



The Michael Sieff Foundation
Working together for children's welfare

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

MORNING PANEL DISCUSSION – FULL TRANSCRIPT

GARETH CROSSMAN: Thank you very much. My name is Gareth Crossman from The Adolescent and Children Trust. Also, I used to work as a solicitor in the Youth and Magistrates' Courts, and just to back-up the lack of training, from my first day in the youth courts I can't think that I had, throughout the entire process, any specific training that would have prepared me to represent children as opposed to adults.

The main point I would like to make is about when the process starts. Most of the discussion has been about what happens when you get into court, but really the criminal justice process starts at the point of arrest, and by extension, article 6, the right to fair trial, begins when you are under arrest.

If it's difficult in the courts, when you are representing a young person in the police station, that difficulty really is compounded. I remember when I was practising - I don't know if it has changed much since, but there was a very perfunctory: 'Do you know the difference between right and wrong?' 'All right, let's go ahead', and that was really it.

If we are now trying to address the difficulties of competence, then not just at trial but at the beginning of the process, giving assistance to solicitors who do have concerns about their client's competence, it is extremely important.

Just one other point I would like to make. I always get a bit nervous when I hear the words 'Home Office' and 'profiling' put next to each other, so if there is going to be profiling of young people in relation to criminality, I hope it's with a view to keeping them out of the criminal justice process, rather than predicting that they are going to be an active participant in the criminal justice process.

CHAIRMAN: When Eileen was talking about profiling, I think it was not the idea that you are scared of, and one can understand that; it was very much to do with looking at the patterns that she described in the slides.

EILEEN VIZARD: Just on that point, I think there are two separate things here: the Home Office funded the research study which our team undertook, looking at the origins of serious criminal behaviour, including psychopathy. They paid for it because basically no other government department wanted to be involved with these controversial children, but the profiling thing, which I put on the slides, was just my way of gathering together what we know about the backgrounds of these children.

And there is no determinism in this. The fact that we might be able to identify highly at risk children doesn't mean it has to be that way. If we can intervene early, we have an excellent opportunity to stop it happening.

CHAIRMAN: Thank you. Mark, on the other subject, the issue really is, I suppose it might raise the question about training for police in terms of appropriate forms of questioning for young suspects, but also, again, it's the issue of training for representatives and perhaps whether the responsible adult system really deals with the situation at the moment.

MARK ASHFORD: I am aware in passing, from reading various reports in the United States, that in some of the jurisdictions in the United States - and each of the 52, I think it is, States of the United States have a separate

criminal jurisdiction - some of those have juvenile bureaux within the police force, so the officers are especially trained and they then deal with juvenile suspects. We have no such concept, certainly in the Metropolitan Police, and I have never heard of such an idea anywhere else in England and Wales. But that is certainly one way to funnel the expertise.

To deal with the point about checking moral understanding, there used to be a common law doctrine of what was grandly called *doli incapax*, translated as 'knowledge of', effectively establishing that a child under the age of 14 knew that what they had done was seriously wrong as opposed to merely naughty.

Jack Straw did not like that; he saw that as an impediment to proper punishment of youngsters, so it was abolished in 1998, so now, unless an officer has a vague memory that they did a training course a few years ago and they have to ask these questions, there's no consideration of moral understanding at all.

Whenever I train psychiatrists, as I'm doing tomorrow for Eileen, they want to go straight into moral understanding. I keep saying, "Hang on: as a lawyer, it's irrelevant. I'm really sorry, but with one or two very minor exceptions, moral understanding, as opposed to dishonesty, is really irrelevant to our legal process."

JOHN FAYLE: Hello. My name is John Fayle. I'm also from The Adolescent and Children Trust, but in a previous life I used to work for the Youth Justice Board as a policy adviser.

The question I want to ask is about child abuse, and both Eileen and Mark alluded to this fairly strongly. It does seem to me that at a policy level in government the link between child abuse and serious crime is resisted, avoided, denied, and it's a serious impediment to policy development and trying to do something to help these young people.

As evidence for my contention on this, I would say that in the Youth Crime Action Plan that the Government published last June, I think, child abuse was simply not mentioned. It was simply not mentioned as a factor that had anything to do with youth crime.

In the consultation document that the Sentencing Advisory Panel put out a few months ago in relation to sentencing of children, again, there was no reference to child abuse as something the court should consider, or something that might be a mitigating factor.

During my time at the Youth Justice Board, the discussion about child abuse as a factor in youth crime was stoutly resisted, and it just seems to me it's a very curious and disastrous, really, gap in the way we think about these things.

EILEEN VIZARD: Maybe I could deal with that. You are raising a very important point there about the role of trauma and child abuse in the genesis of youth crime. There is no question that it does have a central role; however, it's not causal. In legal terms we cannot say that once you have been abused, that's it, your likelihood of going on to offend is X per cent. As I was trying to explain earlier, it's one of a number of extremely well documented risk factors. I don't know why the Youth Justice Board didn't seem to know anything about it. There is decades of evidence to establish that trauma in childhood can contribute to later offending.

But I think it is important that it is seen in the context of the other risk factors, simply because there are plenty of people out there who have been victims of physical, emotional, sexual abuse, and of course are leading exemplary lives. So it doesn't follow, obviously, that if you are abused you will go on to be an abuser.

It begs a bigger question for me, which is, because these are relevant risk factors, at what point and by whom will they be considered? We were talking about having a precharging assessment in a way, possibly by the police or other people, to think about whether the charges should actually go ahead. Well, how is that to be done? Who is going to do that? Can sufficient training ever sensibly be given to police officers, or even lawyers, to make an adequate assessment there? My view would be that we need to bring in other disciplines to assist with that kind of assessment.

MARK ASHFORD: It is not just at the policy level that questions of abuse are ignored in the criminal justice process. I will never forget the two, a 16 year old and an 18 year old, completely separate, who both disclosed to me that they had been sexually abused by family members outside the immediate nuclear family. Both of them were too embarrassed to talk about it, but they disclosed it to me after months that I had been representing them. Both of them had dealt with it by what I think sometimes is called, by mental health professionals, 'self-medication'. One was using crack cocaine to blot out the pain; the other was sniffing aerosol gas, and he was doing 10 or more cans a day.

Both of them got into residential programmes. It's very difficult if you are under 18: there are virtually none that are specialist adolescent units, but the 16 year old, the youth offending team got him into a specialist unit.

The social worker told me later that when he went to the first review, he said, "Well, what work is being done on dealing with the abuse?" There was an embarrassed silence. "Oh, we don't want to deal with that", and part of the problem is that a lot of the funding for particularly say drugs type programmes, it is very much systems. They want to look at relapse prevention, they want to look at the nice easy stuff they can do in group sessions, because of course

that is efficient. You cannot of course deal with trauma like that in a group of 15/20 people, that's where things become more difficult.

My impression in both of those cases - it is anecdotal, but my impression was that the staff just didn't have the training or the expertise to deal with those hard cases. Not everybody who is a Class A drug user has that kind of trauma in their background, but it's a practical example of how it's not just at the policy level that we don't want to face up to this, it's at the day-to-day level of working with individuals.

BARBARA ESAM: I'm Barbara Esam. I'm a Sieff Trustee and a lawyer in the Public Policy Department of the NSPCC. I have two questions, one for each speaker, if that's not too greedy.

Eileen, in relation to assessment, and I think that's a particularly pressing issue, I'm just wondering if you have a view about the practicalities in terms of how you would get the amount of information that a court needs, or given the last comment you just made and others have made, perhaps the police need, in order to properly assess a child? And what level of expertise would be needed in order to get that in front of the police and in front of the court?

I'm also just thinking about, in relation to young witnesses, the police do have responsibility for considering what special measures young witnesses need, so they are given a responsibility of assessing their needs to some extent, and they can bring in intermediaries. That's another important component.

And Mark, I'm wondering in relation to SCv.UK, given how much help that gives young defendants in theory, I wonder if you think if proper assessments were made and put before the court, would that assist young defendants and their advocates? And in that whole arena, do you think there is

scope now, or in the future, for more appeals to the European Court on the basis of the section 6 fair trial rights being trampled on?

EILEEN VIZARD: Shall I go first on the assessment issue? I think it is a very important issue, Barbara; thank you for the question.

As you know, we did address it in the Royal College Report on Child Defendants, and I think the executive summary of that is in everybody's pack. But what we said there, and what I still believe to be the case, is that certainly starting with children, young defendants who are charged with what we defined as really serious crimes, such as murder, rape, arson, that sort of thing, there should be a default position of a full assessment of those children, by which I mean (and we have itemised this) an assessment of their cognitive functioning, their level of intellectual functioning. Mark has given a couple of cases there of young defendants with extremely low IQs who couldn't possibly understand the trial process in full.

So there needs to be an assessment at an early stage of intellectual functioning, and also of mental state. This has to be done for serious cases by mental health professionals. We cannot provide a brief check-list for police officers or other people to do this, it needs to be done with reliable results, because these are serious cases. Of course there are resource implications, but we actually have to grasp this.

However, I would also add that the psychosocial context which are presented on is vitally important, because I think we need to know what were the contributing factors, including things like experiences of child abuse, that led to any disorder in the mental state. That would lead me, as a psychiatrist, to be thinking, can we see this young person as having some form of diminished responsibility is not an adequate concept, but damage to their capacity such

that it's not fair for them actually to be standing trial. These are considerations that, in my view, need to be assessed fully at the outset.

The bulk of less serious crime, less disturbed young offenders, I think we need to deal with separately, because there will be a substantial minority of them who have a learning disability, and there is a real risk of a miscarriage of justice in that group as well, if they are tried and, for instance, it subsequently turns out that their mental age is well below the age of criminal responsibility.

CHAIRMAN: Mark, your part of the question was really to deal with whether the attitude of judges might change.

MARK ASHFORD: As I said in my speech, I think we are vulnerable to further challenge in Europe. In relation to SC and the point about a separate specialised court, obviously creating a completely separate tier of the court system requires legislation, but certainly, I strongly think that the presumption should be that there are permanent modifications whenever a youth defendant is before the court, even if they are charged with adults.

So, rather than the system wasting time having applications and arguing for 15 minutes whether or not the wigs come off, this should be automatic: he is under 18, you are in lounge suits, out of the dock unless there is a serious security issue. In fact, there should be a separate set of procedural rules for trying youth defendants. At the moment, as I said, even when the whole morning's list are youngsters entering their pleas or being sentenced, at the moment the Crown Court just carries on as normal, even if somebody objects, as I recently did. A 16 year old went through his plea and case management hearing charged with rape of his cousin. He was very, very embarrassed by the charge, plead not guilty. The main concern about going to court on that first appearance was of anybody finding out. It was the plea and

case management list. There were about 20 barristers in the courtroom and there were other people milling around. An application was made at my request by the barrister to clear the court, or certainly invite anybody who doesn't have a reason to be there to leave, and because that was going to be inconvenient and would hold up the court for five minutes, "No, let's just get on with it."

That is just one example of how it works at the moment: the pressure that the whole system is inevitably under to just move things forward, we are not responding to this. In our current financial climate anything that costs money is unlikely to happen, so realistic objectives or aims are things like a presumption that we change, rather than the current Practice Direction, which is that the presumption is that the status quo is okay.

Part of the problem is of course that once the system concedes that there is a better way of engaging with young defendants, what about the young adults? What about the adults with learning disability? It opens up an enormous challenge to the way that we currently proceed with Crown Court trials.

CHAIRMAN: Just before we go to the next question, can I throw out two challenges to this conference? I spoke about the Thompson and Venables case at a Sieff conference in 2001, and I'm very sad to say it seems to me, as a criminal practitioner and a Recorder, that virtually nothing has changed.

So I'm going to throw out these two challenges for us to consider: (1) how to create the political will to change, as opposed to tinker; and (2) how to manage the resource implications.

If we are to produce anything from this, other than agree amongst ourselves as professionals, we are going to have to deal with both those challenges.

PENELOPE GIBBS: Just a couple of points there. We talked about specialist police, with the Prison Reform Trust doing some work about the new

justice system. In fact it is about five year olds in Northern Ireland, kind of totally off the radar, but actually their youth justice system has been revolutionised by a new process of restorative justice, which most of the defendants go through.

My understanding is that they have specialist youth police actually in Northern Ireland, so it is just over the water now. I don't know if they operate within the police station, but they definitely have a different system there.

I would absolutely support the idea of the political will to change and I think there are different ways of doing it, but it's up to all of us to get to the decision-makers, now and in the future, and put our case.

CHAIRMAN: Thank you. Can we take one more, and then lunchtime?

SHAUNEEN LAMBE: Shauneen Lambe, Just for Kids Law, but I was also the lawyer in the TP case, so Mark was very kindly not too critical of the judgment.

I too have a lot of frustrations with that decision, and one of them I wanted to discuss with Eileen was this idea of, in that case, the mental age of TP was found to be under the age of criminal responsibility. That was one of the points I was trying to argue in the youth court, that the age of criminal responsibility is set as a mental age, not as a physical age.

I couldn't get anywhere with District Judge David Simpson on that point and it didn't seem to go anywhere in the High Court, but it seems to me that that makes logical sense and is something that people should consider when they are writing reports in these kinds of cases, because I know experts are reluctant to put an age equivalent when they are doing IQ scoring. That is very helpful to Courts and lawyers who understand it in those kind of terms as opposed to just straight IQ performance indicators.

My second point, following on from that, is that we are in these huge times of Legal Aid cuts, and while I try and do full assessments on all of my clients who are facing serious charges, I'm being told by the Legal Services Commission that I cannot have a psychologist and a psychiatrist, and even if I can, they are cutting my costs on what is being requested by those experts.

Do you have any suggestions of ways of getting around that, because I am not able to get the experts I require because of these limitations.

EILEEN VIZARD: Yes, okay, thank you. Firstly on the mental IQ age issue, yes, I don't mind, as a psychiatrist, using mental age equivalent, because I think it gets across the concepts pretty well to the general public, to the non-mental health colleagues.

So I very much support what you have done in that case. This was a young man with an IQ of 56. I don't know the details, but with an IQ like that I'm sure everybody knows the bell-shaped curve: 100 is bang in the middle; people who go to university may have IQs of 110 to 120 plus, and there aren't that many of them. People with learning disability are down on this side with an IQ of 70. Once you get down to 56 or so, you are in what we psychiatrists call the moderate mental retardation range, and the chances of grasping abstract concepts and being able to follow subclauses and so on are virtually nil.

So whether or not the mental age concept is the right way to get that across to courts, I don't know. The percentile measure which is down here is commonly used and you might want to think about that instead: that 99.8 per cent of the same age peers would be more competent than they are in looking at a range of court related issues. That's one way in which psychologists often summarise their findings.

In a way, it just highlights for me the fact that we are trying to put separate arguments on developmentally delayed and developmentally immature

children in a court context that was not set up to deal with them, so you may find other ways of trying to argue these points. But the fact is, children who have a profound learning disability like this will never be able to stand trial and have complete competence to understand what is going on in the current court context.

What we have said in the college report, and what we were aware of even then, a couple of years ago, is that there were difficulties in funding psychology and psychiatry assessments, and that there should be a working group from what is now the Legal Services Commission, to actually look at the cost of expert reports. It is quite true, you are not going to be able to get both types of reports under the current funding system, and yet both are essential, certainly from my point of view.

I don't know what Mark would say, but you do need to have a psychologist's assessment and also a mental health assessment, and it is not right to ask a psychologist to do an abbreviated version. You need a psychiatrist, and I'm afraid funding really needs to be made available at the very least for the most disturbed and most dangerous young offenders.

I don't know if you would agree, Mark?

MARK ASHFORD: It is going to get worse. I think the budget, in the words of the Ministry of Justice, has to save something like £200-300m. The Legal Aid budget is expected to make efficiency savings of over £100m, and that is about 5 per cent of the total budget. It has been going down and down and down all the time I have been working, for the last 15 years.

So it's only going to get worse.

CHAIRMAN: Before we all get too depressed, I'm afraid I'm going to call time on the morning session. There will be time later on in the programme to develop and refine some of these points that are already starting to emerge, which is very encouraging, but you have earned a lunch break now until a quarter to two.

[Morning panel discussion concluded]