



**The Michael Sieff Foundation**

Working together for children's welfare

## **1908 – 2008: The Children Act 100 years on *young defendants today***

### **QUESTIONS TO LORD JUSTICE THOMAS – FULL TRANSCRIPT**

CHRIS STANLEY: Chris Stanley. I am a magistrate. I would like to argue that our current youth justice system is not fit for purpose, and that the progress that we might have made over the 100 years has gone backwards and forwards, and in the last few years has been going backwards.

I am a youth court magistrate and I sit in an adult court building, so that's a step backwards from the Act in 1908. The Juvenile Court that was created in 1908 included both care and crime. Now we have two separate systems, which I think is a great disadvantage, where we deal with those children who need care in a family proceedings court and those who need punishing for their criminal behaviour in another court. Those children are often the same children, and I would argue we need to bring together, somehow, those two jurisdictions.

LORD JUSTICE THOMAS: Can I answer your question in two ways? You are absolutely right, we do go forwards and backwards, and I think it is astonishing that although Maloney said the time had now come for separate buildings, we do not have them in most places. You are right, and all the research shows, certainly if you talk to people concerned with the prevention of youth crime, that it's possible generally to identify those most at risk, and it will be people who work in both the family and criminal systems who know that.

It is much more difficult to say that you should apply -- the debate has gone backwards and forwards on this subject -- the same court process to both. There plainly should be a link between what is happening, but there is a very significant difference (on the assumption that you are dealing with a criminal issue) when dealing with what is a very distinct matter, the civil rights of children.

SHAUNEEN LAMBE: My name is Shauneen Lambe. I'm a director of a charity called Just For Kids Law.

Just following on from that point, there is a problem that I find with the two systems, which is that, given that the age of criminal responsibility is 10 but in family court proceedings the test for Gillick competency is individual to each child, how can those two systems run in conjunction with each other? If you are able to go through a criminal system yet you are not competent to instruct your own lawyer in the family proceedings, it seems the two things don't work together.

LORD JUSTICE THOMAS: I think we ignore a matter that all of us know in our daily lives, a really significant matter, and that is the different rates of maturity of children. If I can take an extreme example, if you look at the punishment that can be inflicted for murder, it dramatically alters on the transition of an age, yet you can find that a person under that age is much more mature than a person over that age. But this is a central theme of our criminal law: we draw these rigid lines.

I take a very firm view that it is very, very important, wherever we can, to look at the child and not the abstract notion of a child at a given age.

But -- and this is a question that I think gets very political -- can you translate that into a system where people would say on the one hand, take the age of 12, 'Well, that child is 12. He ought to be treated for his criminal

responsibilities as another 12 year old.' I think that's a very different question from the question of the way in which we punish people, where the way in which you deal with age is something where you need to consider the need for enormous flexibility.

PENELOPE GIBBS: It's just a comment, really, from Penelope Gibbs, from the Prison Reform Trust.

You seem to be saying that you need two different systems, but actually in Scotland, for many, many years now they have operated one system for under 16 year olds who commit a crime, except in exceptional cases. The vast majority of those under 16 who have committed crimes are dealt with together with children who have welfare needs, as children who have welfare needs. So it is possible to unite those systems.

LORD JUSTICE THOMAS: I don't think there is any problem at all, and our system has always done this in using the same people. What I think is more difficult is to say that you can adopt the same procedure, you can put them in the same building, you can deal with them in the same court, you can have the same people. That is easy. Our system should do that, and we used to have much more flexibility in the transition between those who did family work and those who did criminal work, right across our system.

One of the problems we have at the moment, particularly at a more senior level, is that people have specialised too much. It is again a question for you to consider, and as I said, it is important and we are not complacent about this, but it is much more difficult to see how you can have rules and procedures that deal with criminal sanctions and a procedure that is the same that deals with people's civil rights.

AL AYNSLEY-GREEN: I am Al Aynsley-Green, the Children's Commissioner for England. I am really pleased to be here today and to meet all you guys and to take part in the dialogue.

I represent the four UK Commissioners here today -- as you know, there is one in each of our countries -- and it is fair to say that of all the issues we are confronting, there are two that we have great commonality on. The first is the plight of children in the asylum system, and secondly the plight of children in conflict with the law.

In each of the four countries we have major major concerns over the experiences we are hearing from children in those processes. We took our concerns to the United Nations in Geneva in June of last year, and as you know, the UN committee on the rights of the child was very condemnatory in its concluding observations in October on the current situation across the UK.

But the point I want to raise for discussion is listening to the voice of the child. This is what we spend all of our time doing. Each of us has different powers. I have a power of entry to go into prisons and other establishments to listen to children, and I can tell you that what those young people tell me of their experiences of the court process is alarming. I do encourage the system, as it were, to see the world through the eyes of the child.

The power of this approach was exemplified yesterday, when we published, with very large media coverage, our report on the experiences of children being arrested and detained before deportation, and the lived experiences of those children added power and credibility to our report.

I am just putting a marker down now, can the court system, can judges, please listen to what children have to say about their experiences in the courts?

LORD JUSTICE THOMAS: I do entirely agree with you. Bearing in mind the part of this kingdom from which I come, I would say that the work of the first Child Commissioner in Wales was amazing, and his death was most untimely. He did make a difference, and I think certainly I have seen, from reading certain research reports -- and I am not going to make another plug, if I may say so -- that actually listening to what people tell you about a system, for example, what I think the Prison Inspectorate does, which is when it goes round prisons, it talks to prisoners. Therefore, to understand what is happening in prisons, it informs it greatly, and when I have accompanied prison inspectors going around prisons, I have found that one of the most interesting and valuable parts of such a visit.

What I think is very important is that we do listen. I certainly find the research that has been done immensely informative. One of the things I mentioned was questioning, when it is pointed out from a lot of research that children don't understand the way they are questioned. When you listen to people asking questions, you understand why they have a problem. That is, I think, a very powerful illustration of why I am in complete agreement with you: we must listen to children.

MARY DUFF: Mary Duff, representing the Magistrates Association. I just wanted to return to the first point that you made right at the beginning, and to make clear our view and our stance on family courts and youth courts. We see them very much as separate entities. We always consider the welfare needs of the children when they come into these courts, and we know about the information because we have youth attending teams who bring all that to the arena. We then consider that when we decide on the punishment.

We are very wary about identifying children and assuming they will become criminals. We are very worried about that. We can see that, yes, some

children who come from, for instance, single parent families and poor areas might end up in a youth court, but to assume that is not what we are about.

I just wanted to make those two points.

We are very clear about the separateness of courts and are very careful about identifying children.

JOHN GRAHAM: John Graham. I am director of The Police Foundation and we currently host the Independent Commission on producing a new response to youth crime and antisocial behaviour. There is a page in your pack which describes that briefly.

My question is about trying to develop a much more flexible response to children and young people who get into trouble, such that it better reflects their stage of development and maturity, which is definitely something which you also have illustrated your sentiments for.

In Germany, and indeed in other continental European countries now, they have adopted a system whereby 18 to 20 year olds are now treated as juveniles before the court. This reflects the difficulties that young people face in making a successful transition from childhood to adulthood, from dependence to independence. Also, in Germany now they are having a discussion whether they should actually raise the age of adulthood completely from 18 to 21. The system at the moment allows 18 to 20 year olds to be dealt with either as juveniles or as adults, on the basis of a test of maturity.

The Commission has been thinking about this notion and wondering how we might be able to make recommendations in relation to improving the flexibility of the system in this country that takes account of different stages of development.

Do you have any recommendations or ideas as to how we might be able to pursue that in this country, given the different contexts in which we are working here?

LORD JUSTICE THOMAS: It is very common to address the age of criminal responsibility at the bottom end, the lower end, and I briefly touched on this by referring to the problem of those who are just over the age. Should we think of raising it? I think it is an issue that needs debate, but I think I can confine myself to saying two things, because this is a highly political issue. My job as a judge is really to say, well, if that is a political decision, how do you do it?

Certainly it seems to me that we have to look more flexibly at how punishment relates to maturity. This is a very difficult issue, and it is something that actually needs addressing and is being considered by the Sentencing Advisory Panel, and will be considered by the Sentencing Guidelines Council. So help on this issue is, I think, extremely important.

Secondly, as I have already responded about where you start the age of criminal responsibility, I think it may be very difficult for society to accept that one 12 year old goes down one route and another 12 year old goes down a different route. I think we have to look much more at the flexibility of sanctions and procedures rather than altering the ages. You need to be slightly softer and more flexible in your procedures, but you probably cannot alter the rigid age groups which define one from the other. This is a very difficult question.

STEPHEN JAKOBI: Stephen Jakobi, 'Children Aren't Criminals'. We are a campaign group and we solely concentrate on the issue of age of criminal responsibility.

I, too, am laying down a marker. I am the least experienced and least expert here (and I am not going to have any contradictions whatsoever on this), but I come to this particular problem entirely through being an adviser to the European Union on defendants' rights and problems. What worries me is that the debate is extremely national and it seemed to me to be *entirely* a political problem, not partly a political problem. The experts, so far as I could see and on whom I rely, are all agreed that our age of criminal responsibility is disgraceful and gives rise to problems that other jurisdictions do not appear to have to the same extent.

I wonder whether you would comment on that?

LORD JUSTICE THOMAS: There is no doubt that this is entering yet another area of political controversy, that the role of the European Union in relation to criminal justice may well grow substantially if the Lisbon Treaty is signed and brought into force, and the way in which our opt-outs are exercised. But there is no way you can look at what is good in one country without actually drawing heavily on the experience of others. I think that we, as judges, are learning that we have much more than we ever thought possible to learn from others, and I hope we are not merely catching up with others but that others will take that view as well.

CHAIRMAN: Michael Bowes from the platform has one point. He promises me it is a short point that he wants to put to you.

MICHAEL BOWES QC: I was picking up on what Al Aynsley-Green said about listening to the voice of the child. Perhaps you would give some guidance as to what you think about appropriate training for judges, the magistracy and advocates, in how to deal with child defendants, child witnesses and those before the courts.

LORD JUSTICE THOMAS: There is no other way of getting people experienced in asking questions of children than practice. How you carry out that practice, where you find the child volunteer, I would not care to comment, but it is vitally important that you appreciate that most people, whether they be adult or child, hate saying, "I don't understand", because that makes you look a fool. You pretend you understand. As you get older you realise that the worst thing you can ever do, particularly if you are a judge, is to sit through something pretending you understand it when you don't understand it. That is the course of disaster. But it's not always easy for a child to understand that.

Therefore, when a child apparently doesn't say he doesn't understand, I think we ought to realise that that probably isn't the case, and I think research shows that.

So what I would say to Michael Bowes is that you do need actual practice and you do actually informally find out afterwards from the person, have they understood half of what they are saying, but in a way that doesn't embarrass them, because that is the only true way of knowing if you are doing things right.

CHAIRMAN: Thank you very much, you are welcome to stay as long as you can. I know you have another engagement shortly, but thank you very much for getting us off to a thought provoking and stimulating start this morning. Thank you.