the interim report at the end of July 2014 there has been a further full meeting of the working group on 7th October 2014. In September 2014 the Lord Chancellor announced that there would be legislation to introduced mandatory training for all advocates in sexual offence cases in the Criminal Courts; it seems likely that there will eventually be a similar requirement in the family court.

16. On 25th September Russell J had a further meeting with Haddon-Cave & Green JJs regarding advocacy training and to discuss how best to take up the offer of assistance from the ATC in training family advocates. As a result, following the recommendations in the interim report and with the approval of the President of the Family Division a working group similar to that which had been set up for training advocates in criminal proceedings was put in place for training advocates in family proceedings. With the President's approval the Family Advocacy Training Working Group (ATWG (Family)) is to be headed by Newton J.

17. On 15th October 2014 a preliminary meeting took place at which Green J, Russell J, Newton J met with HHJ Rook QC to share information about the Advocates' Training Working Group (ATWG) in Crime and how best to transfer experience gained from that to the training of family advocates, including the involvement of the judiciary. The need for training to be judge-led is no less necessary in family justice; as is the need for judicial training.

18. The Open Meeting hosted by Lord Justice Fulford which was a precursor to the ATWG being set up for producing materials and training for criminal advocates was mirrored by an Open Meeting hosted by the President of the Family Division held in the President's court in the Royal Courts of Justice on 12th November 2014. Interested parties were invited and HHJ Rook QC kindly attended to explain the ATWG for criminal advocates. It is intended that the work of the ATWG (Family) will produce training materials and training which can then be pushed out to ensure that all advocates in family cases are trained. It is anticipated that this work will take two to three years.

19. An initial example of the "toolkits " that will be produced for advocates in family cases has already been produced and has been published by the Advocate's Gateway (TAG) for use in the family courts; it can be found online at http://www.theadvoctesgateway.org/images/13vulnerablewitnessesandpartiesinthefamilycourts081114.pdf

20. Funding The funding for intermediaries and for the representation of vulnerable parties has been referred to above and is a matter of concern and some controversy. At present the cost of intermediaries at court and during proceedings is met by HMCTS. It is difficult to understand any argument that would suggest that intermediaries (like translators or interpreters) should not be present when necessary for the purposes of meeting with professionals, particularly legal representatives out of court and during the preparation of the vulnerable party's case. The position of funding, which is dealt with on an ad hoc basis, is unsatisfactory. If access to justice for vulnerable parties is not to be denied it is a matter which requires urgent review and clarification.

21. **The role of children & young people** The need to include children and young people in proceedings which directly concern and affect them has formed an important part of the remit of the WG as set up by the President. The WG has been greatly assisted by the members of the FJYPB who form part of the membership of the group and their comments and responses have formed part of the basis for the recommendations both in the interim and in this report. The FJYPB will continue to be consulted, along with others in the preparation and production of Practice Directions. During the discussion and deliberations in preparing this report it has become apparent that meeting judges alone will not provide the increased role that should be played by young people and children now the family courts have entered the 21st century.

22. The President set out the need to review the 2010 Guidelines for judges meeting children in his "*View*" in June. The reasons behind those guidelines was to encourage judges to overcome a reluctance to meet the children who are subject to proceedings by providing some guidance on how it should or could be done, however the children and young people themselves come at it form a different perspective. It is their wish to be included and listened to and to know that that was part of what happened in their case. The principle difficulty is the blurring of lines between evidence gathering and principles of child-welfare and good practice. There should be no need to remind all judges that part of the evidence they are required, by statute, to consider in almost every case involving children is the child's wishes and feelings, nor that the ascertainment of this evidence is not a judicial function.

23. The purpose of children meeting the judge making the decision in their case needs careful consideration and delineation; this will include the management of the expectations of the child *and* of the judge. There is a dangerous conflation of the need for the child or young person to be part

of the proceedings and to be given an understanding the legal process (which should include meeting the judge if appropriate) with having her or his views, wishes and feelings and direct evidence of what they may have suffered or seen (their evidence) before the courts. It is clear from the available research[15] and the views of children and young people expressed so vividly in the presentations by the FJYPB that young people want to know that they are heard and listened to; that they have chosen to focus on meeting the judge is understandable but it is less clear what is understood to be the purpose of such meetings.

24. The WG endorse the views expressed by Professor Cooper which illuminate the flaws inherent in the 2010 guidelines which include the judge meeting the young person to hear their wishes and feeling; however, as alluded to above, it is not part of the judicial function to evidence gather so the wishes and feelings expressed at the meeting cannot properly be taken into account when decision making. This a difficult concept for any young person to grasp at best; and is misleading as it amounts to saying the judge is here to listen to you but cannot take any notice of what you say. It would seem from the Fortin research that the paternalistic and interpretive approach to the "evidence" or expressed views of children in the past has left them feeling that they were effectively excluded from adult decision making which directly concerned them and would affect them for the rest of their lives.

25. A fresh approach to the evidence of children and young people, including the expression of their wishes and feelings (it needs emphasising that their wishes and feeling are part of the evidence which must be considered by the court as a matter of law and statute) is long overdue. All too often

[15] See for example the research carried out by Fortin et al: Fortin, J., Hunt, J., Scanlan, L., (2012) *"Taking a Longer View of Contact"* https://www.sussex.ac.uk/webteam/gateway/file.php?name=nuffield-foundation-final-report-16nov2012.pdf&site=28

there is no opportunity for children to have a frank interview about what has happened to them; instead it is left to opportunistic "disclosures" or reported speech to carers or social workers who may lack the necessary skills to ask further questions which assist the child to put their evidence before the court. The experiences and views and feelings of very young children are rarely sought out and regularly dismissed on the basis that they "lack sufficient maturity or understanding". Once again the family courts lag behind the approach taken in criminal proceedings as set out above.

26. There is a need for the evidence of children and young people to be put before the family courts as it would be in criminal proceedings. The practice in Wales[16]of carrying out direct work with children at the outset of any potential proceedings is an example of practice which put the children's evidence and views at the centre of decision making. The pilot scheme to include pre-recording of cross-examination and re-examination being held in Leeds, Kingston and Liverpool (s 28 Youth Justice and Criminal Evidence Act 1999) referred to in the interim report should form the basis for future practice in early evidence gathering of the evidence of the subject children themselves; as there is no reason why similar techniques could be not be employed for use in family proceedings.

27. **Conclusions** The conclusions reached by the WG in the interim report remain largely unaltered. There proved no need to reproduce or to duplicate the comprehensive and outstanding work done by the Advocates Training Council (ATC) and others contained in the report published in 2011[17], and the WG has been able to build on the work that

[16] Swansea City and County Council legal department have a decision making panel regarding the initiation or otherwise of public law proceedings. Before a decision is taken there is direct work done with the subject children to gather their evidence.

[17] 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,

has already been done. We have been able to adapt their practical approach for use in the family justice system, including the provision of a framework for training advocates. That training which will be rolled out over the next two years and the provision of support for witnesses through intermediaries will have substantial benefits for family justice as a whole allowing for the optimum conditions in which the best evidence can be given, which in turn will lead to a more effective and efficient use of court time. As we concluded previously both coincide with, and militate for, a greater likelihood of a fair and just hearing and outcome for all the parties in each case.[18]

28. 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 prepared by the *Advocates' Gateway* as a toolkit for use in family proceedings. 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.

29. The steps already taken by some judges to assist vulnerable witnesses are evidence of how such support has proved useful to the court in conducting trials in a fair and proportionate manner[19] providing access to

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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

[18] 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.

[19] His Honour Judge Clive Heaton QC 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

justice for vulnerable and intimidated parties. However as previously observed it 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 manner that best meets their needs by ensuring that the evidence they give is the best evidence achievable.

30. "Vulnerable and intimidated witnesses" In the interim report there was reference to the discussion regarding the use of the term "vulnerable witnesses" and whether another description should be used. It arose out of 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. However it is a term that has been in use for some time, to alter it now would be unnecessarily confusing. It is recommended that the term should be extended to include intimidated witnesses as it does in the criminal court.

31. The WG considered it is necessary to focus on reform in public law and on private law cases involving domestic abuse where the difficulties are most apparent and the need for equality of arms most acute. The former concerns the state's intervention in the lives of families, often with lifelong effects; the latter concerns persons who are likely to be victims of abuse and intimidation. In all family proceedings the lack of appropriate support and assistance for witnesses, whether they are parties, the children and young people or interveners would amount to a denial of justice. Failure to provide sufficient and adequate support for vulnerable or intimidated

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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.

witnesses whether they are children, young people or adults results in a concomitant failure in their ability to give their best evidence, in turn directly undermining the likelihood of the judge or tribunal reaching a fair decision; it is justice denied. In the year that Magna Carta is the subject of much public celebration it is appropriate that steps are being taken to reform the manner in which the evidence of vulnerable and intimidated witnesses and parties, including children and young people.

32. **Proposals & Recommendations** Following further work and consultation the recommendations as to the progress of modernisation reform in the Family Court and Family Division are set out below. Some of the 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.

33. It is recommended that there are two new Practice Directions (to be known as PD 3D and PD 3C) to stand alongside the new rule previously recommended, one which replaces the 2010 Guidelines for judges seeing children and another which makes provision for the identification of vulnerable and intimidated witnesses and the arrangements which will need to be put in place such as the pre-recording of evidence currently being piloted in 3 Crown Courts. The ground rules hearings currently being written into the Criminal Procedure Rules (due to come into force in April 2015) should prove useful in drafting the PD.

34. The need for greater transparency has been a leitmotif of recent modernisation of family justice and in keeping with that approach the WG recommend that there should be an increase in public access to the family courts so that members of the public, including children and young people can see what is happening. The Family Courts should hold Open Days every year – some have already with great success, as have numerous

Crown Courts. Visits by groups of school children such as those arranged by the Inns to the High Court and by judges in Crown Court have proved to be very effective; it has the dual purpose of de-mystifying the Family Court and is educative.

35. **Evidence of children/young people** This report contains recommendations in respect of the evidence of children and young people. It is the view of the WG that the Family Court has fallen behind the criminal courts in its approach to their evidence. Modernisation and reform must include the direct evidence of children and support for the evidence of children to be heard at the youngest age appropriate for each child; just as in the criminal court have the Family Court should hear the evidence of children of pre-school age. The dissatisfaction of children and young people expressed by those on the FJYPB and others reveals their underlying belief that they are not being listened to and heard. Those young people that the WG heard from do not expect, or even want, the judge to do as they say; they want to know that they have been listened to and this perceived (and in many cases actual) defect cannot be cured with by meeting the judge or tribunal alone if at all. To hear[20] a child must mean to hear her or his evidence and if the child/young person is not going to give oral evidence there must be provision for their evidence to be heard as directly as possible without interpretation by the court appointed officers or others.

    i. There should be a new mandatory rule in respect of Vulnerable and Intimidated Witnesses/Parties and Children supplemented by practice directions and guidance approved by the President.

[20] The right of the child to be heard and the need to make provision for hearing from the child is contained in numerous international conventions including the UN Convention on the Rights of the Child (now part of Welsh Law). See also Council of Europe (2010) "*Guidelines on Child Friendly Justice"; The European Convention on the Exercise of Children's Rights.*

ii. The term vulnerable and intimidated 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 should be to be extended to cover the parties as well as witnesses.[21]

iii. The rule/s should be inserted in the Family Procedure Rules 2010 (as amended) as rule 3B after the existing rule 3 which should now be known as rule 3A. The purpose is to give prominence and emphasis to the treatment of children and parties in family proceedings; 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 outset of any proceedings, or at the earliest opportunity.

iv. It is recommended that importance of the new rule and the reform in practice and procedure will be part of the over-riding objective and as such a reference to it will be include in rule 1 at FPR 2010 r1.1(2) (d). (Please see Appendix III for further details)

(d) make provision for vulnerable parties and witnesses and children to assist them in improving the quality of their evidence and to participate fully in proceedings;

v. Draft rule is included in part here: (See Appendix III)

3B.1. (1) For the purposes of this part a party or witness in family proceedings must be considered entitled to assistance on the grounds of age, incapacity or on the grounds of fear or distress

(2) For the purpose of this part a party or a witness is entitled to assistance when –

(a) that person is under the age of eighteen at the time of the hearing;

[21]The 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

(b) the court considers that the ability of the person to participate in the proceedings will be diminished by reason of any of the circumstances falling within rule 3B.1 (3); and/or

(c) the quality of the evidence of the party or witness is likely to be diminished by reason of any of the circumstances falling within rule 3B.1 (3)

(3) The circumstances are that the party or witness –

(a) suffers from a mental disorder or otherwise has a significant impairment of intelligence or social functioning;

(b) the nature and circumstances of the allegations with which the party or witness is concerned;

(c) the age of the party or witness;

(d) such other matters which appear to the court to be relevant, namely –

i) the social and cultural background and ethnic origins of the person;

ii) their domestic circumstances and religious beliefs;

iii) medical treatments they are undergoing or disabilities from which they might suffer;

(e) any behaviour towards the party or witness on the part of

i) any other party to the proceedings;

ii) any other family members of that person;

iii) any family members or associates of other parties to the proceedings.

(4) In determining whether a party or witness is entitled to assistance the court must consider any views expressed by that person.

(5)When this part applies –

a) the court should give directions for the provision of measures, including “special measures,” on an application or on its own initiative for any of the following measures –

i) preventing a party or a witness from seeing the other party or parties;

ii) allowing a party or a witness to participate in hearings and to give evidence by live link;

iii) using a device to help a party or witness to communicate;

iv) providing for a party to participate in proceedings through an intermediary;

v) providing for a party or witness to be questioned through an intermediary;

vi) admitting recorded video evidence;

b) where the court can exercise any power it has to give, vary or discharge a direction a measure to help a party or witness give evidence.

3B.2. (1) In all proceedings the court must take every reasonable step at the first opportunity, and in any event in cases where the PLO applies at the first Case Management hearing or in private law cases at the FHDRA, to decide whether, as part of its duties under rules 1.1 (2) (d) &1.4 and the application of PD 3B, it should give directions to provide for measures to assist a party or a witness to participate in proceedings and to improve the quality of their evidence -

(2) In this part the quality of the evidence of a party or witness is a reference to the ability of the party or witness to give evidence in terms of completeness, coherence and accuracy and;

a) to give evidence coherently the party or witness must be able in giving evidence to give answers which address the questions put to them in a manner that can be understood individually and collectively.

(3) In all proceedings the representatives of all parties must identify whether a party or witness is likely to be entitled to assistance at the outset of all proceedings, in cases where the PLO applies at the first CMH or in private law cases at the FHDRA, and make an application to the court if this part applies.

(4) Any party who makes application to the court to give or make directions or an order must –

a) apply in writing as soon as reasonably practical and as provided for in PD 3B, and in any event not more than 21 days after the proceedings have been issued and;

b) serve the application on each other party.

(5) The court may decide whether to give, vary or discharge a direction for measures

a) at a hearing or without a hearing;

b) in a party's absence provided that party has 7 days to make representations.

(6) An applicant for directions or orders for measures to assist parties and/or witnesses must-

a) explain why the party or witness is entitled to assistance;

b) explain why the measure or measures sought would be likely to improve the party's ability to participate in the proceedings;

c) explain why the measure or measures sought would be likely to improve the quality of the party or witness' evidence;

d) propose the measure or measures that would be likely to maximise as far is practicable the quality of that evidence;

e) report any views the party or witness has expressed about their entitlement to assistance or the likelihood that the measure or measures sought would improve their evidence.

3B.3 (1) The court must consider the role and evidence of children and young people in proceedings with which they are concerned whether or not they are parties.

(2) The court will consider how the direct evidence of young people can be put before the court before the court reaches a decision concerning that child by the use the procedure in set out in this part.

(3) The court will consider and make directions in regarding the child or young person visiting the court and/or meeting the judge or tribunal following the procedure and practice as set out in PD 3C.

vi. The rule will require that court/judge will consider the role of the subject children/young people and how best to provide that their direct evidence is put before the court. The application of the new PD 3C regarding the judge/court seeing the child/young person will be considered at the outset of proceedings including when and how such a meeting should take place if it is appropriate or how

and if the child/young person should be given the opportunity of communicating directly with the judge.

vii. The WG will take forward reform and modernisation in the evidence of children and young people in family proceedings and prepare a further report to make recommendations as to best practice in evidence gathering from children/young people with the aim of placing their evidence, along with all other evidence at the centre of the cases concerning them and decision making process.

viii. The rule will require that the court/judge will identify whether a party or witness is vulnerable at the outset of the proceedings or as soon as they become involved in proceeding and make provision for such support, special measures or other assistance they may need properly and fully to participate in the proceedings and to give best evidence;

ix. The rule will require that the all the advocates and representatives of the parties must identify if a party or witness is vulnerable and/or intimidated and consider how best he or she can be supported and assisted to give their best evidence 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.

x. There should be a requirement in the same terms for LiPs.

xi. A new PD 3C (replacing the 2010 Guidelines) for children seeing judges in the Family Court and Family Division should be drafted based on the recommendations above, reflecting the Court of Appeal's decision *Re KP* [2014] EWCA Civ 554. It will include provisions setting out in clear terms the status of the communication between judge and child; including at what point during the proceedings any meeting should take place; the persons who should be present and the purpose of any meeting. There will

be guidance for the manner in which the court's decision is to be communicated to the child/young person.

xii. There should be training for all family judges, at all levels, in seeing children; as was anticipated when the 2010 Guidelines were published.[22] It is recommended that the considerable experience of judges in criminal trials who regularly meet child witnesses to explain the procedure and without eliciting any evidence from them should be utilised in the drafting of the PD.

xiii. Each Designated Family Judge should nominate a judge within their court to deal with and encourage ways of the public and schools having access to the courts and judges on open days or school visits.

xiv. 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 PLO or CAP.

xv. 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 Criminal Procedure Rules for ground rules hearings due be published in April 2015, to make the best use of the procedure and practice that have developed in the criminal courts pursuant to the 1999 Act and the work of the ATC.

xvi. The PDs should explicitly reference and approve the Advocate's Gateway (TAG) following the procedure in the Criminal Practice Directions 2013.

xvii. 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

[22] See the article published in *Family Law* 2010 by Bellamy, Platt & Crichton which made reference to "the need for good quality judicial training".

court when the protected person is a vulnerable witnesses 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.

xviii. The new rule and Practice Direction 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.

xix. The rule change should be implemented by way of training for the judiciary and advocates and as recommended previously 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.

xx. Previous recommendations as to the training of advocates are already in place and will go forward under the ATWG (Family) lead by Newton J.

36. **Timetable** It is the aim of the WG that the rule change will be in place when the Rules Committee can consider such changes later in the spring of 2015. In conjunction with this further work will be carried out to produce PD with reference to the Criminal Procedure Rules due in April 2015 as set in paragraph 33 above. This will ensure that there is consistency of approach in the criminal and family jurisdiction.

37. **Evidence of children and young people** Further work will need to be carried out by the WG on modernising the way in which the evidence of children and young people is gathered and put before the family courts. This will ultimately require a substantial change in the prevailing culture in respect of the evidence of children on the part of judges, social services,

Cafcass and others who work with children in the family courts. The WG will make further recommendations on how this may be put in place after further consideration and wider consultation; it is hoped that this can be done by the summer of 2015; in any case the WG will provide a further report by 30th July 2015.

AH & AHR
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