

Child defendants

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Contents

Acknowledgements	5
Members of the Working Party	6
Executive summary	7
Introduction	14
Criminal legal context	16
Civil legal context	24
Human rights and child defendants	26
Developmental psychology and child development	30
Mental health issues	50
Ethical considerations	56
The age of criminal responsibility	59
Alternative legal provisions	63
Training	67
Conclusions	71
References	74

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However, any errors of comprehension or of interpretation in this report are mine alone.

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Executive summary

Despite recent helpful changes in the criminal law in relation to youth justice, the legal context around child defendants remains complicated and there is persisting confusion about how to deal with the welfare needs of children charged with serious offences. In many ways, society prefers to perceive children either as victims of crime or as offenders. Therefore, the dual status of many child offenders as children in need as well as young delinquents has been difficult to address within current civil and criminal legislation.

The Working Group on Child Defendants was set up by the Royal College of Psychiatrists to present a balanced appraisal of the current situation involving the needs of child defendants aged 10 years and upwards who appear before criminal courts on a range of charges. This report draws together relevant issues including the present legal situation (both civil and criminal), human rights issues, the age of criminal responsibility and psychological and mental health issues, as well as discussing alternative legal provisions for child defendants. However, the report does not set out to campaign to change the law or to promote a particular position in relation to children who offend. Rather, it focuses on issues that are relevant to the Royal College of Psychiatrists and on which we believe it would be helpful to provide the public and professional communities with up-to-date information.

Overall, the intention of providing this report is to promote further discussion about the developmental and mental health needs of children who offend.

Certain key issues have emerged from the deliberations of this group as meriting further attention and these are summarised below.

Age of criminal responsibility

There are many difficulties in setting a definitive age of criminal responsibility. However, a consensus is emerging from different sources (JUSTICE, 1996, 2000; Michael Sieff Foundation, 2001) that the age of criminal responsibility in the UK is too low and that the current youth justice system needs to be amended (Auld, 2001).

If the age of criminal responsibility in the UK is to be reviewed, then consideration should be given to the Commentary on the Beijing Rules (quoted in Ashford & Chard, 2000: pp. 793–794), in relation to criminal responsibility and to legal processes in other European countries, where the average age of criminal responsibility is 14–15 years.

Human rights

The human rights of child defendants also need to be addressed. Article 6 of the European Convention on Human Rights guarantees to all defendants the right to a fair hearing. In a Concurring Judgment in the cases of *T v. the United Kingdom* and *V v. the United Kingdom* [2000], Lord Reed spelled out the fact that article 6 should be interpreted to take into account developmental factors in relation to children:

‘There is, on the other hand, nothing in Article 6 to indicate that there can be any derogation, in cases involving children, from the principle that the trial process should provide for the effective participation of the accused who must be able to follow the proceedings and to give instructions where necessary to his lawyer. In order for that principle to be respected in cases involving children, however, the conditions under which the trial is held (including the procedure followed) have to be such as will permit such participation, taking into account the age, level of maturity and intellectual and emotional capacity of the child concerned’ (Concurring Judgment of Lord Reed, *T v. the United Kingdom: V v. the United Kingdom* [2000]).

Therefore, it follows that the trial of children and young people within a full adult court context is inappropriate in relation to their developmental immaturity and cognitive limitations and that a more appropriate youth court context should be sought in all cases to ensure that the child’s human rights are not contravened and that the child is able to participate effectively in the trial process.

The European Convention on Human Rights and the Children Act 1989 refer to children and young people as ‘children’ until they are 18 years old. The designation of ‘child’ is a clear indication of an assumption of some degree of developmental immaturity persisting until the age of 18 years. The child defendant’s human rights to be treated in the way that the designation ‘child’ suggests, i.e. as a developmentally immature individual, are not currently protected in an adult court context.

Assessment

Since the level of cognitive and emotional functioning of a child defendant is not always clear and since it is likely that the child will have at least one psychiatric disorder, there should be a mandatory assessment of every child under 14 years old who is facing serious charges in a criminal court. The type of serious charges that should normally ensure an assessment include murder, manslaughter, abduction, rape, arson and grievous bodily harm. However, children who show patterns of escalating recidivism from petty crime to much more serious offences may also need to be assessed. This assessment should include both psychiatric, psychological and social work components, to give an opinion on the child’s mental state, fitness to plead and diminished responsibility, to look at the welfare needs of the child and also to inform sentencing in relation to compliance with treatment.

Coordination of criminal and civil justice systems

There is a need to coordinate the criminal and civil legal systems around child defendants so that welfare considerations are not lost in the pressure to try the criminal case. At present, children can be dealt with in three separate justice systems:

- public law proceedings such as care proceedings
- civil litigation proceedings
- criminal proceedings.

The law views children as victims in a very different way from children as defendants. More favourable provision is made for child witnesses appearing in criminal proceedings than for child defendants appearing in the same courts. Children who are subject to care proceedings or who are undertaking litigation may have the support of a Children's Guardian or a Litigation Friend but there is no equivalent provision for children who are defendants.

New measures should be set up to ensure the mandatory integration of the criminal justice system with the civil justice system, bearing in mind that the very young child defendant is often a 'child in need' in terms of the Children Act 1989. Children who are defined as in need under the Children Act 1989 are

'those whose vulnerability is such that they are unlikely to reach or maintain a satisfactory level of health and development, or their health and development will be significantly impaired without the provision of services.' (Department of Health, 2000: para 1.8).

Most children facing very serious charges, such as murder, manslaughter, abduction, rape, arson or grievous bodily harm, will be known to have suffered significant harm, by dint of earlier trauma, parental failure to protect or in the process of offending. In relation to these seriously offending children, consideration should be given to an application for an interim care order or for the appointment of a Children's Guardian to act for the child in both civil and criminal proceedings.

Care planning

Experience with these cases suggests that there is often a total lack of medium- to long-term care planning by local authorities in relation to children who are caught up as defendants in the criminal justice system. For instance, it may be assumed that, since children placed on remand in secure accommodation are being cared for, they are also 'in care', even in the absence of a care order. The issue of who is parenting such child defendants and who has parental responsibility for the child is often lost in the anxiety to protect the evidence. This means that professionals may become paralysed in their thinking about the welfare considerations and may state that no care plan can be considered until the trial is over. Confusion exists about the precedence that should be taken by

the criminal justice system requirements over any welfare considerations such as therapy for the child or contact with relatives, when it is feared that such processes could contaminate evidence in the trial.

Therefore, whether or not care proceedings are taken or a Children's Guardian is instructed, an inter-agency care plan should be constructed around the child defendant facing serious charges. Such a care plan should be implemented immediately such charges are made, should cover pre-trial, trial and post-trial periods regardless of the disposal, and should address issues of parental responsibility, expert assessment and the child's needs, including treatment needs as well as welfare issues.

Child protection investigation (section 47 enquiry)

It is easy to forget that a child defendant facing serious charges has, by definition of the serious charges (murder, manslaughter, abduction, rape, arson or grievous bodily harm), experienced a failure to parent and protect, which requires investigation as well as the criminal investigation of the alleged offence. If a serious charge is made against a child defendant this should trigger an initial assessment by social services to decide if the child is a child in need and if so whether the child is suffering or is likely to suffer significant harm. Once the initial assessment has been undertaken consideration should then always be given to instigating a child protection process following government guidance on inter-agency cooperation for the protection of children from abuse (Department of Health *et al*, 1999).

Training for legal and court-based professionals

There are complex developmental, cognitive, psychiatric, ethical and legal issues arising in relation to child defendants, which are different from those arising in relation to the needs of, for instance, children as witnesses. This is because impaired functioning can mean that the child defendant is not fit to plead, possibly has diminished responsibility for the crime or may need immediate psychiatric treatment. Training is urgently needed for all those who come into contact with child defendants in the UK criminal justice system. Such training should have a child developmental focus, should cover pertinent issues in relation to psychology, psychiatry and the role of the family, and should be provided for all court-related disciplines including criminal judges, barristers, defence solicitors, Crown Prosecution Service solicitors, police officers and relevant court staff. The need for a developmentally appropriate child-centred approach to dealing with the needs of children entering the court system as defendants should be stressed.

At the same time, it should be made clear to those undertaking this training that this approach is not at the expense of justice but rather in the service of

fairness to the child facing charges and that ultimately a fairer result will also be ensured for the victims, with the best evidence being produced within the criminal proceedings.

Accreditation for legal and court-based professionals

Since 2003, the Law Society and the Youth Justice Board have run a one-day training course for defence solicitors and barristers that covers law and child development (for further information see the London Criminal Courts Solicitors' Association website, www.lccsa.org.uk). However, attendance at the one-day training course is voluntary. It seems clear that active steps should also be taken to ensure a process of accreditation of suitably trained legal and other professionals involved with child defendants in the court system. The Law Society should give consideration to an accreditation scheme for solicitors working with child defendants. Such training and accreditation schemes would be comparable to that currently in force in relation to specialist joint police and social work training for interviewing child witnesses for criminal proceedings (Home Office & Department of Health, 1992; Home Office *et al*, 2002). Training in work with child defendants would, therefore, build on the existing knowledge base about children's needs and would take on board recent research (Grisso, 2000a) in relation to the cognitive capacities of child defendants.

In future, it should never be possible for an entirely untrained defence solicitor, barrister, judge, police officer or other professional to undertake direct work with child defendants in the criminal justice system without being able to demonstrate accredited training experience.

Training and accreditation for child care workers, child psychiatrists and clinical psychologists

Although most people working in these disciplines will have received considerable training in relation to child development, cognitive development and psychiatric issues, many professionals working with child defendants in the criminal justice system are ignorant of the criminal law and of the role of expert evidence in the criminal courts. This training should include instruction in the relevant legal and evidential issues pertinent to the trial context, child protection issues and the needs of children under the Children Act 1989.

Multidisciplinary training context

Given the complex nature of the problems experienced by child defendants, such training should be within a fully multidisciplinary context to include lawyers, psychologists, psychiatrists, social workers, probation officers, police officers and all others usually involved in work with children and young people in the

criminal justice system. In this way a balanced exchange of information and perspectives about work with children who are defendants can be ensured.

Child defendant user perspective

In any subsequent process of consultation on this report, a user perspective from children and young people who have faced criminal charges should be sought.

Recommendations

- 1 There should be a government-led process of consultation on the needs and human rights of child defendants to include the age of criminal responsibility.
- 2 The age of criminal responsibility in England and Wales is too low by a considerable degree and that it should be raised.
- 3 If the age of criminal responsibility is raised, offending children who are under the age of criminal responsibility and cannot, therefore, be charged with a crime should be dealt with in a different 'civil' disposal so that their offending behaviour can be addressed and assessment and treatment given. Such a civil disposal could be analogous to the Scottish Children's Hearings system, with an inquisitorial, not an adversarial, approach.
- 4 The recommendations of the Review of the Criminal Courts of England and Wales (Auld, 2001) to create a Specialist Youth Court with specialist judges and experienced lay justices for child defendants facing 'grave crimes' should be followed.
- 5 All child defendants facing serious charges should be seen as 'children in need' in terms of the Children Act 1989 (section 17) and should be subject to an assessment of their needs using the Government's assessment framework (Department of Health, Department for Education and Employment and Home Office, 2000).
- 6 The Youth Court should have the power to require an investigation by the Local Authority into the child's welfare and, subsequently, if appropriate, to transfer the case from the Youth Court to the Family Proceedings Court.
- 7 If appointed, the Children's Guardian or Litigation Friend should liaise closely with the youth offending team in relation to the disposal of the child following sentence, to ensure implementation of appropriate treatment during the child's sentence.
- 8 Where children facing very serious charges are known to have suffered significant harm (because of earlier trauma, parental failure to protect, or in the process of offending), the local authority should consider taking out an interim care order on the child.
- 9 There should be assessment by a clinical psychologist of all child defendants facing serious criminal charges, including murder, manslaughter, abduction, rape, arson or grievous bodily harm.

- 10 There should be an assessment by a child psychiatrist of all children facing serious criminal charges, including murder, manslaughter, abduction, rape, arson or grievous bodily harm.
- 11 The Royal College of Psychiatrists and the British Psychological Society should produce a joint statement laying out the principles of such psychiatric and psychological assessments. This statement would provide guidance for assessments of child defendants, would prevent the development of idiosyncratic psychiatric and psychological assessment methods and would provide the courts with consistent expert reports.
- 12 Pre-trial therapy should be provided for all child defendants suffering from identifiable and treatable psychiatric disorders.
- 13 A child defendant's pack (similar to that available for child witnesses) should be made available to child defendants facing criminal proceedings so that their human rights and the legal process are clarified for them in developmentally appropriate terms.
- 14 Training should be provided for all legal professionals working with child defendants, in relation to child development, psychiatric and psychological issues. This training should be within a multidisciplinary context and it should result in the accreditation of such legal professionals to work with children facing criminal charges.
- 15 Training should be provided for all child care professionals working with child defendants, in relation to child development, psychiatric and psychological issues. This training should include instruction in the relevant legal and forensic issues pertinent to the trial context, child protection issues and the needs of children under the Children Act 1989.
- 16 Training should be provided for all child psychiatrists and clinical psychologists working with child defendants, in relation to child development, psychiatric and psychological issues. This training should include instruction in the relevant legal and forensic issues pertinent to the trial context and the role of the expert witness in the criminal court.
- 17 There should be agreed procedures for the payment of psychiatric and psychological reports for clients of youth offending teams, and that the indemnity issues for experts who assessed youth offending team clients without being employed by the youth offending team should be resolved.

Introduction

The position of young children aged 10 years and over who commit serious crimes has been the subject of media discussion (Jenkins, 2000; Orr, 2000), research (Boswell, 1996) and public debate (JUSTICE, 1996) within the past decade.

Since the age of criminal responsibility in England and Wales is 10 years, and therefore lower than that of most other jurisdictions (JUSTICE, 1996), the appropriateness of dealing with children aged 10 years or over within an adult court context has been questioned repeatedly during the 1990s; a recent European Court of Human Rights judgment (*T v. the United Kingdom: V v. the United Kingdom* [2000]) has concluded that full adult procedures are inappropriate for the trial of child defendants who are developmentally immature. However, this emerging legal consensus on the needs of child defendants has been noted to be 'woefully at odds with public attitudes' (Wolff & McCall Smith, 2000), which remain prone to demonise child defendants and to reject attempts at explaining the origins of offending in childhood. The needs of children who are defendants are hardly, if ever, discussed and the priority, accepted by professionals and public alike, is to get on with the trial in the hope that other matters (such as the child defendant's needs) can be resolved later.

Although media coverage of child defendants tends to focus on the relatively small numbers of children who kill or children who are charged with sexual assaults, a much greater number of children and young people in their mid to late teenage years are responsible for a wide variety of less serious offences, such as burglary and car theft. However, developmental maturity and fitness to plead to such charges, as well as other issues discussed in this paper, are equally relevant for the bulk of child defendants whose cases do not hit the headlines.

In the UK, once a child or young person becomes involved in the criminal justice system, welfare considerations will often take second place in professional thinking about the case. The extent to which child defendants facing serious or less serious criminal charges may also be seen as 'children in need' in terms of the Children Act 1989 (Home Office 1989: section 17) is seldom formally assessed, and any challenge to the prosecution of such children by parents or local authorities with parental responsibility appears to be rare. Once charged with a criminal offence, a child over 10 years old who does not plead guilty to the offence is obliged to participate in the full trial process, unless expert evidence finds that child unfit to plead to the charges.

Suggestions about alternative procedures for dealing with child defendants from the age of 10 years and upwards have been made (JUSTICE, 1996) and include reconsideration of the age of criminal responsibility, private trial of children under 14 years of age before a specially convened panel, and the creation of a single offence of homicide (instead of separate offences of murder and manslaughter) with judicial determination of the most appropriate sentence in

each case. It has also been suggested (Michael Sieff Foundation, 2001) that a range of 'less serious' offences by juveniles should be removed altogether from the criminal justice system and that the 'more serious' offences should be prosecuted bearing in mind the welfare needs of these child defendants. These may be reasonable suggestions, but there are many other concerns (which this report also addresses) in relation to the practicalities of dealing with developmentally immature children in the criminal justice system.

At present the only individuals appearing in criminal court proceedings involving child defendants aged 10 years or over who are certain to have received training in child development are expert witnesses, such as child psychiatrists and clinical psychologists, and in practice these are seldom called into court. The many other adults dealing with child defendant cases, including the sentencing judges, defence solicitors, prosecutors, court staff and police, are not required to have specific training in work with children before (for instance) interviewing an alleged child offender or taking instructions from such a child. Although the recent introduction by the London Criminal Courts Solicitors' Association of a developmentally informed, one-day training course for defence solicitors and barristers is encouraging, this is still a voluntary training course with no accreditation.

The human rights of child defendants who do not receive treatment for diagnosed psychiatric disorders in order to preserve evidential integrity do not appear to have been addressed, in contrast to beneficial changes that have recently been introduced to reduce delay in court proceedings involving child witnesses.

This paper addresses child developmental, ethical, psychiatric and mental illness issues, the assessment of child defendants and the role of expert witnesses in criminal courts, as well as the welfare principles contained in the Children Act 1989 relating to child defendants. An attempt has been made to place this discussion in a wider context that takes on board the legal and social context in which these crimes are committed by children.

Purpose of the report

This report has been created by a committee set up by the Royal College of Psychiatrists in order to present a balanced appraisal of the current situation involving child defendants from 10 years old upwards who appear before criminal courts on a range of charges. It draws together relevant issues including the present legal situation, both civil and criminal, human rights issues, the age of criminal responsibility, and psychological and mental health issues, as well as discussing alternative legal provisions for child defendants. However, the report does not set out to campaign to change the law or to promote a particular position in relation to children who offend; rather, it focuses on issues that are relevant to the College and concerning which we believe it would be helpful to provide the public and professional communities with up-to-date information.

Overall, the intention of providing this report is to promote further discussion about the developmental, mental health and welfare needs of children who offend.

Criminal legal context

The criminal justice system is often controversial, and every democratic country has experienced the short-term tensions that can occasionally arise between politicians and the judiciary in relation to the sentencing in prominent adult and juvenile cases. However, there are longer-term swings in societal opinion about juvenile justice which are politically influenced but which are also very much affected by the prevailing public opinion.

Around the world and over a long period, judicial systems for offending juveniles have varied enormously, both in the range of their jurisdictions and in their philosophies. Grisso (2000a) reviewed the history of the juvenile justice system in the USA, and showed that the philosophy underpinning this system has always varied from time to time, usually swinging between a punitive or a welfare orientation. He describes how the US 'social experiment' of providing a social-welfare correctional court system for juveniles at the dawn of the 20th century had changed radically by the end of that century, partly due to the increased rates of violent crime by juveniles (Grisso, 2000a: pp. 1–2). This author also describes the current US juvenile justice system as one that has decreased the differences between juveniles and adults facing criminal charges and hence has allowed the trial of youths on charges that would have been dealt with differently before. However, towards the end of the 20th century, the existing US juvenile courts, which had suffered from a period of 'benign neglect' (Steinberg & Schwartz, 2000: p. 13) by legislators, appeared to be torn as to how to respond to the wide range of juvenile offending with which they were presented.

Subsequent changes in US juvenile justice philosophy were greatly influenced in 1967 by the case of *Gault* (Steinberg & Schwartz, 2000: pp. 12–14), in which a 15-year-old youth was sentenced to 6 years in custody by a juvenile court for minor offences that would have attracted only a fine or a sentence of a few months for an adult. The US Supreme Court, commenting on an earlier case involving a juvenile who was arbitrarily transferred from a juvenile to a criminal court (*Kent v. United States* [1966]), stated that 'There is evidence...that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children' (quoted in Steinberg & Schwartz, 2000: p. 13).

Steinberg & Schwartz (2000: p. 13) noted that with the demise of the period of 'benign neglect' of juvenile justice in the USA, juveniles were now subject to a process of 'adulthood' within the court system, with both its benefits (such as rights to counsel) and its drawbacks (still an adult system). However, movements in the USA (Maloney *et al*, 1988; Bazemore & Umbreit, 1994) and in the UK (JUSTICE 1996, 2000; Michael Sieff Foundation, 2001) have advocated a more balanced approach with an emphasis on 'restorative justice' (Bazemore & Umbreit, 1994) and the rehabilitation of the juvenile offender.

However, it is also clear that public opinion is still divided about the merits of such a balanced approach in relation to juveniles who are perceived as committing more violent offences and therefore not always seen as deserving rehabilitation.

Youth justice system in England and Wales

Sources of law

The law relating to children accused of crime comprises statutes that are applicable both to adults and children and statutes directed specifically at children. The statutes relating specifically to children have been enacted over some 60 years. As well as detailed legislation passed by parliament, the youth justice system is increasingly influenced by general human rights principles contained in international conventions. A number of government departments and agencies have key roles in the implementation of the juvenile justice system: these include the Home Office, the Lord Chancellor's Department, the Prisons Department and the Youth Justice Board.

A review of the criminal courts (Auld, 2001) has suggested reforms to the current juvenile justice system, with the provision of specialist youth courts staffed by trained judges and magistrates and operating without juries. However, in a subsequent Home Office document *Youth Justice – The Next Steps* (Home Office, 2003), a companion to *Every Child Matters: Change for Children* (Department for Education and Skills *et al*, 2004), most of the reforms suggested in the Auld Report (Auld, 2001) and in the Home Office white paper *Justice for All* (Home Office, 2002) were rejected. The rejected reforms had included a new, strengthened youth court and a judge sitting with two youth court magistrates to hear serious cases. Instead, *Youth Justice – The Next Steps* (Home Office, 2003), proposed retaining the current system of trial in a Crown court, with judges specialising in youth cases through selection and training and the participation and understanding of child defendants to be enhanced by the development of a young defendant's pack.

After the consultation period, the Home Office published a summary of a response (Home Office, 2004) to *Youth Justice – The Next Steps* (Home Office, 2003). The key components of this response included proposals to pursue the development of a young defendant's pack and proposals to discuss training of the Crown Court Judiciary with the Judicial Studies Board and with lawyers' professional bodies. Some respondents to the consultation (Home Office, 2004, p. 6) had taken the opportunity to voice additional concerns not raised in the consultation paper. These concerns included the following:

- the government should take the opportunity to raise the age of criminal responsibility
- the only way to prevent offending was to make welfare services available (which was not always done in practice)
- young victims have access to video links to court but young defendants do not; this should be reviewed

- some commented that the Auld recommendation on a strengthened youth court was a good proposal and should still be implemented.

However, none of these concerns were further addressed in the summary of the government's response (Home Office, 2004) nor were suggestions made about how these concerns could be addressed later.

Aims of the youth justice system

The principal aim of the youth justice system is to prevent offending by children and young persons (Crime and Disorder Act 1998: section 37). However, a court must also have regard to the welfare of any child or young person who appears before it as a defendant (Children and Young Persons Act 1933: section 44), but it is not always clear how decisions are made to assess the welfare needs of child defendants.

The Youth Justice Board was set up in 1998 as a result of the Audit Commission's review of the youth justice system, *Misspent Youth* (Audit Commission, 1999). The formal responsibilities of the Youth Justice Board include advising the Home Secretary, setting, monitoring and inspecting standards, identifying and disseminating good practice, and commissioning and purchasing places in the secure estate. However, the Youth Justice Board is probably best known for the work of youth offending teams. Since April 2000, all local authorities in England and Wales have coordinated their work with young offenders in multidisciplinary agencies. These youth offending teams are required to include at least one of each of the following:

- a social worker
- a probation officer
- a representative of the local education authority
- a police officer
- a representative of the local health authority.

The health worker is usually a drugs worker or a community psychiatric nurse, but in a few areas the health worker may be a clinical psychologist. Youth offending teams provide a range of services which include:

- schemes to divert young offenders from the courts
- bail support schemes to reduce offending while on bail
- reports for the courts regarding defendants convicted by the courts
- implementation of community sentences
- supervision of young offenders released from custody.

The local authority also has a duty to safeguard and promote the welfare of children who are in need (Children Act 1989: section 17; Department of Health, 2000). The main agency that will carry out this duty is the social services department. Where a child is considered to have suffered or to be at risk of suffering significant harm and that harm is attributable to the care received from the child's parents, the local authority may institute care proceedings. However,

consistent systems are not in place to ensure that all child defendants are given welfare assessments.

The Youth Court

The Youth Court is the main criminal court that deals with children. The Court's procedures are designed to be less formal and the proceedings are held in private. The magistrates who sit in the Youth Court have received special training.

Until the early 1990s a single court – the Juvenile Court – dealt with children accused of crime and children subject to care proceedings. Since then the hearing of care proceedings has been dealt with by the Family Proceedings Court. The Youth Court has no power to refer a child to the Family Proceedings Court even if there are considerable concerns regarding the child's welfare. This appears to sit uneasily with the expectation of section 44 of the Children and Young Persons Act 1933, that the Youth Court should have regard for the welfare of children appearing as defendants. The conference on Child Defendants: Is the Law Failing Them? (Michael Sieff Foundation, 2002) recommended a number of changes to the juvenile justice system. The recommendations relating the welfare needs of children were:

- 'There should be a specialist youth court where all offences involving child defendants would be heard. In this specialist youth court, all child defendants should be tried by specialist, trained magistrates and judges. More serious offences involving child defendants in the specialist youth court should be heard by senior judges' (p. 42).
- 'All children 10–16 years old who are facing serious criminal charges should have a full mental health assessment' (p. 42).
- 'The youth court should have a power to require an investigation by a Local Authority into whether an application should be made for a care order to a family court – the family proceedings court in the first instance. This would be similar to the power in Section 37 of the Children Act 1989 for a court to seek such an investigation in a private family case' (p. 43).

Hence, it would be fair to say, that despite the existence of the Youth Court, there are major deficits in the juvenile justice system in terms of ensuring that the welfare needs of child defendants are noted, assessed and actually met. It also appears to be the case that, even if the Auld Report recommendations on juvenile justice (Auld, 2001: p. 8) were enacted, these measures would provide a more appropriate criminal court context for trying juveniles but would not necessarily build in the type of welfare provisions recommended in the above quotation and by others (JUSTICE, 1996, 2000; Michael Sieff Foundation, 2002).

Defence lawyers

A child accused of a crime will almost always be represented by a solicitor and in the more serious cases by a barrister as well. However, at present there is

limited specialist training (for further information see the London Criminal Courts Solicitors' Association website, www.lccsa.org.uk) and no accreditation of lawyers who represent children in the criminal courts. This is in stark contrast to the well-established training and professional development programmes now available within civil proceedings for family lawyers, both solicitors, barristers and the Family Division Judiciary.

Sequence of events in the legal process relating to juvenile crime

A specific conceptual framework for the movement of child defendants through the criminal justice system is lacking in the UK. The stages in this process as described below are drawn from day-to-day work with all offenders coming before the British courts (Ashford & Chard, 2000). In the USA, in contrast, a sophisticated model of transition through the 'juvenile justice pipeline' is described by Steinberg & Schwartz (2000). This model describes critical decision points along the pipeline (Steinberg & Schwartz, 2000: p. 15) and lays out clearly the stages in the process which unfold in most, not all, states in the USA. These stages are referral, intake, detention, transfer, adjudication, disposition and release. Steinberg makes the point that 'at each decision juncture, information about the juvenile's stage of development should play an important role in the outcome of the decision' (Steinberg & Schwartz, 2000: p. 19).

Although the many deficiencies in the US system are fully discussed by Steinberg & Schwartz (2000) and others (Grisso, 2000*b*), the fact remains that a conceptual model of juvenile justice does actually exist in America, whereas UK thinking about the systems around offending juveniles is much less advanced.

A. The investigative stage

Arrest and detention When police officers investigating a crime identify a suspect, they will normally arrest that person. The arrest and detention of suspects is governed by the Police and Criminal Evidence Act 1984 (PACE) and the Codes of Practice made thereunder. Broadly, suspects may be held without charge for 24 hours (longer in the case of serious offences). Where a custody officer authorises a juvenile suspect to be kept in police detention, the custody officer is obliged to ensure that the arrested juvenile is moved to local authority accommodation unless the custody officer certifies either that it is impracticable to do so or (where the juvenile is at least 12 years old) no secure accommodation is available and keeping him in other local authority accommodation would not be adequate to protect the public from harm (PACE: section 38(6)).

Legal advice and representation A child detained in a police station has the right to free legal advice and to be represented by a solicitor (PACE: section 58; Codes of Practice: Code C:6) while in the police station.

Article 6 of the European Convention on Human Rights guarantees a right to legal representation if the interests of justice so require. Such representation should be funded by the Criminal Defence Service (part of the Legal Services Commission). However, legal advice from child trained and accredited defence lawyers is not currently available.

Appropriate adult In the case of suspects under 17 years old, the police are required to notify a person responsible for the child's welfare of the child's arrest, and to arrange for their attendance. That person may be the child's parent, guardian, a care authority or any other person who has, for the time being, assumed responsibility for the child's welfare (PACE Codes of Practice: Code C:3.7), and is known as the 'appropriate adult'. The police are required to exercise discretion when selecting this 'appropriate adult'; in *DPP v. Blake* [1989] it was held that the 'appropriate adult' could not be a person with whom the juvenile had no empathy.

Interrogation An important means of gathering evidence is the questioning of the suspect by the police. A suspect under the age of 17 years may not normally be interviewed unless an appropriate adult is present. At the beginning of the interview the appropriate adult must be informed that she or he is not expected to act simply as an observer and that the purposes of this adult's presence are first to advise the person being questioned and to observe whether or not the interview is being conducted properly and fairly, and second to facilitate communication with the child. The interview will be recorded on audiotape.

Disposal Where the police consider that there is sufficient evidence to prove that a child suspect has committed a crime, a number of options are available. The police may charge the child with an offence, or submit the case to the Crown Prosecution Service for advice. If the public interest does not require court action, the child may be diverted from the courts by the police administering a reprimand or, in more serious cases, a warning. Children who receive a warning will also be referred to the youth offending team, who may work with the child and the parents to prevent further offending. However, there is no national policy to ensure that prosecution in the public interest is interpreted by the police and the Crown Prosecution Service in a consistent manner in relation to child defendants. Discrepancies in prosecution policy seem to be particularly apparent in relation to decisions about whether to prosecute or caution young teenage boys for sex offences.

B. The adjudicative stage

Where a child (i.e. a person under the age of 18 years) is charged with a criminal offence, the venue for trial will depend on a number of factors.

Child charged alone with a summary offence A child charged alone (or with other children) with a summary offence will be tried in the Youth Court.

Child jointly charged with an adult with a summary offence A child jointly charged with an adult with a summary offence will be tried in the Magistrates Court, unless the adult pleads guilty, in which case the court may remit the case to the Youth Court.

Child charged alone with an indictable offence A child charged alone (or with other children) with an indictable offence other than homicide shall be tried summarily (in a Youth Court) unless the offence is a specified grave crime for which the child may be sentenced to be detained for a long period and the court considers that if the child is found guilty of the offence it ought to be possible to sentence the child to such a period of detention.

Child jointly charged with an adult with an indictable offence A child jointly charged with an adult with an indictable offence may be committed or sent for trial with the adult if the court considers it is necessary in the interests of justice to do so.

C. Disposal

A criminal court is required to sentence any offender on the basis of the seriousness of the offence. In deciding on the appropriate disposal the court will also consider the offender's:

- previous criminal convictions
- compliance with previous orders of the court
- personal mitigation.

Where a child is convicted by the Magistrates Court or the Crown Court, then (save where the offence is homicide) that court must remit the case to a Youth Court unless satisfied that it would be undesirable to do so.

In the case of a child defendant, a significant mitigating factor would be the youth of the defendant. The courts have demonstrated a willingness to reduce a sentence to reflect the lesser responsibility for wrongdoing and the lesser awareness of the consequences of the offence. Nevertheless, in the case of serious offences by children, the courts are prepared to pass long sentences to protect the public and to act as a deterrent to others.

Where a child is convicted of murder and is sentenced to be detained during Her Majesty's pleasure (the equivalent of life imprisonment for an adult), the tariff or punitive term is set by the Home Secretary in accordance with the recommendation of the Lord Chief Justice (2000a). This is an interim position, pending new legislation to give effect to the decision of the European Court of Human Rights in the case of Thompson and Venables (*T v. United Kingdom: V v. United Kingdom* [2000]). Here, the Home Secretary of the day had increased the tariff, apparently in response to public opinion as expressed by the tabloid press.

The European Court of Human Rights ruled the Home Secretary was not ‘an independent and impartial tribunal’ as required by Article 6.

Information about the child offender Before sentencing, the court will normally wish to obtain information about the child offender’s family and education. This will normally be provided by the youth offending team in the form of a pre-sentence report. It is unusual for a report from a psychologist or psychiatrist to be requested, and it is not clear what procedures would be used to obtain such mental health advice.

Community sentences The courts have a range of sentences especially designed for young people: these include orders designed to address the child’s offending by individual sessions or group work (supervision order) and orders that are designed to punish by depriving the child of free time (attendance centre orders). The new action plan order combines elements of both types of order, as well as providing a means by which the child offender may make reparation to the victim or the community at large. In the case of offenders aged 16–17 years, the courts may also make use of the ordinary adult community sentences.

Where a child has mental health problems, the court may pass a psychiatric community rehabilitation order or a supervision order with a requirement for treatment under the direction of a qualified medical practitioner. Neither order may be made unless arrangements have been made or can be made for the proposed treatment (sections 41, 41, 63–66 of the Powers of Criminal Courts (Sentencing) Act 2000). Furthermore, assessment of the likely response to treatment of the child would be a prerequisite for any mental health team to accept such a case from court. In addition, there is no obligation on the local child and adolescent mental health services (CAMHS) to accept such court-mandated treatment cases. In practice, court orders for treatment under the supervision of a named child psychiatrist are seldom made, since the lack of forensically trained CAMHS staff is well known to sentencing judges.

It seems that there is an urgent need for a national strategy to ensure that CAMHS are funded to provide these assessment and treatment services either to the youth offending teams or directly to the courts.

Custodial sentence The Youth Court may sentence children aged 12–17 years to a detention and training order for a period of 4 months to 24 months. Half of this sentence is served in custody, the other half under supervision in the community.

As well as the detention and training order, the Crown Court has the option in the case of grave crimes of imposing a longer period of detention under the Powers of Criminal Courts (Sentencing) Act 2000: section 91). Children convicted of murder will be given a mandatory life sentence under section 90 of the same Act.

A custodial sentence may be served in a prison service establishment, a local authority secure unit or in a privately run secure training centre. The decision where to place the child offender is made by the Youth Justice Board, following an assessment of the child by the youth offending team.

Civil legal context

Within the civil law, children may be dealt with in two main contexts: public law proceedings such as care proceedings, and civil litigation. Within civil litigation, children may take a variety of legal actions, such as seeking damages. In these situations, children may be allowed to have a 'Litigation Friend' appointed to assist them in the court action. This provision does not exist in relation to the child defendant in criminal proceedings, but in Children Act 1989 proceedings a Children's Guardian may be appointed.

Public law proceedings involving children occur within the remit of the Children Act 1989. This Act brought together many disparate pieces of civil legislation in relation to children, with a view to simplifying legal intervention relating to children in need. The concept of children in need (Children Act 1989: section 17; Department of Health, 2000) covers children who require welfare provision which parents or carers have been unable to give, as well as children at risk of significant harm or children known to have suffered significant harm where a child protection intervention has usually occurred. The children in need under the Children Act 1989 are defined as follows:

'a child shall be taken to be in need if:

(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;

(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(b) he is disabled' (section 17(10)).

This definition of children in need is further clarified by the Department of Health, as follows:

'those whose vulnerability is such that they are unlikely to reach or maintain a satisfactory level of health and development, or their health and development will be significantly impaired without the provision of services' (Department of Health, 2000: para. 1.8)

However, there is little in the Children Act 1989 to indicate how professionals are meant to deal with children in need who are also offenders within the criminal justice system. There is no guidance, for instance, to parents, carers or local authorities about whether – or how – any objection could be raised to the prosecution of a child in need, as defined in Section 17 of the Children Act 1989 (Home Office *et al*, 1989) and in other guidance (Department of Health, 2000), whether or not that child is placed at home, accommodated by the local authority or under a full care order.

The notion of an appropriate adult, a Litigation Friend or a Children's Guardian to advise or assist a young child defendant facing a prosecution is not mentioned within the Children Act 1989, nor is this mentioned in any of the existing criminal statutes listed above as being advisable or possible in order to address the welfare needs of the child.

Links between civil and criminal justice systems

Overall, the strong impression emerges that there has been little or no cross-referencing between the criminal and civil legislation which currently affects children and young people. Having said this, admirable efforts are made within the current youth justice system as recently amended by the Crime and Disorder Act 1998 to establish relevant principles in relation to young people who offend. These principles are summarised as follows:

- 'Preventing offending by children and young persons
- having regard to the welfare of children and young persons
- avoiding delay
- proportionality in sentencing
- the prevention of discrimination' (Ashford & Chard, 2000: pp. 9–10, 1.27).

Ashford & Chard (2000) also makes the point that recent criminal legislation in relation to juveniles shows an increasing emphasis on the principles of restorative justice (JUSTICE, 2000) rather than retributive justice. However, if this is a change in sentencing approach in relation to young offenders, then it is more applicable to the range of sentencing options available for children and young people convicted of less serious offences.

At present, the principles of restorative justice do not apply, for instance, to children or young people found guilty of murder, for which there is a mandatory sentence of indeterminate conviction under section 90 of the Powers of Criminal Courts (Sentencing) Act 2000. As pointed out in the report by JUSTICE on children and homicide, 'childhood, therefore, provides scant protection from the full rigours of the law or the philosophy of retribution which underlies its application to adults' (JUSTICE, 1996).

Human rights and child defendants

The most important human rights document is the European Convention on Human Rights. Since 2 October 2000 the principles of this Convention have been incorporated into domestic law by the Human Rights Act. Every public body and court of law is required to make decisions in compliance with the principles of the Convention. In the field of youth justice the most important guarantees are:

- article 3: the prohibition of torture and inhuman and degrading treatment or punishment
- article 5: the right to liberty
- article 6: the right to a fair trial
- article 8: the right to respect for private and family life.

The UK is also a signatory to the United Nations Convention on the Rights of the Child. This establishes general principles that in any decision involving a child, the best interests of the child shall be a primary consideration (article 3) and that a child has the right to express his or her own views in all matters affecting that child's life (article 12). The Convention also deals specifically with the youth justice process in articles 37 and 40. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (commonly referred to as the 'Beijing Rules'; Office of the United Nations High Commissioner of Human Rights, 1985) provide more detailed guidelines (Commentary on the Beijing Rules is quoted in Ashford & Chard, 2000: pp. 793–794).

The fact that a right to legal representation exists does not mean that the child will have the intellectual and emotional ability to instruct a lawyer adequately. In civil and care proceedings children are presumed to be unable to instruct a lawyer, as they are considered to be too young to assume the responsibility for making decisions. To deal with this problem an adult is appointed to make decisions in the best interests of the child. This adult is referred to as a Litigation Friend, but this role could be occupied by a Children's Guardian. The exception is where the court is satisfied the child is of sufficient age and understanding to instruct the lawyer directly.

No such concept of a Litigation Friend or a Children's Guardian exists for children in criminal proceedings. More importantly, the underlying assumption in criminal proceedings in the UK is that any child over the age of criminal responsibility will be competent to instruct a solicitor. However, conversely, one of the 'foundational' components of adjudicative competence in the USA (Bonnie & Grisso, 2000: pp. 32–33) is the competence to assist counsel or to instruct a solicitor.

Right to a fair trial

Article 6 of the European Convention on Human Rights provides a number of procedural guarantees for the child accused of crime. These include the

presumption of innocence; the right to be informed of the nature of the charges; the right to be legally represented; and the right of the accused to examine witnesses and call witnesses in his or her own defence. Read as a whole, article 6 guarantees the right of an accused to participate effectively in his or her own trial. With child defendants, the European Court of Human Rights has emphasised that this includes a developmental perspective:

'it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings' (*T v. United Kingdom: V v. United Kingdom* [2000]).

In a Concurring Judgment in the cases of *T v. the United Kingdom* and *V. v. the United Kingdom* [2000], Lord Reed spelled out the fact that article 6 should be interpreted to take into account developmental factors in relation to children:

'There is, on the other hand, nothing in Article 6 to indicate that there can be any derogation, in cases involving children, from the principle that the trial process should provide for the effective participation of the accused who must be able to follow the proceedings and to give instructions where necessary to his lawyer. In order for that principle to be respected in cases involving children, however, the conditions under which the trial is held (including the procedure followed) have to be such as will permit such participation, taking into account the age, level of maturity and intellectual and emotional capacity of the child concerned' (*T v. the United Kingdom: V v. the United Kingdom* [2000])

In response to this court ruling, a Practice Direction (Lord Chief Justice, 2000*b*) has been issued which suggests ways in which the trial procedure might be modified for a child defendant to promote understanding and participation. The suggestions include allowing the child to sit with his or her family and legal advisers, the removal of wigs and gowns, simplification of the language used in court and taking regular breaks.

Psychologists and psychiatrists may be involved in advising the court on the child defendant's capacities and suitable modifications that are required to ensure effective participation. However, it is not clear how such mental health advice would be sought, who would request it and whether or not it would occur in every case.

Human rights issues are central to the involvement of child defendants in courts, since there is also an overlap between the child defendant's cognitive abilities and the child's ability to participate effectively in the trial process. Ashford & Chard (2000) make the point that:

'the defence lawyer must be alert to the possibility that his/her client may be unable to participate effectively in the trial process. This is particularly important when the client:

- is under the age of 14 years; or
- has learning problems or a history of absence from school' (Ashford, 2000: p. 45, 3.26 A).

The need to take a developmental approach to medico-legal assessments is emphasised in a recent review of international practice by Ashford & Bailey, 2004. The authors (Ashford & Bailey, 2004) propose two key suggestions:

- 1 That all child defendants, including those charged with serious offences, should be tried in youth courts to ensure that there are safeguards to enhance understanding and participation.
- 2 Child defendants should have an assessment of their emotional and cognitive functioning before the venue and mode of trial are decided.

It appears that the Thompson and Venables case as a whole raised serious human rights issues, which have led among other things to the Lord Chief Justice's new Practice Direction (Lord Chief Justice, 2000a) on the treatment of child defendants tried in the Crown Court. Now that the Human Rights Act is in force, there will no doubt be further legal challenges in respect of the handling of child defendants, and indeed other aspects of the criminal justice system. It is not clear on which point such challenges would be successful.

Criticism has already been made by the committee that monitors the compliance of European states with the UN Convention on the Rights of the Child in relation to the low age of criminal responsibility in the UK. The UN standard minimum rules for the administration of juvenile justice (the Commentary on the Beijing Rules) state:

'The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.)' (Office of the High Commissioner for Human Rights, 1985).

Given that the median age of criminal responsibility in most European Union countries (excluding the UK) is 14–15 years (JUSTICE, 1996), it seems likely that implementation of the Human Rights Act, which will take on board the Commentary on the Beijing Rules in relation to juvenile justice, will result in pressure for the UK age of criminal responsibility in children to be substantially raised. Furthermore, the European Court of Human Rights judgment *v. the United Kingdom in the Bulger case (T v. the United Kingdom: V v. the United Kingdom [2000])* stated that the two 11-year-old boys concerned had not been able to give factual instructions to their lawyers, nor had they been able to follow the trial proceedings, and therefore the two boys had been denied a fair hearing in breach of article 6 of the European Convention on Human Rights.

A further issue that merits consideration in relation to human rights and has been little discussed in relation to child defendants is the question of the postponement of therapy or treatment until after the trial, so that evidence is not affected by therapy. Clinical practice with children and young people facing criminal charges suggests that, even in the presence of diagnosed psychiatric disorders, child defendants will seldom be channelled towards treatment or therapy until the trial process is completed. This issue is addressed in the JUSTICE report, where it is noted that:

'Dealing with juvenile homicide in adult Courts, where cases may take many months to come to trial, inevitably mean substantial delays in providing the psychological help required by many of the young people; effective therapy can only begin after the verdict because of the need to preserve the integrity of the evidence and the fear that treatment may affect it' (JUSTICE, 1996).

The report, however, goes on to note that:

'This is, of course, equally a cause for concern in the case of child victims of abuse, and has led to moves to allow their evidence to be taken early.'

In this respect, it is clear that the human rights of the child witness in relation to child abuse cases in the UK have been more fully addressed in recent years with measures to support and protect the child witness from the full rigours of the adult court setting.

The review of the criminal courts (Auld, 2001) has recommended that, in grave cases against young defendants, a specialist youth court should be constituted with a judge of appropriate level and at least two experienced youth panel magistrates. Implementation of these recommendations on specialist youth courts would represent a significant shift towards recognising some of the specific developmental needs of child defendants. However, as noted earlier, the government's Summary of Responses (Home Office, 2004) to *Youth Justice – The Next Steps* (Home Office, 2003) has rejected the Auld recommendations and has instead suggested training for the judiciary and for lawyers, plus a child defendant's pack for children facing trial.

The Crown Prosecution Service has published guidance for professionals undertaking pre-trial therapy with child witnesses in order to give advice on appropriate therapeutic approaches which would have a minimal effect on the child's subsequent evidence and where the child witness can receive necessary therapy before the trial, as would any equally needy adult witness (Crown Prosecution Service *et al*, 2001).

The Home Office Minister Keith Bradley announced a consultation process with a view to producing guidance on pre-trial therapy for young child defendants (Michael Sieff Foundation, 2001). Such guidance would represent a welcome acknowledgement of the welfare needs and human rights of children awaiting trial.

Developmental psychology and child development

It seems obvious enough that children and young people are not yet grown up and fully developed either physically, emotionally or cognitively. Nevertheless, there are few widely accepted, integrated models of child development which incorporate all aspects of the child's development over time and into the lifespan. Much thinking about children's development in the past has relied on models now seen to be outdated, not empirically based and reliant upon pre-fixed 'stages' through which it is supposed that all children will pass, at roughly the same age.

In reviewing the limits of traditional theories of child development, Rutter & Rutter note that 'For the most part, there has been a concentration on the universals of development, rather than on individual differences.' (Rutter & Rutter, 1993: p. 1). They point out that this is one of the weaknesses of the 'big' theories of child development, since they ignore the scope for individual variation and change over time in the overriding assumption that 'there is just one developmental path that is followed by everyone and that there is a fixed end point of normal maturity.' (Rutter & Rutter, 1993: p. 2). They then go on to list three ways in which the 'big' theories (for example Kohlberg, 1964; Piaget, 1932 and Erikson, 1950) are lacking. First, such theories do not fully integrate an understanding of the role of genetic factors, biological maturation and brain pathology into their models. Second, most of the 'big' theories ignore or play down the vital role of children's social lives in their development. Third, 'each of the 'big' theories has been shown to be wrong, or at least seriously lacking in some of the concepts that are central to the theory'. (Rutter & Rutter, 1993: p. 3).

Hence it is clear from Rutter & Rutter's 1993 review of the evidence that one theoretical model will not explain the whole of child development. Rather, it is necessary to draw on a range of perspectives which are empirically based, in order to capture something of the complexity of a person's development through childhood and across the lifespan. It is clear that children's development should be seen as an important aspect of lifespan developmental changes where certain childhood developmental trajectories will show continuities into adult life, such as the likelihood of early onset conduct disorder persisting into adult life (Farrington *et al*, 1990) but other trajectories may show discontinuities when associated risk factors such as inconsistent or poor parenting, delinquent peers, drug abuse can be improved or removed from the child's environment.

Such persistence or desistence from developmental trajectories is relevant in the consideration of the needs of child defendants, since the more serious child offenders are very likely to be on an adverse and possibly life-course persistent trajectory into adult life (Moffitt, 1993). Appropriate intervention, even at the relatively late point of contact with the criminal justice system, carries the

possibility of directing the child towards law abiding behaviours and away from a life-course persistent pattern of adult criminality.

Steinberg & Schwartz argue persuasively that:

'In order to make well informed decisions about the treatment of juveniles who have entered the juvenile justice pipeline, therefore, policy makers, practitioners and mental health practitioners need to be familiar with the developmental changes that occur during childhood and adolescence in the capabilities and characteristics that are relevant to competence, culpability and amenability. Legislators need this information in order to create age related laws and statutes that are developmentally appropriate and scientifically reasonable' (Steinberg & Schwartz, 2000: p. 20).

Steinberg & Schwartz describe developmental psychology as concerning the 'scientific study of changes in physical, intellectual, emotional and social development over the life cycle'. They go on to define development as a

'change that is systematic, age related, universal, predictable, enduring and adaptive, in the sense that development usually involves some sort of lasting improvement in competencies and capabilities that occurs across the population around a given age' (Steinberg & Schwartz, 2000: p. 21).

They describe development as occurring as a result of biological forces (maturation), environmental forces (learning) or usually from a combination of both these factors.

Advances in neuroscience research, including gene–environment interactions and their effects on the development of psychopathology, such as antisocial behaviour, are reviewed by Rutter (personal communication, 2004). However, no direct causal link has been demonstrated between genes and subsequent antisocial behaviour as Rutter points out:

'In short, the genes do not directly predispose to disorder but, equally, environmental hazards do not lead to mental disorder in the absence of genetic liability. The findings require a rejection of the old sharp dichotomy between genetic causation and environmental causation and, instead, emphasise that genes often act through the environment' (Rutter, personal communication, 2004).

There is clearly a need to establish the basic facts about normative child development across populations of children since policy changes affecting large groups of children need to be based on scientific findings with accepted, universal validity. Individual variations or pathological development in certain child defendants can then be compared with accepted norms for that age group.

It is generally agreed that child development can be described across several categories and these include: physical, intellectual, emotional and social development (Steinberg & Schwartz, 2000).

Physical development

It is accepted that all children pass through certain observable physical developmental stages such as babyhood, infancy, toddler, young child, pre-pubertal, adolescent or teenager and young adult. Such physical developmental stages bring with them less clearly agreed intellectual, emotional and social skills that must be mastered before passing on to the next stage.

On a more mundane level, the physical development of the child is relevant to the way in which the child defendant is perceived by those dealing with his or her case. The emergence of the secondary sexual characteristics in the pubertal child will transform the appearance of that child, sometimes dramatically, from that of a young child to that of an adolescent.

Puberty can start as early as 9 years of age or may not emerge until the age of 16 years with completion of the pubertal process some 2–3 years later. Secondary sexual characteristics will emerge with maturation of the genitals in both boys and girls, the growth of body hair and hair around the genitals as well as a change in the shape of the child's face, from the roundness associated with a young child to the more angular features seen in adults. Pubertal children also show growth spurts and may suddenly become much taller with a more defined adult body build and changes in the tone of the voice. Furthermore, it has been noted that children of the same chronological age may present as physically very different, with some pre-pubertal girls and boys looking like children whereas others, more fully into puberty, may look like sexually mature adults (Rutter & Rutter 1993: p. 13).

It has been noted that

'...it is clear that psychological development must be heavily dependent on biological maturation. The functioning of the mind has to be influenced to a major extent by the structure and organization of the brain. The question is whether maturational variations play a significant role in individual psychological differences.' (Rutter & Rutter, 1993: p.13).

However, there is little reliable connection between externally visible signs of puberty in children and the stages of psychological development described below. In the words of Steinberg & Schwartz (2000):

'it is inappropriate to draw inferences about a juvenile's psychological or social maturity from his or her physical appearance.' (Steinberg & Schwartz, 2000: p.25).

'A tall, physically mature juvenile with an adult appearance may well have the decision making abilities of a child. An adolescent who carries himself like an adult today may seem like a child tomorrow. Variability between individuals is still more important; it is difficult to draw generalisations about the psychological capabilities of individuals who share the same chronological age.' (Steinberg & Schwartz, 2000: p. 24).

Furthermore, the evidence suggests (Herman-Giddens *et al*, 1997) that African American youngsters are likely to arrive at puberty earlier than other youths and this clearly has implications for the possible misattribution of psychological maturity to such children facing criminal charges.

In conclusion, physical development in children is closely intertwined with other aspects of their development. However, children reach physical developmental stages at widely differing ages and there is no reliable correlation between the physical and psychological development of children. The message from this aspect of the research is clearly that physical appearances can be deceptive and that training is needed to assess true developmental status.

Intellectual development

Intelligence is a somewhat blurred concept consisting of many different facets. In children, intellectual development is a changing, dynamic process which is affected by other aspects of the child's development and which can be helped or hampered by environmental and other factors in the child's life. Development of the human intellect is potentially a life long learning process and is not confined only to the childhood and adolescent years. Adults are able to learn new skills and to develop new intellectual capacities well into old age, although this can also be a period in the life span characterised by loss of cognitive skills through dementia and organic brain disease. However, it remains the case that enormous developmental changes occur in the intellectual capacities of children between birth and late adolescence. Improved cognitive or thinking capacities are only one aspect of the maturational and learning processes which need to occur to turn the naturally impulsive, self-centred, short-term thinking toddler into a reasonably self-controlled, reflective young adult, able to take a long-term view.

It is often said that an individual's intellectual abilities have developed to adult levels by the age of 17 years (Steinberg & Schwartz, 2000). Although this may be the case, the development of good judgement, emotional and social maturity usually takes much longer to achieve. It is also important not to group all adolescents together since the intellectual functioning of a young adolescent may be very different from that of a late teenager. Furthermore, although adolescents may have the intellectual equipment to attempt adult reasoning, they do not have the experience and range of information on which to base sensible judgements. In addition, adolescents, by dint of their immaturity, may be more susceptible to external social and environmental factors and this may mean that their intellectual capacity is not used to make good judgements, such as avoiding drugs or crime opportunities.

Intelligence is a psychological trait, found in all individuals across all cultures and populations. Intelligence is measured as IQ (intelligence quotient) using standardised instruments which give a designated mean of 100 and a range of scores from 20 to 150 or over. Individuals with IQ scores of 120 upwards are described as having superior functioning, whereas those with IQ scores of less than 70 have a range of learning difficulties which are associated with social, educational and psychiatric problems.

There are certain definitional problems in relation to terms such as mental impairment, learning disabilities, learning difficulties and mental retardation.

Mental impairment may take the form of specific learning disabilities (such as dyslexia) as well as more general learning disabilities (mental retardation). It is important to recognise that the term 'mental impairment' used in the context of the Mental Health Act 1983 is a legal one, the definition including the element of behavioural disturbance.

Historically, the Departments of Health and Education have adopted terminologies sufficiently similar to cause confusion. The differences are subtle; whereas the Department for Education and Skills refers to 'learning difficulties'

and classifies them as ‘moderate’ and ‘severe’, the Department of Health adopts the term ‘learning disabilities’, and uses the World Health Organization (WHO) categories: this also includes the terms ‘moderate’ and ‘severe’ but for different groups. Table 1 sets these categories against approximate IQ figures. Local variation confuses this distinction further with some health services using the term ‘learning difficulties’ and many child health services, while referring to learning disabilities, use the educational categories. Furthermore, psychiatric classification systems such as DSM-IV (American Psychiatric Association, 1994) and ICD-10 (World Health Organization, 1992) refer to learning disabilities as ‘mental retardation’ and give different IQ ranges for categories which are also named differently. The different terminology and IQ ranges used in DSM-IV and ICD-10 are important since these classification systems are used routinely by psychiatrists and psychologists during assessment and are increasingly referred to by lawyers in criminal and civil court proceedings. The mental retardation IQ ranges for DSM-IV and ICD-10 are set out in Tables 2 and 3

The child with general learning disabilities (mental retardation) functions overall at a lower mental age. However, there are also difficulties from the psychological perspective in the casual use of the term ‘mental age’, even although this can be a useful legal concept. Whatever the cause of the child’s disability, its effect is usually to give uneven, superimposed selective deficits. The result may be to leave the individual with misleading islands of ability that may encourage the interviewer to see the child as more competent than is the case.

The cautious note sounded above about the misleading impression of maturity given by young children who have reached puberty early should be emphasised even more in relation to pubertal, learning-disabled children and young people. Given the eagerness to please and suggestibility of learning-disabled children who may have learned legal or psychological phrases off by heart, the automatic recitation of such jargon should not be taken to indicate a good understanding of the process but, rather, an attempt to take some control over a new situation by attempting to sound competent or streetwise.

An understanding of the role of learning disability in offending behaviour by children is extremely important because studies (West 1969; West & Farrington 1973, 1977) have provided evidence of the role of low intelligence in the development of delinquency. Farrington’s longitudinal data from this sample of inner-London boys

Table 1 Definition of terms used by the UK Departments of Health and Education

Approximate IQ range	Learning disabilities (Department of Health)	Learning difficulties (Department for Education & Skills)
70–80	Borderline	Mild
55–70	Mild	Moderate
40–55	Moderate	Severe
20–40	Severe	
<20	Profound	

showed that harsh parenting, early separation from parents, aggressiveness at school age at age 12–14 years and low IQ were the factors which most reliably differentiated violent from non-violent offenders (Farrington, 1978).

In reviewing the literature on the association between low IQ and delinquency, Rutter & Giller (1983) confirmed the findings of West & Farrington (1973, 1977) and noted that, in part, this association is due to the earlier association with troublesome behaviour in the classroom. Rutter & Giller (1983) went on to conclude that the association between low IQ and delinquency is robust, and quoted the American research by Hirschi & Hindelang (1977) which shows an association between official and self-reported delinquency and low IQ. In a more recent review of the association between IQ and crime, Rutter stated that

‘Empirical findings from more recent epidemiological and longitudinal studies have amply confirmed the reality and robustness of the association. More importantly, they have taken the issue forward through the testing of possible mechanisms.’ (Rutter *et al*, 1998: p. 140).

Rutter *et al* (1998) also notes that the IQ–delinquency association is not a function of social class but that it is associated with hyperactivity and attentional problems. In exploring the nature of the IQ deficit implicated in delinquency, Moffitt (1993) has concluded that the cognitive deficit particularly applies to verbal skills and to functions concerned with planning and foresight and that these associations are mainly evident with life-course persistent antisocial behaviour that begins in early childhood. However, it is not clear from the review by Rutter *et al* (1998) of the literature on IQ and delinquency exactly what the causal mechanism is for this strong association.

It seems clear that referred clinical populations will have a higher comorbidity for other problems (Rutter *et al*, 1998: p.157), and from a clinical perspective it is likely that more-disturbed children with such comorbidity will be less amenable to treatment and more likely to reoffend. There has long been evidence linking significantly increased rates of psychiatric disorder with mental retardation or learning difficulties (Rutter 1964; Rutter *et al*, 1970a, b; West, 1982) as shown in Rutter *et al*'s (1970a) Isle of Wight study.

Table 2 ICD–10 categories of mental retardation (World Health Organization, 1992)

Code	Name of condition	IQ range
F70	Mild mental retardation	50–69
F71	Moderate mental retardation	35–49
F72	Severe mental retardation	20–34
F73	Profound mental retardation	under 20
F78	Other mental retardation	Assessment of IQ not possible owing to severe impairment
F79	Unspecified mental retardation	Evidence of mental retardation, but not enough information to assign patient to any above category

Table 3 DSM-IV categories of mental retardation (American Psychiatric Association, 1994)

Code	Name of condition	IQ range
V62.89	Borderline intellectual functioning	71-84
317	Mild mental retardation	50-55 to about 70
318.0	Moderate mental retardation	35-40 to 50-55
318.1	Severe mental retardation	20-25 to 35-40
318.2	Profound mental retardation	Below 20 or 25
319	Mental retardation, severity unspecified	Strong presumption of mental retardation but untestable

It is also the case (Rutter *et al*, 1970a, b; Richardson *et al*, 1979) that the lower the IQ the greater the association with psychiatric disorder (30% of 'retarded' children and 50% of 'severely retarded' children were rated as disturbed in Rutter's 1970a sample). Taking these links between low IQ and psychiatric disorder along with the association noted above between low IQ and crime, it is clear that disturbed, learning-disabled child offenders are likely to present commonly before the courts.

However, it is not at all certain that the existence of either the learning disability or the psychiatric disturbance will be picked up by the court system, or that the child will be perceived as needing a mental health assessment. These difficulties in relation to learning-disabled children underline the need for comprehensive training programmes for all those working with child defendants.

Hence, an intelligent 10-year-old facing criminal charges might have some elements of cognitive maturity to do some of this abstract work. However, developmentally it is not possible that such a 10-year-old could draw on the same range of life experiences as an 18-year-old nor is it possible that he could use logic to analyse and process his decision-making (to plead guilty or not guilty, or to instruct his solicitor) in the same way as could an adult.

From various developmental frameworks (Rutter & Rutter 1993) it seems likely that the ability of children to make sense of their world and to develop their cognitive capacities to a higher level of abstraction in adolescence, depends very much on the presence of a stable parenting figure to help children with their explorations, to encourage more new hypotheses to be developed and to answer their questions. In children from neglectful or abusive family backgrounds seen in clinical or court settings, the epistemological drive or the quest for knowledge is often absent or very limited with a lack of lively curiosity about the child's own environment. Children who have not learned to question and challenge their environments may be very poorly placed to question the complex legal system in which they may find themselves when facing criminal charges.

The extent of vocabulary and the level of comprehension will also be relevant for child defendants undergoing a police interview. If the language used by

interviewing police officers is inappropriately adult, then the child's comprehension of proceedings and human rights may be significantly impaired. It is important to assess these factors since the child may present as misleadingly articulate but in fact may have a poor comprehension of spoken language.

The ability to solve problems, especially social problems, is another feature of intelligence. It is important to include an assessment of problem-solving ability as part of the overall assessment of the child defendant's cognitive ability. For example, in terms of social interactions is the child able to identify existing problems? Another cognitive ability relevant in relation both to intelligence and crime, is 'planning'. Can the child formulate an effective plan of action so as to solve a problem? In terms of risk assessment the question to answer might be 'does this person plan their actions or do they usually act impulsively?'

Issues such as the ability to maintain attention and concentration may also have a role in the young person's ability to accurately assess situations and make informed judgements. Reduced attention span and concentration could markedly affect the ability of the child defendant to follow complex legal arguments or court processes.

Any risk assessment of a child defendant will need to explore the extent to which that child feels any guilt or shame in relation to the offence and whether or not the child has any empathy towards the victim. Empathy, morality and guilt are abstract concepts that demand a certain level of cognitive development.

Only once a series of cognitive developmental stages are achieved can a child take on the perspective of others and then include this perspective in moral decision making. Therefore, young people with low intelligence or other cognitive deficits may have deficits in terms of their ability to experience empathy or guilt since they have difficulties generally in taking on the perspective of others.

It is important to point out that while the legal system may ask for an individual's 'mental age', this may be a misleading concept. For example, if an 18-year-old boy with learning difficulties (accused of indecent assault) were assessed and found to gain scores typical of a 10-year-old, it might be misleading to say he is 'functioning' at the level expected of a 10-year-old. This young man has had 18 years of psychosocial experiences and these are unlikely to have been typical of those experienced by most 10-year-olds. Moreover, many of his wants and needs are going to resemble those of an 18-year-old rather than a 10-year-old (for example with regards to girlfriends and sexual contact). However, it may still be the case that such an 18-year-old defendant is indeed impaired in his ability to make logical judgements based on an understanding of abstract legal concepts.

Deficits in 'theory of mind' (Bowler, 1992; Happe, 1994a, b; Frith, 2003) are felt to underlie mental disorders such as autism and Asperger syndrome. In these disorders the child is unable to perceive or understand the thoughts and feelings of others, but very few offenders (adult or child) suffer from formally defined autism or Asperger syndrome (Mawson *et al*, 1985).

However, if individuals with autism and Asperger syndrome are thought to have difficulties in the dimension of social problem-solving, then clearly many young people in the justice system have marked problems in these areas (Happé & Frith, 1996), particularly in the appreciation of the impact of their actions on the victim.

Emotional development

Emotional development is dependent on several factors including cognitive development and the child's experience of parenting. In terms of thinking or cognitive ability, from the age of approximately 9 years, a child can distinguish between accidental and intentional provocation, and from 12-years-old, children will increasingly see issues from a number of different perspectives. Development of the young person in other areas (for example achieving intellectually understanding of concepts such as guilt) will also have an impact, leading to greater emotional introspection and consideration of the consequences of their actions for themselves and others in emotional terms.

An important aspect of emotional development is the capacity to defer gratification and to control unacceptable impulses. Self-control and the ability to resist impulses increase gradually from an early age and this continues into adult life. Biological factors such as the functioning of the frontal lobes of the brain play an important role in the development of self-control and of other abilities. The frontal lobes are involved in an individual's ability to manage the large amount of information entering consciousness from many sources, in changing behaviour, in using acquired information, in planning actions and in controlling impulsivity. Generally the frontal lobes are felt to mature at approximately 14 years of age.

Acquisition of self-control overlaps with the development of other characteristics. For example, understanding the emotional consequences of their actions does much to shape the behaviour of the normally developing young child and adolescent.

Another important aspect of emotional development in children is the capacity to monitor their own behaviour and to alter it accordingly. Gaining self control, deferring impulses, recognising the impact of behaviour on others and monitoring their own behavioural patterns are also part of the process of developing insight into how their own minds work, how their behaviour affects relationships with other people and how to make the right choices about behaviour in future.

These aspects of emotional development are highly relevant in the assessment of child defendants, many of whom are emotionally immature, impulsive and lacking insight into the impact of their criminal behaviour on others. Emotional understanding of the decision-making processes involved in the criminal justice system is essential if the child defendant is to participate fairly in the trial. However, the British Medical Association (BMA) guidance, looks at factors affecting competence, and notes that:

'Quite young children express mixed feelings but it is not until middle childhood that they gain much insight into their own emotional lives and realise when there is emotional ambivalence.'
(British Medical Association, 2001: p. 99).

Emotional understanding of processes such as ambivalence and emotional stability are often characteristics which are considerably underdeveloped in the deprived and disturbed children who tend to present as defendants before criminal courts. This may mean, for instance, that an emotionally immature child who is impatient with his own, inexplicably mixed feelings about offending, may be unable to reflect on these feelings and to make suitably informed choices, for instance, about how to plead or how to instruct his solicitor.

Attachment theory is one way in which the emotional needs of the developing child can be understood. Bowlby defined attachment as:

'any form of behaviour that results in a person attaining or maintaining proximity to some other differentiated and preferred individual, usually conceived as stronger and wiser' (Bowlby, 1973).

In Bowlby's model, children form attachments to caregivers who can provide a 'secure base' from which the child can begin to explore the physical and social world. On the basis of these attachment relationships, Bowlby postulated that children create 'internal working models' of the relationships with the attachment figure which will become later templates for their own relationships with others (Bowlby, 1973).

A substantial subsequent evidence base (Ainsworth *et al*, 1978; Trevarthen, 1979; Main & Solomon, 1986, 1990; Stern, 1995; Solomon & George, 1999) now exists to support the hypothesis that attachment patterns are a robust construct across cultures. There is good evidence that development of close interpersonal relationships in early life, constitutes an important basis for later social functioning and that attachment qualities constitute an important part of those early relationships (Rutter, 1995; Shaver & Cassidy, 1999). However, attachment theory alone is insufficient to explain the complex and sometimes paradoxical attitudes shown by antisocial young people towards others. DeKlyen & Speltz note that 'not all aspects of the parent-child relationship pertain to attachment and not all child outcomes are theoretically associated with attachment history' (DeKlyen & Speltz, 2001: p. 322) since children learn from interaction with peers, teachers and from observation of other parent-child relationships. Furthermore, in the years since Bowlby's 1973 original work, more complex, evidence-based models describing reciprocal transactions between the child, family and the external world have been developed and reviewed (Crick & Dodge, 1994). Within Dodge *et al*'s 1986 social processing model, a series of steps in processing social cues is described including encoding the perception of environmental cues with selective storage of certain features, the mental representation of the encoded cues and the attribution of meaning to these mental representations including the perceived intentions of others. In subsequent steps, the individual draws on a behavioural repertoire to decide on actions and then monitors the effects of his actions using the encoded, perceived intentions of others. Linked to the social processing theory of Dodge *et al* (1986) is cognitive social psychology which describes such encoded memories as scripts (Shank & Abelson, 1977), constructs of social concepts (Higgins & Bargh, 1987) or relationship schema (Baldwin, 1992).

It is possible to make comparisons between the attachment derived internal working model of Bowlby (1973), the encoded storage of environmental cues

within Dodge *et al*'s (1986) social information processing model and cognitive social psychology models (Shank & Abelson, 1977; Higgins & Bargh, 1987; Baldwin, 1992), all of which attempt to describe ways in which the child responds to cues from the environment and builds up patterns of subsequent behaviour.

It seems likely that scripts and schemata which were encoded by an abused or neglected child will contain many more negative or hostile attributional biases than scripts from adjusted, non-abused children. A review of the perceptual and attributional processes in aggression and conduct problems (Pettit *et al*, 2001) draws on the social information processing model of Dodge *et al* (1986).

Pettit *et al* propose a model for the development of aggression and conduct problems in which early experiences (such as abuse or insecure attachments) may lead to knowledge structures (such as hostile world schema and self-defensive roles) which give rise to perceptual attributional processes (such as hypervigilance to hostile cues and hostile attributional bias) resulting in aggressive behaviour and conduct problems (Pettit *et al*, 2001: pp 304–305). If this model is accurate, then it might explain the persistently hostile, aggressive or untrusting attitudes towards authority figures noted in abused and antisocial children and young people which make them very difficult to engage in treatment. Clinical assessment often indicates that such antisocial children are also insecurely attached to carers, whereas the empirical evidence reviewed above also suggests that such children have very distorted, hostile mental schemata (or poor internal working models) of relationships with others.

Studies of the impact of attachment patterns and the neurobiology of attachment (Schore, 2000), the neurological impact of trauma (Perry & Pollard, 1998) and the effects of child abuse and neglect (Glaser, 2000) on the child's brain have concluded that the psychosocial patterns of attachment laid down in early infancy have a lasting effect on the neurobiology of the child's brain, and that if the child has been subjected to trauma and or abuse there may be lasting effects on the way in which the child's brain subsequently responds to human relationships.

Overall, such research findings on attachment and interpersonal relationships are relevant to the emotional development of child defendants, many of whom are known to have suffered child abuse and neglect and to have had very disrupted patterns of care. In assessing the attitude of child defendants to their crimes, the likely impairment in the child's understanding of human relationships and hence impairment in their feelings of guilt, remorse or empathy, need to be borne in mind.

Social development

Models of normal child development (Rutter, 2002) take as a starting point the fact that the developing child can rely on the constant presence of a responsible, caring parent or parents who will protect the child from adversity and who will also provide a good developmental role model. A key issue in relation to children who go on to offend is the nature of their social development in the family and

the community, and the quality of their adult role models for social behaviour. The physical, intellectual and emotional development of children needs to be tested out, in many ways, within the social environment and it is in this social context that a child's delinquent behaviour may first become apparent.

In reviewing the moral development of children, Wolff emphasises the importance of positive parenting experiences in the acquisition of a moral sense in early childhood, and notes:

'Although psychoanalysts were right to stress the importance of attachment to parents as a basis for conscience development, and were also correct in identifying the emotions as the vital mediators in socialization and the process of identification with parental standards as crucial, they erred in their overemphasis of anxiety and threat as promoting moral behavior in childhood. Dunn's [see Dunn *et al*, 1995] observations and Kochanska's [see Kochanska, 1991] experimental studies show that very young children best acquire moral ideas in an affectively positive atmosphere, when they joyfully comply with their mother's requests and strictures, making them their own. The importance of pleasure at doing right has long been underestimated' (Wolff, 2002: p. 272).

It is worth adding that the pleasure of a normally developing child in doing right is often reinforced by parental praise for the good behaviour in a way which is much less likely to occur in the climate of inconsistent or punitive parenting that prevails in the homes of antisocial children and young people.

Many social factors are usually involved in the development of delinquency, whether these relate to peer-group offending, drug-related crime or delinquent family backgrounds which may condone juvenile crime. West & Farrington (1973) found that factors such as criminality or social deviance of parents, conflict-ridden or 'broken' homes, lack of early training or caring supervision and being brought up in a delinquent neighbourhood were predictive of later delinquency and that 'good homes' were one of the protective factors against offending.

Studies looking at the backgrounds of very seriously disturbed children who murder (Bailey, 1996), for instance, have shown that their home backgrounds are characterised by paternal psychopathy, alcohol abuse and absence from the home, coupled with a history of violent behaviour by fathers both in the home and in the community. Depressive illness in the mothers of juvenile murderers, histories of serious sexual and physical abuse of the juvenile murderers and past histories of a range of other offending behaviours were also noted in Bailey's 1996 study and replicated in other studies looking at serious juvenile offenders (Boswell, 1996).

An important child-related aspect of social development is moral development, and this is of particular relevance for children facing criminal charges where certain assumptions are made about moral understanding. Moral development is also a crucial issue to be addressed within clinical psychological assessment and also within a psychiatric assessment of the child defendant. The moral development of children is a complex issue which has implications for both the understanding of the seriousness of the offence and the presence or absence of any subsequent empathy for the victim or remorse for the crime. In reviewing these issues, Apler (2004, p.54) notes that:

'...awareness of rules and feelings forms the basis of the child's moral development. This awareness depends on both cognitive and emotional maturation. Emotional maturation involves a developing capacity for empathy and the ability to experience guilt and shame. These factors are necessary for the child to be able to understand that certain behaviours can be wrong.'

However, there are particular difficulties in assessing moral understanding in delinquent child defendants. Apler notes that:

'Delinquents may have a reduced capacity for emotional awareness of right and wrong. They may not understand, or be concerned with, the emotional effect of their behaviour on the victim. They may not be able to experience or acknowledge feelings of guilt or shame. Angry adolescents who appear indifferent to the consequences of their behaviour fall into this category.' (Apler, 2004: p. 56).

An account of the psychological and social factors involved in understanding the moral and psychological components of criminal responsibility in children is given in the JUSTICE report by Professor Sir Michael Rutter (JUSTICE 1996: pp. 7-9). In this report the following point is made:

'there is no single age at which it can be said that physical and mental development has reached maturity.' (JUSTICE 1996: p. 9).

Of particular relevance in consideration of the issue of moral responsibility in children is the statement:

'Older children are able to use internal justice principles and have concern for victims of wrong acts, whereas younger children tend to be more governed by fear of punishment after detection' (JUSTICE 1996, p.8).

To which might be added children with learning disabilities and young people who have a delay in their development of such internal moral reasoning principles.

It is well established in the literature (Rutter *et al*, 1998: p. 40) that juveniles under the age of 18 years account for approximately a quarter to a third of all offences in England and Wales and in the USA, and that the majority of these juveniles will not progress to patterns of adult offending and will, in a sense, grow out of the delinquent behaviour. However, clear continuities between serious juvenile offending and adult delinquency are also documented (Rutter *et al*, 1998). These crime demographics suggest that deficits in moral reasoning or development cannot be responsible alone for the increasing rates of juvenile crime and that other social factors, such as peer-group pressure, and drug abuse, may be involved, particularly for less serious juvenile offenders.

In contrast, a much smaller subgroup of offending youths (life-course persistent) (Moffitt, 1993) will show early indications of later criminality. In reviewing the outcomes for the younger, preadolescent offenders, Scott states:

'As compared to adolescents who first offend a few years later, the criminal conduct of younger teens (and preadolescents) is less likely to be part of a typical developmental process that will progress to a stage of natural recovery and desistence. Their behaviour is more likely to reflect a nascent personality disorder, developing over time through the interaction of individual vulnerabilities and environmental factors (Moffitt, 1993).' (Scott, 2000: p. 314).

The role of defective moral reasoning in children who show signs of emerging personality disorder, may be relevant for the smaller group of very serious child

offenders who are known to have more than one psychiatric disorder. Links between early-onset, severe conduct disorder and later personality disorder have long been described (Robins, 1966, 1978; Jessor & Jessor, 1977; West, 1982) and in all these studies the role of parental delinquency, violence and child abuse are highlighted as significant aetiological factors.

More recent research (Frick *et al*, 1994) showed that psychopathic traits labelled callous-unemotional can be measured reliably in children with severe behavioural disturbances and these traits are not interchangeable with behavioural definitions of conduct disorders. In a review of the evidence, Frick *et al* (1994) suggest that these traits may designate a unique group of children with conduct disorders, which in turn provides a more explicit link to adult conceptualisations of psychopathy and severe personality disorder.

Clinical assessment of juvenile offenders will help to distinguish between those children who are involved in less serious offending within an unacceptable social context and those more disturbed, callous or unemotional children who commit more serious offences for reasons that might be more internally driven.

Role of the psychological assessment

An important element in the psychological assessment of child defendants and indeed all children is the developmental framework within which children are viewed by healthcare professionals such as psychologists and psychiatrists. Such a developmental framework assumes that the child's cognitive, emotional and moral development starts in infancy and continues throughout childhood, adolescence and early adult life. Hence, the arbitrary fixation of an 'age of criminal responsibility' at age 10 years in England has no obvious grounding in developmental psychology and takes no account of the wide variation in cognitive abilities and moral understanding of 10-year-old children that will also be affected by the issues concerned and the context of the crime.

In their involvement in the legal system psychologists and psychiatrists are frequently asked to comment on the cognitive abilities of a child defendant. The question asked might be 'is the young person intelligent enough to know that what they have done is seriously wrong?'. The usual course of action is for a psychiatrist to explore whether any mental illness is present (as this may have interfered with their decision-making process) and for a psychologist to assess the intellectual abilities of the young person. The psychologist will then decide whether the young person is intelligent enough to have known the act was seriously wrong and to have had knowledge or intent regarding the consequences for the victim (and themselves). However, the assessment should also address the question of whether or not the young person is actually competent to understand the charges, to give sensible instructions to a solicitor and to make decisions about whether to plead guilty or not guilty. In guidance produced for researchers and research ethics committees by the Royal College of Psychiatrists

(2001) the question of children's competence to take decisions in relation to healthcare or treatment is discussed. It is noted that:

'It follows from these considerations that any assessment of a particular child's competence to take a specific decision rather than on any standardized tests (although these may be useful in alerting professionals to the possibility that the child is unusually mentally advanced or delayed in comparison with others of the same age). Furthermore, the assessment needs to be based on how the child deals with the matter after discussion and help with understanding and with ways of thinking about the issues. First impressions can be misleading.'

'But, even with the most detailed and skilled of assessments, it will still be the case that capacity needs to be considered as a graded dimension and not as something that is either present or absent. Even preschoolers are likely to have some appreciation of what is involved in their healthcare but they will have a limited capacity to appreciate long-term consequences and will be restricted on their capacity to balance competing considerations.'(Royal College of Psychiatrists, 2001: p. 58).

Although the College's guidance refers specifically to consent issues in relation to research into treatment, these considerations are closely linked to notions of 'adjudicative competence' in the USA (Bonnie & Grisso, 2000: pp. 73–100) and adjudicative competence is, in turn, linked to the UK question of fitness to plead within a trial context (Ashford & Chard, 2000: pp. 46–47).

The British Medical Association 2001 guidance on consent, rights and choices in healthcare for children and young people lays out a practical approach to assessing competence and ten good practice principles are identified. These include the observation that:

'Competence is dependent on the task in hand. It should be constantly reassessed as children develop and as different treatments, tasks or challenges are faced.'(British Medical Association, 2001: p. 94, 5.2).

This statement makes it clear that child developmental issues are very important in the assessment of competence and that competence to make decisions is not a once and for all capacity but is affected by the task in hand and the maturity of the child.

In further discussion of factors affecting competence the British Medical Association 2001 guidance points out that:

'there is huge individual variation both in the time taken to reach particular mental levels and in the ultimate levels attained. Accordingly, no rule about competence that is based just on chronological age can possibly be satisfactory... The influence of emotional factors and experience on competence mean that mental age is not an answer either, although it might give better clues about competence than chronological age.'(British Medical Association, 2001: pp. 98–99, 5.4).

Ashford & Chard (2000) go on to itemise the issues that a clinical psychologist with experience of assessing adolescents should be asked to address, as follows:

'...assess the client's intelligence; identify any developmental or cognitive defects; and assess how any deficits are likely to affect the client's ability to:

- (a) understand the charges and the possible consequences of guilty and not guilty pleas;
- (b) make rational decisions relevant to the legal process;

- (c) remember relevant facts;
- (d) communicate in a coherent manner;
- (e) understand testimony in court; and
- (f) behave appropriately in the court room' (Ashford & Chard, 2000: p. 46, 3.27).

Depending on the outcome of such an assessment by a clinical psychologist, Ashford & Chard (2000: p.46) suggest that the defence lawyer may then have to consider raising the question of fitness to plead (see section on mental health issues, Ashford & Chard, 2000: pp. 36–40). Assessment of fitness to plead in the UK has tended to be something undertaken only with the most obviously impaired children who are psychiatrically disturbed or severely learning disabled.

In respect of trial on indictment, the issue of fitness to plead falls into two stages. First, a jury has to determine whether the accused is operating under such a disability that he or she cannot be tried on the indictment. Second, if the jury finds that there is such a disability, it must decide whether the accused did the act or made the omission charged against him or her as the offence. If the jury finds that the accused did not do the act, then the accused must be acquitted. If the jury finds that the accused did do the act, then the court has a range of options open to it (section 5 of the Criminal Procedure (Insanity) Act 1964). These options range from a hospital order to an absolute discharge.

In practice, the psychiatric evidence on fitness to plead given in most child defendant cases tends to assume that the child is fit to plead unless seriously impaired. This assumption means that a trial, sentencing and disposal can occur and that treatment can be started subsequently with the knowledge that the court proceedings will, by then, be completed.

However, the wider possibility that most child defendants may not be fit to plead to charges by dint of their extensive psychopathology, developmental immaturity and impaired judgement, is seldom considered in the UK or the USA for the reasons mentioned above.

In the USA, fitness to plead is described as 'adjudicative competence' or competence to stand trial. However, Bonnie & Grisso describe how, in the USA

'concerns about the capacities of immature youths to understand the nature of the adjudication process and to make critical decisions related to it are being raised in legislatures and courts across the nation.' (Bonnie & Grisso, 2000: p. 73).

If an American youth is found to be incompetent to stand trial, he is committed for restoration of competence and the proceedings can continue, in due course, in the same way as described above for the UK jurisdiction.

Bonnie & Grisso (2000: p. 77) emphasise that the competence to assist counsel (or the ability to instruct a solicitor in the UK context) is the 'foundational' component of adjudicative competence.

Thomas Grisso has outlined a conceptual framework for competence in juveniles (Grisso, 2000*b*: p. 142) based on legal and psychological definitions of competence. His framework consists of four stages:

- 1 Understanding charges and potential consequences:
 - ability to understand and appreciate the charges and their seriousness
 - ability to understand possible dispositional consequences
 - ability to realistically appraise the likely outcomes.
- 2 Understanding the trial process:
 - ability to understand, without significant distortion, the roles of participants in the trial process (for example, judge, defense attorney, prosecutor, witnesses, jury)
 - ability to understand the process and potential consequences of pleading and plea bargaining
 - ability to grasp the general sequence of pre-trial/trial events.
- 3 Capacity to participate with attorney in a defense:
 - ability to adequately trust or work collaboratively with attorney
 - ability to disclose to attorney reasonably coherent description of facts pertaining to the charges, as perceived by the defendant
 - ability to reason about available options by weighing their consequences, without significant distortion
 - ability to realistically challenge prosecution witnesses and monitor trial events.
- 4 Potential for courtroom participation:
 - ability to testify coherently, if testimony is needed
 - ability to control own behavior during trial proceedings
 - ability to manage the stress of the trial.

These criteria overlap with the list of issues described by Ashford & Chard (2000: pp. 29–30) to be assessed by the clinical psychologist or psychiatrist seeing the child defendant.

In a paper given to the Sieff Conference (Michael Sieff Foundation, 2001) Joyce Plotnikoff has made the case for a ‘child defendant’s pack’ to give basic information to children about court processes and the roles of various lawyers and court staff. Plotnikoff’s concern is echoed in a study showing that young defendants have trouble separating the role of defence counsel from court authority and the meaning of a not guilty plea (Peterson-Badali & Abramovitch, 1992).

Such difficulties are clearly developmentally based and in a study looking at changes in young people’s reasoning about plea bargaining, Peterson-Badali & Abramovitch point out that young people:

‘begin to develop the ability to think in terms of hypothetical conditions some time in early adolescence, but it takes several more years for them to achieve their adult potential to do this, especially to use this ability in unusual and emotionally charged circumstances, such as their own legal proceedings. The time line for this process varies from one adolescent to another’ (Peterson-Badali & Abramovitch, 1993).

Assessment of the cognitive abilities of child defendants is clearly a crucial issue in relation to young offenders where learning disability is known or suspected. It is essential for those working within the legal system in relation to

child defendants to recognise that learning disability cannot be assessed simply by visual inspection of the child defendant, i.e. it is not adequate to say 'he or she seems perfectly normal'. As noted above, physical appearance can be deceptive and true developmental status needs to be professionally assessed.

There may be highly relevant discrepancies between aspects of the child defendant's cognitive functioning, which have a direct effect on the child's fitness to plead. For instance, a 15-year-old child might have the everyday living skills of a 7-year-old set in the physically mature, pubertal body of an ordinary looking adolescent.

In a similar way an articulate child may use phrases and expressions, including professional terminology and legal words, which give a false impression of a higher level of understanding. This is particularly true with 'streetwise' children who may quickly learn to parrot phrases picked up from defence lawyers or social workers so that they do not lose face in discussions about their case, can make some sort of verbal contribution, even although the parroted phrases are not understood. In this way children can acquiesce in the legal process without truly understanding what is going on and at the same time giving a false impression of their ability to participate effectively in the trial process.

However, little or no UK research has looked at the cognitive capacities and level of understanding of child defendants facing serious criminal charges. Recent research from the USA (Grisso, 2000*b*) has suggested worrying variations in the cognitive capacities of youths as trial defendants when learning disability is confirmed. The point is made that:

'Even when adolescents' cognitive abilities are similar to adult capacities, theory suggests that they will deploy those abilities with less dependability in new, ambiguous, or stressful situations, because the abilities have been acquired more recently and are less well established.' (Grisso 2000*b*: pp. 158-159).

To which must be added the point that there is anyway a considerable variation in the level of competence achieved by different children at any one age (Grisso, 2000*b*). It must be said that, precisely because of this wide individual variation in the degree of children's understanding at different ages, the notion of a categorical cut-off point for age of criminal responsibility makes little sense.

If this is the case, it could then be argued that the age of criminal responsibility should be set at the same level as, for instance, the legal voting age and the age for entry into the services (18 years in the UK) since all these age limits relate to the consequences of one's actions, both good and bad, for society as a whole. Alternatively, it could be argued that the issue of criminal responsibility should be argued out on a case-by-case basis, relying on assessment information about the mental age, developmental maturity and level of understanding of the individual child defendant.

In court, a child's ability to give an account of events can be impaired by a number of factors including poor physical health on the day of the trial, overwhelming anxiety or anger about giving evidence or intimidation by the physical surroundings of the court. From a psychological perspective, however,

the basic evidential capacity of the child defendant will depend on two main components:

- the child's mental state; this needs to be stable, therefore any disturbance that might interfere with the child's perception of the world and the ability to understand it will impair evidential capacity
- the child's cognitive ability; a concept that includes a large number of facets, such as memory, understanding and the ability to communicate. The last includes both verbal (speech) and non-verbal means as well as the ability both to comprehend and to express thought.

Any psychological assessment therefore has to be across a range of domains. Discrepancies are particularly likely between the following areas:

- Educational achievement, adaptive skills and social and emotional development. A child's ability often is gauged on the former and given as being equivalent to that of a certain age, for example a 15-year-old might have the everyday living skills of a 7-year-old. However, a child who might be unable to cope with monetary change or public transport might well have had the emotional and social experiences of an older child and the drives of an adolescent.
- Language reception and expression. If a child is articulate, perhaps even using legal phrases, it does not necessarily mean that they understand. Even when there is an adequate understanding, comprehension will depend on the child's ability to pay attention.

Conclusions

When discussing developmental psychology and child development, it is important to bear in mind that none of these processes operate in a vacuum. The child's experience of parenting (important in relation to physical and emotional development), the provision of appropriate role models (moral development and self-control depend heavily on appropriate modelling and social learning) and the learning environment (whether it fostered or hindered intellectual development) all play a vital role. For instance, during adolescence, as young people take on a wider and more social perspectives and become integrated within a peer group, they will nevertheless tend to adopt social values and norms (i.e. ideas about 'right and wrong') which are very similar to those of their parents. Hence, despite any demonstrations of teenage rebellion (often short-lived) the majority of adolescents will tend to adopt parental mores, either law-abiding or delinquent.

Finally, it should be emphasised that clear-cut ages do not apply to the completion of physical, intellectual, emotional and social development. For most young people, given appropriate parenting, normal biological development, and a structured, emotionally supportive and stimulating environment, the bulk of the aforementioned processes should be achieved by late teenage years and a

considerable degree of intellectual maturation may have occurred by 14 years of age. However, there may be delays in one or more of the above areas. For example an intelligent boy may be delayed in terms of emotional development and quite unable to see things from another's perspective, whereas another young person may have average intelligence but excellent appreciation of the thoughts and feelings of others. As Rutter notes:

'Accordingly, any decisions about how young people should be dealt with must take into account this marked individual variation' (Rutter *et al*, 1998: p. 29).

All of the above issues need to be considered when assessing an individual's developmental status and his criminal responsibility for alleged crimes.

As noted in the JUSTICE report:

'[developmental psychology] offers two important insights, which underpin the working party's proposals. The first is that children who commit homicide are likely to be seriously disturbed. This will in all probability mean that they need to be detained; but it also means that they need treatment. The second is that children are different from adults, both in their ability to reason and to foresee consequences and the fact that they are subject to maturation and significant change' (JUSTICE, 1996: p. 3, 1-10).

One option which is untenable in the light of the existing evidence on child development, is to ignore these facts altogether. As Steinberg says 'ignoring this factor [child development] entirely is like trying to ignore a very large elephant that has wandered into the room' (Steinberg & Schwartz, 2000: p. 30).

Mental health issues

Most criminal offences (and virtually all serious criminal offences) contain both a physical and a mental element in their commission. This means that the prosecution must prove not only that the defendant has committed a particular voluntary act (*actus reus*), but also that the act was done with a particular state of mind (*mens rea*), i.e. in most cases an intention to commit the crime, although the precise degree of intention required varies from offence to offence. The criminal justice system is based on the premise that blame can and should be attributed, and the attribution of blame has been called the 'originating and vindicating activity' in the whole criminal justice process. Thus, within the criminal legal system, young people can be found guilty of an offence and therefore blamed for the commission of the offence, but may not be responsible for their actions because of:

- limitations in cognitive development
- limitations in moral development
- psychiatric disorder.

The role of child and adolescent forensic psychiatry in the assessment of child defendants is relevant in relation to the child or young person's ability to participate effectively in the trial process and the child's fitness to plead. Psychiatric opinion in relation to the child defendant's mental state will also be highly relevant in relation to sentencing and disposal, since evidence of mental illness may require intervention under the Mental Health Act 1983, and serious psychiatric disturbance that does not fulfil the criteria for admission for assessment or treatment under the Mental Health Act 1983 may still affect the disposal by the court. Furthermore, the level of psychiatric disturbance, the capacity to accept responsibility and to develop appropriate remorse, moral understanding, empathy for victims and motivation for personal change will need to be assessed in order to recommend appropriate treatment. An essential component of the psychological and psychiatric assessment of child defendants is the capacity for change inherent in a young person: can the child or young person be expected to change his or her attitudes and behaviour to some extent – or to any extent? The assessment of the capacity for change should deal with the time scale within which any such change may be expected, since this has direct implications both for sentencing and for any treatment recommendations.

Although the concept of 'mentally disordered offenders' is usually associated with adults, on the basis of the research literature (Office for National Statistics, 2000), it could be argued that the great majority of the children and young people facing very serious offences could be seen as mentally disordered offenders, on account of their acknowledged high levels of emotional and behavioural disturbances.

As described below, delinquent and violent children and young people have increased rates of psychiatric disorder, notably conduct disorder. Other psychiatric disorders reviewed by Bailey (2002) in relation to violent children include depression, present in 15–31% of those with conduct disorder (Goodyer *et al*, 1997), the rare occurrence of psychotic disorders (Clare *et al*, 2000; Kazdin, 2000), autistic spectrum disorders (Howlin, 1997) and prodromal personality disorder in children (Bailey, 2002). However, the majority of child defendants are unlikely to show signs of serious mental illness such as schizophrenia; rather, they are likely to present with a severe, childhood-onset conduct disorder with a wide range of additional contextual psychosocial problems, which should be assessed in a methodical and forensically oriented manner (see below).

There are certain psychiatric disorders that, by their presence, are likely to impair the judgement of the child, and this will have relevance if that child is facing criminal charges. Kazdin's review of the implications for decision-making and choices by adolescents (Kazdin, 2000) notes the evidence base for attention-deficit hyperactivity disorder present in childhood as a predictor of delinquency and criminal behaviour in adolescence and adult life (Farrington *et al*, 1990; Lahey & Loeber, 1997). High rates (32%) of post-traumatic stress disorder in delinquent youths have been noted (Steiner *et al*, 1997). Kazdin notes the increased exposure to a variety of traumas, such as child abuse and domestic violence, in delinquent as opposed to non-delinquent samples (Kazdin, 2000: p. 49). The possibility of a link between attention-deficit hyperactivity disorder and post-traumatic stress disorder in delinquent children increases the likelihood of a cumulatively adverse effect on the judgement of such children, both in terms of avoiding criminal behaviour in the first place and subsequently in participating fully and fairly in the trial process.

Studies looking at the characteristics and background of young children committing serious offences have found high levels of parental delinquency and psychopathy, childhood abuse and exposure to domestic violence, a higher than expected level of neuropsychiatric disorders in the offending children, and an association with learning disability, academic failure and childhood-onset, severe conduct disorder (Myers *et al*, 1995a,b; Bailey, 1996; Bailey *et al*, 2001; Vizard, 2004). Research looking at the outcomes for juvenile offenders in adult life confirms that the earlier the onset of offending behaviour, the more likely this behaviour is to persist into adult life (Moffitt, 1993) and to be associated with heavy use of the mental health, criminal justice and welfare systems (West & Farrington, 1973; Office for National Statistics, 2000).

Unlike adolescents in their late teens committing minor offences such as car theft or burglary, most of whom can be expected to 'grow out' of this behaviour in adult life, very young children committing serious offences are usually much more disturbed and have shown signs of worrying antisocial behaviour from early childhood. 'Life-course-persistent' conduct disorder (Moffitt, 1993) or antisocial behaviour beginning before age 10 years (the age of criminal

responsibility in the UK) has been associated with later adult disturbance, delinquency and poor parenting (Quinton & Rutter, 1988). Such contextual influences have a profound effect on the developmental pathway taken by the child from such a disadvantaged background. For instance, Kazdin has noted that delinquent adolescents with psychiatric disorders:

'are likely to be living with a parent with a lifetime or current mental disorder, such as antisocial behaviour, alcohol or drug abuse, to be living in a home where there are marital conflicts, harsh child rearing and poor parental supervision' (Kazdin, 2000).

A developmental model for the emergence of severe personality disorder in childhood has recently been proposed (Vizard *et al*, 2004) which builds on the evidence base described above and which suggests a developmental trajectory from childhood to adult life for the small number of children who show early signs of severe personality disorder in childhood.

It is known that exposure to certain traumas such as witnessing domestic violence increases the likelihood of boys going on to become sexual abuse perpetrators (Skuse *et al*, 1998). Furthermore, mixing with antisocial peers will provide the wrong contextual cues for the delinquent child, since it has been shown (Dishion & Patterson, 1997) that peers will positively reinforce deviant behaviour and ignore more normative behaviour. Psychiatric and psychological assessment of the child defendant must, therefore, take account of the context within which the delinquent behaviour has occurred and should assess the child's capacity to think independently from such influences.

Many child defendants suffer from a degree of learning disability, which in some cases may be sufficiently severe for the child or young person to fail a psychiatric test of fitness to plead. Ashford & Chard describe the test of whether a defendant is fit to plead as having been set out by Alderson in *R v. Pritchard* [1836] over 150 years ago as follows:

'Whether he is of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence – to know that he might challenge (any jurors) to whom he may object – and to comprehend the details of the evidence...if you think that there is no certain mode of communicating the details of the trial to the prisoner so that he can clearly understand them, and be able properly to make his defence to the charge; you ought to find that he is not of sane mind. It is not enough, that he may have a general capacity of communicating on ordinary matters' (Ashford & Chard, 2000: p. 46, 3.28).

Ashford & Chard (2000: p. 46) comment that the above fitness to plead test is still 'firmly embodied in our law', and whereas it might have been designed originally to deal with adults, at the present moment the assessing psychiatrists should presumably apply these principles to the mental state of children from the age of 10 years upwards. As pointed out in the JUSTICE report, 'The criminal process through which such children have to go provides its own contradictions. Young children will neither comprehend nor be able fully to participate in the process' (JUSTICE, 1996: p. 1, 1.4).

Bearing in mind the issues described above in relation to the cognitive abilities of child defendants, the general developmental immaturity of young children

and the lack of sophisticated reasoning abilities in such children, it is worth considering whether a 'normal' (i.e. not disturbed and not learning-disabled) child aged 10–14 years would be fit to plead in criminal proceedings, let alone a seriously psychiatrically disturbed and developmentally delayed child of the type most frequently described as appearing before the courts for serious offences. Nevertheless, under the current legal system, the task for the assessing forensic child psychiatrist is to undertake a full mental state examination of the child, to exclude the possibility of serious mental illness in terms of the Mental Health Act, to describe the most significant features of the child or young person's mental state, to gather these features together into a clear formulation of the child's presentation, to express a diagnostic opinion in terms of ICD–10 or DSM–IV diagnostic categories and to make clear recommendations to the court about disposal and treatment. Given the current confusion about terminology in relation to learning disability (see section on intellectual development, pp. 33–38) it is important that diagnostic opinion is expressed consistently with reference to the accepted classification systems, DSM–IV or ICD–10, using the correct terminology, 'mental retardation'.

Models for the psychiatric assessment of delinquent, violent or sexually offending children have been described by Bailey (2002), Sheldrick (1999), Gowers (2001), Hall (2000), Kazdin (2000), O'Callaghan & Print (1994), Vizard *et al* (1996), Graham *et al* (1997) and Gray & Wallace (1992). A key component in such assessment models is the need to combine the formal assessment of mental state (see above) with forensic considerations of interest to the courts such as capacity, fitness to plead, remorse, insight into the offending behaviour and empathy (Sheldrick, 1999). These forensic elements in the psychiatric assessment will allow the courts and other professionals to make judgements about the likely mental state of the child or young person at the time of the crime and also about the difficult question of risk (Dolan & Doyle, 2000) of future offending.

The evidence base for the assessment of violent children within a forensic population (Sheldrick, 1999; Gowers, 2001; Bailey, 2002), learning-disabled offending children (O'Callaghan & Print, 1994; Hall, 2000) and sex-offending children and adolescents (Gray & Wallace, 1992; Vizard *et al*, 1996; Graham *et al*, 1997) confirms that the fullest possible background information on the referred child, an agreed inter-agency plan for the assessment and a semi-structured approach to clinical interviewing with the use of validated assessment instruments constitute the best approach. In her description of the framework for the assessment of violent children, Bailey (2002) explains the links between health needs assessment and risk assessment of offending children. Her assessment model derives from the Salford Needs Assessment Schedule for Adolescents (SNASA; Kroll *et al*, 1999), which was developed for use with all adolescents from high-risk violent children to less disturbed children in the community. Bailey states, 'needs assessment may both inform and be a response to the risk assessment process. Repeated needs assessments may be termed "risk management"' (Bailey, 2002).

The issue being highlighted in relation to the needs assessment of such children is that they have such a wide range of psychiatric, health, educational and social disabilities (21 areas of need are included in the Salford Needs Assessment Schedule) that any assessment of the risk the child might pose needs to take all these factors into account. However, Kazdin's review of diagnostic criteria and assessment methods indicates that, even when best clinical practice is followed, there remain considerable differences of opinion between parents, teachers clinicians and even the young person him- or herself about the severity of the symptoms being presented (Kazdin, 2000). Kazdin's conclusion is that individuals who just miss the cut-off for criteria in one disorder may well fulfil criteria for another disorder, and are likely to show impairment in psychosocial functioning. Kazdin notes that:

'those identified with a disorder are likely to be impaired, but many youths who do not meet the criteria are also impaired and may have a poor long term prognosis. The high prevalence rate of mental disorders among adolescents, particularly among those who are delinquent, clearly underestimates the scope of the problem' (Kazdin, 2000).

Kazdin points out that the prevalence rate of mental disorder in community samples is near to 20% (Kazdin, 2000). However, studies of delinquent youths with conduct disorder have shown much higher rates of psychiatric disturbance. In the Dunedin study (Moffitt *et al*, 2001: p. 141) it was noted that 90% of the conduct-disordered children in the sample had comorbid disorders, and a study of imprisoned young offenders by Lader *et al* (2000: p. 62) recorded that 95% of these young people showed evidence of mental disorder (personality disorder, psychosis, neurotic disorder, drug dependency or hazardous drinking) and 80% of them had more than one disorder.

Given the correlation between psychiatric disturbance and learning disability, it would clearly be of assistance to the assessing forensic child psychiatrist (Hall, 2000) to be able to see the clinical psychology report on the child defendant before undertaking any assessment of fitness to plead. Ideally, liaison between the psychologist and psychiatrist on this issue would be most helpful to the Court, the Crown Prosecution Service and the defence solicitors.

The Audit Commission's review of the problems involved in dealing with young offenders (Audit Commission, 1999) pointed out that rates of prosecution were low, not enough was done to address offending behaviour, the agencies involved often worked in an uncoordinated way and that little had been done to prevent young people from offending in the first place. It is clear that such poor inter-agency liaison around cases involving seriously disturbed child defendants can only exacerbate their problems. At present, no system exists whereby the coordination of various mental health assessments of child defendants can be ensured. Indeed, there is no agreed system in existence to ensure that any health assessment at all is undertaken on a child appearing before the courts. If the child defendant looks reasonably 'normal' and appears to be articulate, there is no particular reason why the defence solicitor or the court should ask for a psychiatric or psychological report. However, assumptions about whether or not

a child is normal cannot be made without assessment. It is anomalous and unacceptable that children appearing as witnesses are automatically considered to be vulnerable within the Youth Justice and Criminal Evidence Act 1999, and yet no such assumption of vulnerability exists for child defendants. Furthermore, learning-disabled adults appearing as witnesses are considered to be vulnerable within the Youth Justice and Criminal Evidence Act 1999. Both adult vulnerable witnesses and child witnesses now have the expectation of an assessment to determine the nature and extent of their vulnerability, yet no such expectation exists for child defendants. As things stand in 2004, it is still possible for a child defendant with all the health needs and risk factors identified above not to have been assessed at trial, particularly if there is no care order on the child and if the child or the parents object to such an assessment.

Ethical considerations

The issue of alternative legal provisions for child defendants in the UK is closely tied in with the age of criminal responsibility, ability to participate effectively in the trial process, fitness to plead and the other issues discussed above. However, before discussing any possible alternative legal provisions, it is important to recognise that, from a psychological and psychiatric perspective, alternatives to the present legal set-up should not be suggested in order to avoid entirely the 'punishment' element of the conviction of a child defendant for a criminal offence. Although a child developmental perspective highlights the developmental immaturity and cognitive limits of children within the criminal justice system, it also underlines the great importance for children (whether defendants or not) of learning the consequences of their actions and of understanding the extent of society's displeasure with them in relation to illegal behaviour.

Any psychological treatment or psychotherapeutic intervention with young delinquents is, after all, partly focused on helping the young person to learn (often for the first time) that there are consequences for them of behaving illegally and that better choices need to be made. Whatever alternative legal provision may or may not be decided upon by the government for juveniles facing criminal charges, the mental health and emotional and social development of these children will not be helped if an entirely therapeutic approach is taken, 'glossing over' the serious consequences of the offending behaviour. It is important, therefore, that any move towards a more developmentally appropriate legal provision for child defendants is not misconstrued as an overly liberal attempt to protect delinquent children from the consequences of their behaviour.

Having said this, the underlying philosophy behind ethical psychiatric and psychological practice with clients must be towards the rehabilitation of offenders (whether juvenile or adult), with assessment and treatment interventions designed to understand the moral, cognitive and emotional deficiencies that led to the offending behaviour, with a view to providing guidance for the young person to move away from offending and towards a more adaptive way of life.

In philosophical terms, psychiatric or psychological treatment interventions will attempt to deal with the young offender (who is usually a victim of childhood abuse or trauma) in an even-handed manner, discouraging the self-pitying wish of many young offenders to have retribution against those who have victimised them. Treatment will instead encourage them to get to grips with the consequences of their offending behaviour, to understand the impact of this behaviour upon their victims and to use these insights in future to avoid further offending. In this sense, therefore, the 'restorative justice' approach to dealing with young offenders is much more in tune with the ethical, moral and developmental realities of working with children and young people who offend.

A second ethical consideration is the lack of adequate welfare input for child defendants during the criminal trial process and the deferment of psychological treatment interventions. Given the high level of childhood abuse, trauma and psychiatric disturbance experienced by most young children facing serious criminal charges, it is essential that these children should be seen as 'children in need' under the terms of section 17 of the Children Act 1989 (Home Office *et al*, 1989) and also in other guidance (Department of Health, 2000).

Many – if not all – children aged 10–14 years facing extremely serious charges will fulfil the threshold criteria required for a full care order under the Children Act 1989, will have experienced significant harm in terms of the 1989 Children Act and will be at risk of continuing to experience significant harm to their mental health while psychological treatment is withheld. Nevertheless, many child defendants are remanded into secure accommodation for the many months or years leading up to their trial, during which time little attention is given to welfare and treatment issues, since that is not the role of secure accommodation services.

Such child defendants in secure accommodation are often not under care orders to the local authority, and therefore parental responsibility continues to reside with their parents or carers, many of whom will have significant mental health, psychosocial and delinquent histories which may make them ambivalent or hostile towards local authorities, health professionals and others dealing with their child within the criminal justice system. In practice, it may be difficult or impossible for these professionals to work cooperatively ('in partnership' in terms of the Children Act 1989) with such parents, who may be defensively aligned with their child's denial of the offending behaviour. Although there are always exceptions to this situation, where some parents may fully cooperate with the investigating authorities, in many cases a true partnership with the parents or carers cannot be achieved in the shadow of pending criminal proceedings involving their child, without a court order.

In specific terms, parental consent is required for the psychological or psychiatric assessment of a child defendant where no Children Act 1989 order exists. Situations have occurred in the UK involving young child defendants facing serious charges where parental consent for psychiatric or psychological examination has been refused, despite overt disturbance in the child defendant.

The ethical issue arising here concerns the point at which the local authority has a duty of care to intervene on welfare grounds to ensure the adequate assessment and subsequent treatment of disturbed young child defendants. At present, there appears to be no clear, relatively speedy and effective method by which a local authority can intervene to supervise the welfare management of a young child facing serious criminal charges where parental responsibility lies with the parent or carer. Committing a child to secure accommodation or other secure setting does not resolve this issue, since parental consent is still required for assessment and treatment. In practice, local authorities appear to take a back seat in relation to the management of cases in which a care order does not exist,

and in which a young child faces criminal charges. There appears to be no legal onus on local authorities to intervene proactively with such child defendants by, for instance, suggesting the appointment of Children's Guardian to look after the child's welfare interest throughout the criminal court proceedings.

A third ethical issue arising in relation to child defendants during the trial process is the tension between the criminal justice system and the welfare needs of the child defendant. This tension usually results in a decision being made that therapy or assessment is best avoided so that evidence is not contaminated (best case scenario), or no decision is made but there is a general, rather muddled consensus among professionals that further discussion of therapy or assessment is best avoided until the trial is over (worst case scenario).

Issues in relation to the potential 'contamination' or distortion of evidence in relation to child defendants have already been debated (and partly resolved) in relation to child witnesses. The argument against pre-trial therapy for child witnesses has always been that the wrong type of therapy, consisting of leading questions or suggestive group discussions during which crime details might be reviewed, can introduce false memories or might distort the child's memory in some way. A secondary aspect of the argument against pre-trial therapy for child witnesses has been the fact that a more traumatised (weeping, distressed, anxious) child in the witness box is said to have a more convincing effect upon the jury than a composed, articulate child who has had a chance to recover from trauma through therapy. A double jeopardy situation arises here, therefore, for children who have suffered trauma, in that entering the witness box (either as a witness or as a defendant) is likely to be a highly traumatic experience in which hesitant and inadequate evidence will be given. On the other hand, should the child witness or defendant have received therapy and become calmer and more composed, there is the possibility of rejection of this evidence by the jury (so it is said) on the grounds that it is too plausible (as a result of therapy). From an ethical point of view, such arguments are untenable and could be said to infringe the human rights of child defendants, since these children are entitled to such psychological assistance as may allow them to defend themselves as well as possible during the trial.

The inconsistency of preventing child defendants from accessing effective psychological help is shown up by the consideration given to adult witnesses or defendants who suffer from diagnosed psychiatric disorders that require treatment. It could never be held, for instance, that an adult man suffering from schizophrenia and alleged to have committed a serious offence should have his medication withdrawn on the grounds that it would alter his mental state and affect the evidence given. Rather, the court would be anxious that fair treatment should be meted out to the mentally ill adult defendant so that he could conduct an adequate defence and be truly fit to plead. It is important that similarly balanced ethical consideration is given to the mental health needs of child defendants.

The age of criminal responsibility

Every criminal jurisdiction should have a minimum age below which children shall be presumed not to have the capacity to infringe the penal law (UN Convention on the Rights of the Child, article 40(3)(a)). This minimum age 'shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity' according to the Beijing Rules (Office of the High Commissioner for Human Rights, 1985: rule 4.1). In England and Wales the age of criminal responsibility is set at 10 years (Children and Young Persons Act 1933, section 50). As children under that age are presumed to be incapable of committing a crime, they can be neither arrested nor prosecuted in the criminal courts for an act committed before their 10th birthday. The age of 10 years is not remarkable in comparison with other jurisdictions in the British Isles (8 years in Scotland and 7 years in the Republic of Ireland), but is low in comparison with other countries in the Council of Europe, where the median age is 14–15 years. It has been noted that 'criminal responsibility depends on the notions of rationality and the capacity to control actions which may have to be modified in the context of children and young persons' (JUSTICE, 1996).

In England and Wales, a child who has attained the age of 10 years is subject to the full rigour of the criminal law. Until 1998 there was a presumption that a child under the age of 14 years was incapable of forming the necessary criminal intent. This presumption – known by the Latin phrase *doli incapax* – could be rebutted if the prosecuting authorities could prove that the child knew that the criminal act was seriously wrong, as opposed to merely naughty. With the abolition of the presumption of *doli incapax*, there is no longer any assessment of the child's moral understanding before attributing criminal culpability.

Although criminal offences cannot be sanctioned by the criminal law when committed below the minimum age for criminal responsibility, this does not mean that official intervention in the life of the child is avoided. For instance, frequently throughout Europe and notably in Scotland, the civil law and social welfare systems will be used to provide intense interventions and support. In England and Wales, welfare intervention in the life of the young child under the age of criminal responsibility is at the discretion of the local authority and is not something that will necessarily occur should the child's home circumstances appear to be adequate. In other words, England and Wales it is perfectly possible for a child under 10 years of age to commit a serious offence with no criminal or civil justice (welfare) response.

Until 1998 in England and Wales, a legal provision of *doli incapax* provided a rebuttable assumption that a child between the ages of 10 and 14 years was incapable of committing a crime on the grounds of an inability to distinguish sufficiently between actions that were 'seriously wrong' as opposed to 'merely

naughty or mischievous'. To some extent, protection for vulnerable child defendants was available through this provision on assessment of criminal responsibility by an expert psychiatrist or psychologist. However, the *doli incapax* provision was abolished in 1998 following criticisms of its relevance, given the lack of clear definition by the courts of the meaning of 'seriously wrong' and the lack of clarity about the types of knowledge the child is required to possess so that the *doli incapax* presumption can be rebutted.

The current age of criminal responsibility is unequivocally attained at the age of 10 years in England and Wales. In contrast, the age of criminal responsibility has been understood in two quite different ways within Scottish law and is described by the Scottish Law Commission's discussion paper (Scottish Law Commission, 2001) as follows:

- 'the "age of criminal responsibility" is the age below which a child is deemed to lack the capacity to commit a crime'. The paper goes on to say that it 'shall be conclusively presumed that no child under the age of eight years can be guilty of any offence' (Scottish Law Commission, 2001: 1.2). This is described as criminal capacity within section 41 of the Criminal Procedure (Scotland) Act 1995.
- 'By contrast, another meaning of age of criminal responsibility is the point at which the age of a suspect or offender has no relevance for his treatment or disposal as part of the criminal justice system, most typically the age at which an accused becomes subject to the full or adult system of prosecution and punishment'. The paper goes on to quote the 1995 Criminal Procedure (Scotland) Act as saying 'no child under the age of 16 years shall be prosecuted for any offence except on the instructions of the Lord Advocate or at his instance' (Scottish Law Commission, 2001: 1.3). This is described as immunity from prosecution, in section 41 of the 1995 Criminal Procedure (Scotland).

Hence Scots law, according to the Scottish Law Commission (2001), is using the age of criminal responsibility in both the senses of criminal capacity and immunity from prosecution.

The main thrust of the Scottish Law Commission paper is the suggestion that the rule on criminal capacity need no longer be retained and that 'the age of criminal responsibility is better conceptualised as relating to immunity from prosecution' (1.4). The paper concludes that 'approaching the age of criminal responsibility in this way not only gives greater coherence to Scots Law but also brings that Law more into line with other legal systems and with international conventions' (Scottish Law Commission, 2001: 1.4).

In practical terms, it appears that the Scottish Law Commission is suggesting raising the age of criminal responsibility to 16 years. However, if this is the case and 16 years becomes the age of criminal responsibility in Scotland, it is important to recognise that, unlike England and Wales, Scotland already has an existing, satisfactory provision to allow for offending children to be dealt with outside the

criminal justice system. In the Scottish Law Commission discussion paper, Lord Jauncey of Tullichettle is quoted as saying:

'In this connection it is worth mentioning that the system of children's hearings constituted by the Social Work (Scotland) Act 1968 which enables many offending children between 8 and 16 years of age to be effectively dealt with outside the criminal courts works extremely well' (Scottish Law Commission, 2001: 3.29).

Apler (2004: p. 52) states that:

'There is clear support for the proposition that children should not be held as responsible for their crimes as adults. What is not clear is when and how to remove the protection from full responsibility afforded by childhood. Every society struggles with this question. And yet the answers found vary enormously. For instance, in Ireland, children as young as 7 years can be held criminally responsible, while in Sweden, the minimum age of criminal responsibility is 15.

In England, the minimum age of criminal responsibility is 10 (Children and Young Persons Act 1933, s50, as amended in 1963). Children below 10 cannot be found criminally responsible while those above 10 carry the full responsibility of an adult. However, as with any purely age-based distinction, the sharp boundary of responsibility thus created is not consistent with what is known about child development. Child development is progressive and variable. It is subject to biological and environmental determinants. The capacity of children to appreciate consequences of their behaviour and to act intentionally through an exercise of free choice is still developing at a rate different for each individual. The age dependent bias for criminal responsibility does not consider individual variability in maturity. Nor does the sharp cut off for criminal responsibility take into account the progressive nature of maturation.'

It is important to note that the low age of criminal responsibility in the UK is in contrast to the much older, legally set ages for a number of activities. These activities include voting (18 years old), drinking in a pub (18 years old), consenting to or refusing medical treatment (16–18 years; British Medical Association, 2001), joining the armed forces (17 years) and instructing a lawyer in civil proceedings (14 years). In certain circumstances, where parental responsibility is shared with a local authority or when the child becomes a ward of court, consent of an otherwise competent young person to various decisions involving his or her own welfare, such as medical treatment, changes of placement and child protection measures, may be overridden with the court's agreement. However, it is also true that complex issues about the rights of the younger 'Gillick-competent' child have been argued out in the courts in recent years (*Gillick v. West Norfolk and Wisbech Area Health Authority and Another* [1986]; *Re R (A Minor) (Wardship: Consent to Treatment)* [1992]). There is now a consensus of legal and medical opinion (British Medical Association, 2001: pp. 31–53) that a child under 16 years old may be competent to give consent to have contraception without parental knowledge. Nevertheless, the situation re competence of children in relation to consent to and refusal of medical treatment is not comfortably resolved. Recent British Medical Association guidance on these issues notes, 'to some commentators the power to refuse is the partner of the power to give consent, and it is logically inconsistent to credit competent children with only one half of this pair' (British Medical Association, 2001: p. 40). Kennedy has said that cases since *Gillick* have 'driven a coach and horses' through that House of Lords decision (Kennedy, 1992).

There is now evidence that the competence of children may be underestimated by standardised tests of understanding (British Medical Association, 2001: p. 99) and that they do achieve more in ordinary day-to-day situations (Dunn, 1988). However, the BMA guidance, in quoting Ceci *et al* (1994), notes that 'This variation in mental performance is even more marked when the person's everyday experiences are unusual' (British Medical Association, 2001: p. 99). Hence, on the one hand it can be acknowledged that children may have better than hitherto recognised competence to solve problems in familiar situations, but, on the other hand, these better competencies are much less consistently available and the children do less well when required to solve problems in unusual or unfamiliar situations. This seems to imply that even an otherwise competent child will do less well in thinking through new problems and choices arising in the unfamiliar court situation.

It is important to note that the European Convention on Human Rights (1951) and the Children Act 1989 refer to children and young people as 'children' until they are 18 years old. The designation of 'child' is a clear indication of an assumption of some degree of developmental immaturity persisting until the age of 18 years. Therefore, given the possible extremely serious consequences for a child defendant facing charges, it seems inexplicable that the age of criminal responsibility in England and Wales should be set at 10 years when the same child defendant would have to wait a further 7-8 years before being deemed mature enough to enter the armed forces or to vote.

Outside the criminal legal system, no challenge would be expected to the assumption that children and adolescents are developmentally immature or not yet grown up. Indeed, such a statement seems ludicrously obvious to members of the public and professionals alike. However, in relation to children who offend, it is clear that a wider discussion of normal physical, intellectual, emotional and social development in childhood and adolescence is at a very early stage in the UK.

Should any change to the age of criminal responsibility be implemented in England and Wales, it is clear that associated changes to the juvenile justice system would need to be introduced to provide for offending youths below the (presumably) higher age of criminal responsibility.

Alternative legal provisions

This report sets out to review the legal provisions for child defendants in England and Wales, and attempts to describe the strengths and weaknesses of the present system. Reference is made to other jurisdictions such as the USA (Steinberg & Schwartz, 2000) and Scotland (Scottish Law Commission, 2001) where there is a published evidence base. However, no attempt has been made to attempt a comparative review of world jurisdictions, since this is not primarily a legal document. Nevertheless, comments on legal provisions for child defendants in the UK may be of interest to those working with juvenile offenders in other jurisdictions.

Suggestions about the nature of any alternative legal context for dealing with child defendants will need to be put forward by organisations such as those in the voluntary sector, child care organisations and legal groups, who have a specific remit in relation to changing the status quo. However, from the perspective of the Royal College of Psychiatrists, any changes to the existing legal system involving child defendants would need to take on board the developmental, psychiatric and ethical issues discussed above and place these within a workable legal system which could in some way bring together the criminal and civil (welfare) considerations around each child.

A helpful summary of a range of other judicial systems dealing with youth crime can be found in the Scottish Law Commission discussion paper (Scottish Law Commission, 2001: Appendix E 'Comparative Legal Material on Some Juvenile Justice Systems', pp. 52–55).

It is clear that one of the main differences between the UK juvenile justice system and other systems is not just the lower age of criminal responsibility in England and Wales, but the absence of an alternative method for dealing with offending children who fall below the age of criminal responsibility and the absence of any mandated welfare component in the treatment of offending children over 10 years old. In other words, what seems to mark out England and Wales from other jurisdictions in Europe is the lack of an integrated welfare provision for young offenders, whether above or below the age of criminal responsibility. This situation is highly relevant when considering the welfare needs of more serious child offenders, many of whom are known to have psychiatric disorders in need of assessment and treatment. However, reviews (Mulvey & Aber, 1988; Moffitt, 1993; Rutter *et al*, 1998) suggest that the bulk of adolescent offending is perpetrated by youths in mid to late adolescence who do not proceed to a career in criminal activity (adolescence-limited) and whose antisocial behaviour tends to follow a natural onset and recovery process (Mulvey & Aber, 1988). Given the high cost to the state of prosecuting the bulk of late-adolescent offenders for less serious crimes, which the evidence (Mulvey

& Aber, 1988; Moffitt, 1993; Rutter *et al*, 1998) suggests they will outgrow, the possibility of decriminalising certain of these offences and removing a large number of adolescent offenders from the criminal justice system has been raised (Michael Sieff Foundation, 2001).

It is salutary to reflect on the fact that, for many years now, other jurisdictions have struggled to find the best, most humane and fairest way in which to deal with juvenile offenders. Quoted by Steinberg & Schwartz (2000: p. 12), Judge Julian Mack, Chicago's second juvenile court judge, described the idealised juvenile court as follows:

'The problem for determination by the Judge is not Has this boy or girl committed a specific wrong but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career. It is apparent at once that the ordinary legal evidence in a criminal court is not the sort of evidence to be heard in such a proceeding' (Mack, 1909).

The search for a more 'balanced approach' (Maloney *et al*, 1988) in the USA contributed in part to the 'restorative justice' movement (Bazemore & Umbreit, 1994) in the 1990s which emphasised the need for the victim's needs to be addressed and for juvenile offenders to be taught new and more adaptive social skills to equip them for responsible adulthood. In the UK, campaigning groups such as JUSTICE (1996, 2000), have advocated more humane and age-appropriate treatment of juvenile offenders with the aim of promoting these children's rehabilitation. A children's charity in the UK, the Michael Sieff Foundation (2001) has specifically recommended a new juvenile justice system rooted in the principles of restorative justice.

However, in arguing for a middle way or a more balanced approach, it is clear that such an approach will not always fit in well with public opinion. Hence it is sensible to suggest that a reasoned public debate (JUSTICE, 1996, 2000; Michael Sieff Foundation, 2001) on the best way forward for juvenile offenders will be necessary if any subsequent changes to the current system are to be implemented by politicians and supported by the general public.

Children charged with homicide

Having said all this, the nine recommendations of the JUSTICE report (JUSTICE, 1996: pp. 25–27) in relation to children and homicide do appear to have relevance also for child defendants facing a wide range of serious and less serious charges. The nine JUSTICE recommendations are as follows:

- 1 The age of criminal responsibility should be re-examined.
- 2 Children under 14 years of age should be tried in private before a specially convened panel, a judge and two magistrates with relevant experience and training.
- 3 Young people aged 14 to 18 years charged with homicide should still receive a public hearing in the Crown Court.

- 4 The legal process involving child defendants should be expedited to avoid delay and it is unacceptable that therapeutic help should be deferred for fear of compromising the legal process.
- 5 A single offence of homicide should replace the distinction between murder and manslaughter for child defendants under the age of 18 years old.
- 6 The mandatory sentence of detention during Her Majesty's pleasure of 10- to 18-year-olds convicted of murder should be abolished and the trial judge (or judicial panel) who has heard the evidence should determine the sentence required with full discretionary powers.
- 7 If children and young people are sentenced to indeterminate detention decisions on their release should be taken by an independent panel.
- 8 It is essential to assess and treat (child defendants) appropriately and consistently and to promote their rehabilitation.
- 9 A more reasoned public debate is necessary in relation to children who kill.

We suggest that to these recommendations should be added the need for formal integration between the criminal process involving child defendants and civil justice, particularly welfare issues.

Welfare considerations

A case could be made for the consideration by a local authority of an application for an interim care order on any child under 14 years old charged with a serious offence. For these purposes, a serious offence can be defined as murder, manslaughter, abduction, rape, arson or grievous bodily harm, etc. Application for a care order could be made on the basis that the threshold criteria for a care order have been met, that significant harm has already been experienced by the child in the commission of such offences and that there has been a major failure to protect the child from the consequences of his or her actions by those with parental responsibility at the time of the offence. Such an approach would be unnecessary with children whose offending is rather less serious, but for the reasons described above, younger children facing very serious offences are almost inevitably children 'in need' in terms of section 17 of the Children Act 1989 and as noted in other guidance (Department of Health, 2000). The welfare needs of these younger offending children often have not been addressed.

However, there are important ethical issues to consider before arguing for care orders on children accused of very serious offences. First, because research shows that a group of such children have many characteristics of serious disturbance, it cannot therefore be said that any one child will share these features, hence meriting an automatic care order. Second, even when such serious disturbance is shown to be present, good practice demands that an individual care plan approach is taken in every case, since the welfare needs of each child will be different and may or may not include a full care order.

Another possibility in terms of alternative legal provisions for child defendants would be the appointment of a Children's Guardian for the child, to assess issues of significant harm and child protection in relation to the child defendant and to coordinate the provision of psychiatric and psychological assessments before the trial. In most cases involving seriously disturbed and dangerous young people, it is hard to envisage a convincing argument against the appointment of a Children's Guardian or the application for an interim care order by the local authority, given that the child's criminal behaviour clearly represents a major parenting failure which has allowed significant harm to be experienced by the child defendant as well as inflicted on the victim of the offence. Very unusual, possible exceptions to this situation would include children with severe constitutional impairments such as Asperger syndrome, brain damage and schizophrenia where parenting failure may not be an issue.

Finally, any integration of the criminal and civil justice elements of cases involving child defendants needs to be agreed between all relevant government departments. Furthermore, on an individual case basis, a multi-agency care plan for each child defendant needs to be agreed and should include all relevant criminal justice and welfare components.

Practical considerations in relation to expert assessments of child defendants

On a practical note, further clarification is needed from the Youth Justice Board, the Legal Services Commission and others, about the funding of expert psychological and psychiatric reports on child defendants.

Although the youth offending teams have been set up to include a designated health input, there is no national consistency of health provision and most of these teams do not have access to agreed and funded health resources. The result has been that local psychologists and psychiatrists have been persuaded or pressed into providing expert reports on child defendant clients of these teams without agreement on the funding of their services. Failure to pay the health trusts for this medico-legal work has meant that many health professionals and trusts have been unwilling to commit resources to the youth offending teams.

Further thought also needs to be given to the indemnification of psychiatrists and psychologists who provide direct assessments of team clients who are not the patients of their employing trusts. Funding and indemnity issues in relation to the expert health assessments will need to be clarified if mandatory assessment of children facing serious charges is to become a reality.

Training

Since the issue of the needs of child defendants is a relatively new one, it is perhaps not surprising that there are few, if any, appropriate training initiatives for professionals working with this client group (Michael Sieff Foundation, 2001). Existing training for those working within the youth justice system tends to focus on how to deliver the various governmental aims for crime reduction. What is missing is an interdisciplinary training context in which the many lessons from the evidence base on developmental psychology (JUSTICE, 1996; see pp. 28–46) and human rights are integrated into the training offered to all disciplines.

Legal professionals

At present, there is no expectation that defence lawyers, prosecutors or judges dealing with cases involving child defendants should have any specific training in these matters. This is in contrast to the expectations set out by the Judicial Studies Board for the training of all judges who will try cases involving children as witnesses to alleged sexual abuse or cases involving adult rape complainants. Within this training programme judges are required to attend a 2-day residential seminar consisting of lectures on relevant current law and talks by visiting experts on sex offenders (both adult and juvenile), the evidence of complainants and research on treatment outcome. Similar specialist training is given to the judges within the Family Division on topics related to child care. It is also the case that both the Law Society and the Solicitors Family Law Association provide training and accreditation for family lawyers; such accreditation enables other professionals and the public to identify lawyers who are trained to work with such children and families.

The Criminal Bar Association and a number of the Circuits now offer training in the treatment of vulnerable witnesses, including children. In fact, most prosecutors and defence lawyers are very well informed about the approach required when working with child witnesses and the provisions for the protection of such children within the criminal justice system, although it is not mandatory to attend specific training on these matters. In contrast, the Criminal Bar Association does not offer any comparable training for prosecutors and defence barristers in relation to child defendants.

Recently, the Law Society and the Youth Justice Board have run a series of London Criminal Courts Solicitors' Association one-day training events for defence solicitors and barristers that covers law and child development with an input from a child development expert (for further information see the London Criminal Courts Solicitors' Association website, www.lccsa.org.uk). However, since this

course is voluntary and is not linked to any process of accreditation for those attending, there is no compulsion for defence lawyers to ensure that they have appropriate training in relation to child defendants. This means that it is entirely possible for a high-street solicitor with no training in relation to children to interview and take instructions from a child charged with a criminal offence. The lack of training for criminal defence solicitors in child development and other matters is particularly worrying, since it should be the child's defence solicitor who asks for mental health and other assessments and who should act on any perceived welfare needs of the accused child.

Ethical issues may be raised when defence solicitors or barristers, untrained in work with children, interview vulnerable and disturbed children and young people without an understanding of their developmental needs and their human rights in relation to those needs. The suggestion has been raised that 'no defence solicitor should be able to take instructions from a vulnerable child or young person facing criminal charges, without being trained and accredited' (Michael Sieff Foundation, 2001: p. 64, 7.4).

More recently, the Home Office has proposed to

'continue to promote the use of plain English at trials and to improve lawyers' training with a view to accreditation for youth cases' (Home Office, 2003: p. 6).

However, it is not yet clear when these proposals for training lawyers will be implemented.

Police

Despite the significant proportion of children involved in criminal behaviour, police forces in England and Wales do not maintain specialist departments to deal with children accused of crime. This is in direct contrast with the juvenile bureaux established in many cities in the USA (Grisso, 2000*b*) and also in contrast with the specialist child protection teams in all UK police forces, trained to deal with child witnesses in criminal proceedings. Indeed, within the UK, police officers are now trained to a high degree in the specialised interviewing of child witnesses using an agreed and evidence-based approach (Home Office & Department of Health, 1992; Home Office *et al*, 2002). It is clearly important that police officers receive specialist training in child development and in the competence of child defendants before interviewing such children. This is not only because the accused child has a human right to be interviewed by an appropriately trained police officer, but also because more reliable and better-quality evidence will be elicited from a child who is questioned by an officer who understands developmental issues.

Court staff

Court staff need to be trained in child development and other relevant issues so that the needs of child defendants can be catered for and any appropriate facilities for them can be put in place. There is no reason why court staff should understand the needs of the learning-disabled child defendant, for instance, until training

has explained to them that these children will need specialist assessment and possible support in court during the trial. Training for court staff in how to deal with the families of the accused child will also be needed, as will explanations about the need to keep separate children who are defendants from those who may be their alleged victims.

Child mental health and child care professionals

Training in child development with an emphasis on the evidence base from criminology and developmental psychology is needed for all child mental health and child care professionals who will work with child defendants. Although many of these professionals may have a good grounding in basic child development, the more recent evidence base on the vulnerability of child defendants is likely to be new to them and needs to be taught in a way that will ensure effective assessment and useful subsequent reports.

Most child mental health and child care professionals will be aware of the forensic context for assessments under the Children Act 1989, and their roles as expert witnesses. However, since few of these professionals work in the criminal justice system, they have little understanding of the expert witness's forensic role in criminal cases. Therefore, specific training on the criminal justice system and on the role of the child mental health and child care professionals within this system is clearly essential.

Multidisciplinary training

A range of professional disciplines are likely to be involved in any one case of a child facing charges in the criminal justice system. This means that all disciplines need to have an excellent understanding of the roles of other professionals and of the evidence base, whether legal, psychological or sociological, that informs their practice. The best way in which this can be achieved – and which has been used with great success in previous training initiatives for the Children Act 1989 and for the Memorandum of Good Practice (Home Office & Department of Health, 1992; Home Office *et al*, 2002) – is through interdisciplinary training events. Such events allow professionals to hear about the theoretical knowledge base of other disciplines and to exchange views on how to put new information into practice.

Agreement on how to set up and monitor such interdisciplinary training for those working with child defendants will need to be made between the relevant professional and training bodies. In discussing the training of professionals working with child defendants, it is important to distinguish it from established training and practice with children who are witnesses (Home Office & Department of Health, 1992; Home Office *et al*, 2002). In other words, just because there is an agreed approach to training and practice with children who happen to be witnesses in criminal proceedings, it does not follow that some or all of these provisions

can be copied or amended simply to adapt them to children accused of crime. Hence, initiatives currently under way to produce a 'child defendant's pack' and to produce guidance for pre-trial therapy for child defendants will need to look afresh at the quite different evidence base on the mental health needs of offending children described in this report.

Furthermore, any training initiatives in relation to child defendants need to take on board the specifically forensic role of assessment interviews with child psychologists and child psychiatrists in assessing fitness to plead, competence and diminished responsibility of child defendants. These are forensic mental health issues specific to the criminal context, and are not found within civil, child care contexts, in which there is much less professional experience in considering the welfare and mental health needs of children who are also offenders.

Therefore, further liaison is needed between the Royal College of Psychiatrists and the British Psychological Society to look at acceptable and complementary approaches to psychiatric and psychological assessments of child defendants for the criminal courts. Fresh consideration should also be given to approaches to the welfare assessment of child defendants by child care professionals such as social workers. Finally, guidance will be needed from the courts as to the timing of such mental health and child care assessments within the overall criminal court process. The legal person or persons responsible for requesting such assessments should also be identified, and a clear system by which such requests can be made, funded and delivered needs to be established.

Conclusions

The issues surrounding the investigation, prosecution and disposal of child defendants are complex. Despite recent helpful changes in the criminal law in relation to youth justice, the legal context around child defendants remains complicated. Nevertheless, certain consensus issues have emerged from recent documents (Auld, 2001; Scottish Law Commission, 2001; Michael Sieff Foundation, 2001) and from the deliberations of this Working Group, which are outlined below.

There is an absolute dearth of available information on the physical, intellectual, emotional and social development of children who are defendants. Both public and professionals lack up-to-date information from the research and legal evidence base on how these children can be expected to perform in the context of a criminal court. Public awareness should be raised on these issues, and opinions should be sought on the needs and human rights of child defendants through a government-led process of consultation.

The evidence base suggests strongly that the age of criminal responsibility in England and Wales is too low by a considerable degree, and it is recommended that it should be raised to a more appropriate level. It is recommended that this issue should be subject to a government-led review process to decide how and to what level the age of criminal responsibility should be raised. However, if the age of criminal responsibility in England and Wales is to be reviewed, then consideration should be given to the Commentary on the Beijing Rules in relation to criminal responsibility and to legal processes in other European countries where the average age of criminal responsibility is 14–15 years.

Article 6 of the European Convention on Human Rights guarantees to all defendants the right to a fair hearing:

‘[It] is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings’ (para. 85).

Therefore, it follows that the trial of children and young people within a full adult court context is inappropriate in relation to their developmental immaturity and cognitive limitations. It is recommended, that the government should revisit the Auld Report recommendations (Auld, 2001) that a Specialist Youth Court with a specialist judge and two experienced lay justices should be established for all cases in which children are charged with ‘grave crimes’. Despite the fact that government rejected the Auld 2001 recommendations in *Youth Justice – the Next Steps* (Home Office, 2003) and in its subsequent Summary of Responses (Home Office, 2004), it remains our view that such a Specialist Youth Court would ensure that the child defendant’s human rights were not contravened and

that they were able to participate effectively in the trial process. Such a court would ensure that the child defendants' human rights are not contravened and that they are able to participate effectively in the trial process.

There should be a mandatory assessment of every child or young person below 14 years old who is facing serious charges in a criminal court. The type of serious charges that should normally ensure an assessment would include murder, manslaughter, abduction, rape, arson and grievous bodily harm. However, children who show patterns of escalating recidivism from petty crime to much more serious offences may also need to be assessed. This assessment should include psychiatric, psychological and social work (welfare) components. The assessment results should give an opinion on the child's fitness to plead, issues relating to diminished responsibility and likely compliance with treatment. The welfare component of the assessment must address the question of who has parental responsibility for the child defendant and the use of the Department of Health's Assessment Framework (Department of Health *et al*, 2000) to assess the parenting ability of the child's parents in order to inform placement decisions for the child, whether or not he or she is convicted.

It would be helpful if any new specialist youth court had the power to order employing health trusts and local authorities to make available the resources for expert psychiatric, psychological and welfare reports on child defendants. These reports are essential in deciding the correct mode of trial for a child or young person (Youth Court or Crown Court), as well as informing sentencing of the child or young person. At present, there is no agreed method by which criminal courts can ensure the provision of such reports.

The youth court should have the power to require an investigation by the local authority into the child's welfare and, subsequently, if appropriate, to transfer the case from the youth court to the family proceedings court.

New measures should be set up to ensure the mandatory integration of the welfare component into the existing juvenile justice system and into any proposed new specialist youth court. It has been noted (Michael Sieff Foundation, 2001: p. 71) that a unified jurisprudence – rather than the civil and criminal systems which sit uneasily together – is needed.

The very young child defendant is often a child in need in terms of section 17 of the Children Act 1989 (Home Office *et al*, 1989) and as noted in other guidance (Department of Health *et al*, 2000), and there may have been concerns about the parenting of the child even before the alleged crime was committed. For most children facing charges of serious offences, consideration should be given to an application for an interim care order or for the appointment of a Children's Guardian or a Litigation Friend to act for the child in both civil and criminal proceedings.

Whether or not care proceedings are taken or a Children's Guardian is instructed, an inter-agency care plan should be constructed around the child defendant facing serious charges. This care plan should be implemented

immediately such charges are made; it should cover pre-trial, trial and post-trial periods, regardless of the disposal, and should address issues of parental responsibility, expert assessment and the child's needs, including treatment needs as well as welfare issues.

If a serious charge is made against a child defendant, consideration should always be given to instigating a child protection process (section 47 enquiry) following government guidance on inter-agency cooperation for the protection of children from abuse (Department of Health *et al*, 1999).

Training is urgently needed for all those who come into contact with child defendants in the UK criminal justice system. Such training should have a child developmental focus, should cover pertinent issues in relation to psychology, psychiatry and the role of the family, and should be provided for all court-related disciplines including criminal judges, barristers, defence solicitors, Crown Prosecution Service solicitors and police officers. The need for a developmentally appropriate, child-centred approach to dealing with the needs of children entering the court system as defendants should be stressed. At the same time, it should be made clear to those undertaking this training that this approach is not at the expense of justice but rather in the service of fairness to the child facing charges, and that ultimately a fairer result will also be ensured for the victims, with the best evidence being produced within the criminal proceedings.

Active steps should be taken to ensure a process of accreditation of suitably trained legal and other professionals involved with child defendants in the court system. Such training and accreditation would be comparable to that currently in force in relation to specialist joint police and social work training for interviewing child witnesses for criminal proceedings (Home Office & Department of Health, 1992; Home Office *et al*, 2002). Training in work with child defendants would, therefore, build on the existing knowledge base about children's needs and would take on board recent research (Grisso, 2000*b*) in relation to the cognitive capacities of child defendants. In future, it should never be possible for an untrained defence solicitor, barrister, judge or police officer to undertake direct work with child defendants in the criminal justice system without being able to demonstrate relevant, accredited training experience.

Such training in relation to child defendants should be within a fully multidisciplinary context to include psychologists, psychiatrists, social workers, probation officers and all others usually involved in work with children and young people in the criminal justice system. In this way an exchange of information and perspectives about work with children who are defendants can be ensured.

In any subsequent process of consultation on this report, a user perspective from children and young people who have faced criminal charges should be sought.

The recommendations resulting from this paper are listed in the Executive summary and recommendations (pp. 12–13).

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