



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

### **AFTERNOON PANEL DISCUSSION – FULL TRANSCRIPT**

CHAIRMAN: What we will do, we will have our star studded panel up there with Lord Justice Toulson, Sally O'Neil and Eileen Vizard. What we would like to do is to have certainly questions now for Lord Justice Toulson, but what we want to do is get some ideas from you, some themes to take away, particularly going back to the two challenges I gave you just before lunch about how to actually change political will and to do so within achievable budgets and have regard to resources.

So Louise has the roving microphone there. Who would like to start, either with questions for Lord Justice Toulson, or very short points with ideas to go forward?

PROF GWYNETH BOSWELL: Hello, Gwyneth Boswell, from Boswell Research Fellows and University of East Anglia.

A number of people have suggested that really the most likely way to influence the Government is on the question of finance, and all the money that the Ministry of Justice is going to have to save. It just seems to me that the most obvious way to do that is to encourage them to criminalise less children and lock up less children. That will actually save them a lot of money. So that could be the beginnings of an argument to take to them.

I don't know whether the panel would like to comment on that?

LORD JUSTICE TOULSON: I agree. I think that putting children into custody is phenomenally expensive, as well as being unsuccessful. What more can

one say? A delegate from the Prison Reform Trust, who had to leave at tea time, wanted to make the point that the majority of young people in custody have not actually committed an offence of violence, and therefore she would have been reiterating your point.

LORD FRANCIS LISTOWEL: Francis Listowel, House of Lords. I did very much listen with great interest to this morning's contribution and I'm sorry I wasn't able to be present for this afternoon's, but the thought that was put in my mind, from what I heard this morning, was that perhaps one avenue to be explored is how to ensure that Parliamentarians have greater knowledge and understanding of young people in the criminal justice system, and that there are means and avenues made available for young people who are in secure estate and coming out of it, to actually speak with Parliamentarians; and also more institutionalised access for Parliamentarians to visit young people in secure estate, in the criminal justice processes, just to make it very easy for Parliamentarians to see what is going on, those who are interested. That might be one helpful way to improve matters for these young people.

SALLY O'NEILL: I think that is a very good idea, if it could be achieved, because I don't think that the vast majority of Parliamentarians have the faintest idea what's going on, what happens when they go to court, what happens when they are remanded in secure units, the sort of environment they live in, the sort of time they are locked up and stuff. I don't think they have the faintest idea, so I think anything that could be done to get Parliamentarians actually physically out there and seeing what is happening and how it works in practice would be an excellent idea.

Because it is so political, I think one of the problems of course is that when you get a case such as there has been recently, with again two very young boys involved in some terribly serious allegation of brutality against

another younger child, you just get the spectre of Thompson and Venables just raising its head again, and it sets the whole thing back.

I was talking to Stephen about this earlier. If you actually get them up there to see what's happening, I agree, I think it would horrify them, but you still have the obstacle to get over that it's still not very politically attractive to undemonise youngsters who get involved in these sort of really very serious offences.

LORD JUSTICE TOULSON: I expect that at Commons level this falls between three different Select Committees: Health, Justice and Education. Education has been split into two, but the junior end of Education -- I forget the names, they are always changing.

But that in a sense is one of the problems: you want a holistic approach but you have these three different departments with their separate interests.

At Lords level, there are a number of peers who have expert experience and interest in this area. Establishing a new committee in the Lords is, I think, an extremely difficult thing to do, from my understanding. The Law Commission lobbied hard for a Joint Parliamentary Committee for the Law Commission, and that got scuppered by the Chief Whip in the Lords, but at an informal level, I think this would be extremely constructive thing to do. When we break at four o'clock, I will try to think of some names. You probably know more yourselves. I think you are absolutely right: some conduit for this getting through.

I was frankly depressed that the Coroners and Justice Bill (which you might not expect to contain reform on murder in it, but it does, under the curious way that legislation now gets packaged together) went through the

Commons without any sort of particular committee interest in some quite important matters. That doesn't have to be so in the Lords.

HOWARD RIDDLE: I am Howard Riddle, Vice Chairman of the Sentencing Advisory Panel; Andrew Ashworth is Vice Chairman.

Our recent consultation paper, which Lord Justice Toulson has just reminded people about, received very great support for the idea that children should almost always be tried only in the youth court. That cannot of course happen for homicide, the law doesn't allow it to. Trial in the youth court, among its many other virtues, I suggest, is that it is cheaper -- perhaps the least of the considerations, but one that is relevant to what we have been asked to consider today.

I was very struck by Sally O'Neill's statement, accepting that if youth court trials, murder trials, take place in a youth court, we should nevertheless retain a jury, and I wondered why that is, because after all, juries inevitably add substantially to the length of a trial, which is one of the problems for youths.

There is the tradition of orality: all the evidence has to be heard effectively live in front of the jury, instead of being prerecorded. There is the adversarial system, which I think adds to the lack of comprehension so far as the defendants are concerned, so I wonder why it is that you accept, I think totally, that juries should remain involved?

SALLY O'NEILL: Because I think it is absolutely fundamental to the way the criminal justice system is viewed that the public is involved, particularly in the most serious of offences, that they actually have some input into what is happening in matters which have a particular impact on them. I think it is a fundamental part of the criminal justice system which should

most definitely be maintained whatever the age, for the most serious offences and for adults and throughout.

I think that people perhaps don't realise how seriously juries do take their job, how much they agonise sometimes over the outcome. It's particularly so with young defendants. That's a tough call for them but they do it, and I think it is absolutely critical that they are maintained as the tribunal who make the findings of fact in those sort of cases, whatever the age of the defendant.

EILEEN VIZARD: Sally, may I bring something up in relation to that, if that's okay? Maybe you can help me then with the role of expert evidence in jury trials, particularly the expert evidence in relation to some of the things we have been discussing today: developmental immaturity and child development and all the rest of it.

It is still the case, isn't it, that it's very difficult to get that kind of evidence into court in relation to children who are defendants, because it's not generally seen as relevant to the fact finding exercise?

SALLY O'NEILL: I think that's right. I think that sort of evidence has a role probably as a preliminary part to the trial in the same way that one would, for instance, carry out the exercise in relation to the competence of a prosecution witness, a young child; there could be psychiatric evidence about that. If there is a problem with the capacity of a young defendant, then that's a matter for the judge to deal with as a preliminary exercise, because if the child, whatever the charge, hasn't the capacity to understand the proceedings, then that's something that the judge needs to deal with at the outset of the proceedings.

There are different ways of dealing with it now, but I personally do not -- I'm sorry to say this Eileen -- have any particular desire to have more

experts involved in criminal trials than are strictly necessary, because it can get very confusing as far as the jury is concerned, and distract them from the fact-finding exercise which they are there to do.

But where necessary, then they will be called on to give evidence, but I think it's a preliminary matter for the judge, rather than for the jury.

CHRIS STANLEY: I am Chris Stanley, speaking as a magistrate. I would like to ask the panel: The youth court is very much the Cinderella of the court system, and yet it deals with some more serious cases, as we have heard. We heard Mark Ashford say that defence solicitors, defence advocates, are very rarely trained in youth court law. Youth court law is one of the most complex that lawyers have to deal with. There's no specialism in the Crown Court or any of the higher courts, and often when I sit with judges on appeal cases, it is clear that both barristers, prosecutors and judge don't know an awful lot about youth court law.

Yet in the Family Division, you go right up with specialisms, tickets all the way up. Can't we do something about making sure that the youth court system is much more specialised, that it has a link through to the Family Division, that there is a separate recognised system for dealing with young people as they go upwards through the system, just as they do in the family side? And then devise a system where we closer link those two systems together? Clearly children who might go through one system or go through the other system are often children with the same backgrounds, and we artificially separate them at that very early stage.

EILEEN VIZARD: Could I comment just on the training issue? I do think it is a terribly important point and it is something we addressed in the college report. Training for all disciplines is necessary, including mental health disciplines, but I do discern a huge difference in knowledge and

understanding between family law, barristers and solicitors, and the criminal side -- not in all cases, obviously. When one is speaking to solicitors and barristers on the criminal side, often there is very little understanding of the issues around children, and this is presumably because there hasn't been a consistent process of training. That does make it very difficult, at the very least in relation to instructing experts and knowing what you can expect from an expert, etc.

There is a wider issue also that I think you were alluding to, Chris, which is legal representation. It may be that the same child with welfare needs who is involved in family proceedings has to deal with two separate solicitors, and I think this is both unfair and a waste of time and money. It surely should be possible for one solicitor to deal with all the issues relating to a particular child who happens to be a defendant.

LORD JUSTICE TOULSON: Here we have another problem, which is that publicly funded solicitors will be doing their work because they have the appropriate franchise, and very few firms, I believe now, have franchises which will enable them to do both family court work and youth court work.

SALLY O'NEILL: That's right. It's the dangers of specialism. It's the dangers of, when these different areas of law become so specialised that they require particular training in order to do them properly, you then hit the problem that because they are specialised, not everybody can do the whole thing.

Certainly so far as training with children is concerned, the criminal bar, Chris in particular, has been fantastically proactive in trying to train our people in how to deal with children and how to cross-examine them. Obviously we think we have a better rate of success than some other people do, but we keep on trying and training is going on constantly. But I don't think there is any particular training for youth courts and wherever they come from,

barristers, solicitors, High Court advocates, people who appear for children in these sort of circumstances must know what they are doing. If that requires special training, then so be it.

So I don't think anyone would argue against a training course to ensure that people know what they are doing from whichever branches of the profession they are coming.

CHAIRMAN: Certainly we could do more on training. Identifying children's work and working with young offenders as a specialism certainly helps in terms of family law, at least as long as there was a premium on the fees. That is of course pie in the sky these days, but at least we are beginning to understand how difficult it is, and we are going some way to undertaking the necessary training.

The other aspect that Eileen raises, of course, is that there is also the issue of the walls between family court proceedings and criminal court proceedings, but it perhaps raises an issue that was aired this morning, and that is whether there is scope for drawing the two jurisdictions closer together in some way, as some people have suggested happens in other jurisdictions.

That might be something that we ought to look at.

SALLY O'NEILL: I think it is difficult when you have that, because the standards of proof, the rules of evidence and all those sorts of things, are so very different in the two jurisdictions.

I mean, for instance, if you have a child who is a complainant in criminal proceedings, they will be required to be cross-examined and what have you: standard of proof, have to be sure. In equivalent family proceedings, which often run concurrently on the same evidence, the child's video will just be called and played: that's the evidence and the child is not there to be cross-examined at all.

They are very different jurisdictions really, so a lot of work needs to be done to actually get them in some way to join together rather than run in parallel, which is what they do at the moment.

EILEEN VIZARD: Can you suggest, Sally, how we might start to break down some of those barriers?

SALLY O'NEILL: I think if you could get the same solicitor and advocates acting for both then that certainly would be a help, but in practical terms, really, you get more and more solicitors and indeed barristers feeling themselves unable to do the family work because of the restrictions on funding, and it is getting more difficult, not easier.

So I'm afraid the answer to that is probably no, at the moment.

CHAIRMAN: The judiciary table has another comment.

JUDGE NICK CRICHTON: Nick Crichton. I am a District Judge in the Inner London Family Proceedings Court, and have specialised for 15 years. It took us long enough to get families separated out from criminal proceedings, that the thought of putting it back together really startles me.

I wouldn't mind seeing a bridge built over that wall, quite a narrow bridge, so that cases would come from the youth court to the family court but wouldn't go back the other way. I think the skills for family work are completely different from the skills for criminal work.

It's a big discussion, and possibly not to be developed here.

We all know that children from care are disproportionately represented in the young people's custodial population, and there is the feeling that if only we could get it right more often in the family proceedings court, we might do something to reduce the number of people going into the criminal justice system.

The problem is -- and I hope this isn't too cynical -- we are dealing with a government which is systematically dismantling our child protection system with every week that passes. It is very, very distressing to sit by and witness that and to be unable to do anything about it.

STEPHEN JAKOBI: Really, I have had to rush around and lobby absolutely everybody, and the answer is, it's a tripartite system we are facing in Parliament between three departments, two of which are represented in decision-making and the third one would like to be. This is mirrored with the political parties, so there is only one way forward and that is really to form some form of support body, cross-party, in Parliament. I would heartily recommend that as an approach.

PROF PETER WEDGE: Peter Wedge again. There is a large, I think, body of agreement here that a lot of change is needed, but it's very difficult to get it made. I wonder if there's a role for some form of public scandal, and I'm thinking here of miscarriages of justice. Maybe the research has been done and I hesitate to suggest more research than has already been done, but we know that we have plenty of evidence on lots of the issues we have been discussing today. On this one I don't know that there is evidence on miscarriages of justice and the extent to which miscarriages have occurred, because of the very issues we are concerned about here: a failure to understand, a failure to be able to participate in the process.

If anyone would help with that, fine. If they cannot, is there something we can do about it? It seems important that we should capture the public imagination, to try and sway opinion in favour of the kind of reforms we have been talking about.

Thank you.

CHAIRMAN: Thank you very much.

EILEEN VIZARD: Could I respond to that briefly and provocatively, just to say that arguably -- *arguably* -- one might say that the whole system of prosecuting 10 year old children opens the door to miscarriages of justice, because I have tried to show today that although these children may certainly have committed the acts, and I am not arguing about that, were they developmentally competent to know the long-term consequences of what they did? The research evidence overwhelmingly suggests that they were not.

I have in my mind, as someone who testified in the Bulger case, the looks on the faces of the jury. The jury really wanted to know why this had happened and why those children were there. That case has gone and there has been a great deal of comment on it, legally and otherwise since, but I would still say that very young children who have to appear in court under these circumstances, to face charges which they are not intellectually and emotionally able to understand fully, could be seen in some ways, I would say, as potentially victims of miscarriages of justice, and they themselves should be dealt with in a different way. I am not of course referring to the victims of the crimes which they have committed, but rather the process in which they have been caught up.

CHAIRMAN: Thank you.

CHRIS STANLEY: Chris Stanley again. I just wondered if the panel would support a review, perhaps a Royal Commission, on the way we deal with under 18 year olds. Most of the law that we have for juveniles is adult hand-me-down law. Do we need an inquisitorial system rather than an adversarial system, and one that is more closely linked to family and family proceedings?

I disagree with Nick Crichton. After the 1908 Act we had 80 years of the Juvenile Court, where we dealt with these children in the same court. I sat in a Juvenile Court and dealt with both types of children, if you can call them

"types" of children, very successfully, and I think it has been pretty unsuccessful ever since.

CHAIRMAN: Well, I'm afraid I don't want to encourage a debate so I am not going to give right of reply to Judge Crichton, but the Royal Commission idea, presumably with a blank sheet of paper rather than any prescription, is one that looks as though it has a measure of support on the panel. Lord Justice Toulson is looking a little sceptical.

LORD JUSTICE TOULSON: Well, of course, the practical answer is that this Government doesn't do Royal Commissions. Whether the next one will, I am not sure. I think that I would want to go away and try and shape the terms of reference rather more sharply. Just how do we deal with people under 18 who get into trouble? I can see that is just such an enormous universal subject, I think one would need to be a little more clear as to the terms of reference.

SALLY O'NEILL: There is potentially more mileage in interesting people in the age gap from 10 to 14, and combining the way that they are treated in the criminal courts with the family courts. I think that politically is more attractive. I think that people's tendency, and politically I suspect their attitude, will be that people of 14 to 18 can encompass some people who have done something really quite seriously wrong and who are capable of dealing with the adult system. I don't think the same argument can be levelled at 10 to 14 year olds. I think that might be a softer target, so to speak, and therefore a more attractive one.

LORD JUSTICE TOULSON: I rather support that, and I think that we are so conscious that by the time you are getting children into custody, so many other things have failed. You have heavily damaged goods, and all the evidence shows that an earlier intervention has a much greater prospect of success, but to try and target some sort of inquiry into a younger age band, both for the

reasons Sally has given and because one would then concentrate on what can we do with these children whose teachers at school will be able to tell you, you know, watch out for so-and-so in four years time, what can we do with that younger age group? I would be rather keener on that, because I think it has quite a nice shape to it.

EILEEN VIZARD: I tend to agree with that notionally, just in that also, young children are often the ones who come to public attention like the current case, who have committed, say, very serious crimes, and we know that these are some of the most disturbed children, so it might actually be easier to get some consideration made for assessing these children early on, on the basis that they have obvious needs and should be seen and ought to be assessed as to whether they really have any competence to enter into the criminal justice system.

LORD JUSTICE TOULSON: Can I add one postscript to this? I think another aspect of this, which would be discrete and worth looking at, is how do we actually deal with children when they are either put into a custodial institution or put into a local authority home, or whatever? One of the things which troubles me is that if a young offender is taken into an institution, that obviously immediately ruptures relations with his family, but if he or she (more usually he) is put somewhere 200 miles away, where they cannot visit, the damage can be huge.

At a legal level, that raises Article 8 issues which have barely been litigated at all. I won't go on about it now, but I think that is a topic within itself that deserves attention.

CHAIRMAN: Just one last point, I think.

JOHN GRAHAM: Just picking up on what Chris Stanley has just suggested, the notion of a Royal Commission, I would actually agree that this

government, in particular, has not looked favourably on setting up Royal Commissions. I remember when I was in government it was often a way of delaying decision-making on very complex issues, and I think that is what this Government has adopted as a policy.

There is an independent commission on youth crime currently operating, and it is run by the voluntary sector. Obviously it doesn't have the status of a Royal Commission, but it is an opportunity to come up with alternative ways of dealing with these issues.

I would just like to stress again that the Independent Commission on Youth Crime and Antisocial Behaviour, which is funded by the Nuffield Foundation, hosted by the Police Foundation, and has its own website and invites people to present their suggestions to that commission, is at least an opportunity for doing something.

CHAIRMAN: Thank you.

FRANCIS LISTOWEL: Just on this particular point, there was a meeting of the officers of the Children's All Party Parliamentary Group yesterday, and it was decided that next year's work would be on children in a secure estate. They wished to produce a report at the end of it, and it occurs to me, listening to this, that one might try to build towards something which would involve Lord Ramsbottom and involve quite a few visits and quite a full-blooded approach, and looking both at the processes, taking children into custody as well as their experience.

Thank you.

CHAIRMAN: Thank you very much. I think I'm going to draw a line there. Thank you all very much. Can I thank on your behalf all our speakers today, particularly Sally O'Neil, Eileen Vizard and Roger Toulson, who stayed to the end and formed a panel for us. If you ask Louise by email for copies of

the papers that you have had, she will supply them, along with any other speaking notes that have become available by the end of today.

Would you also please bear in mind that Barbara Esam is sitting at the table nearest the Panel, ready to take names of anyone who is interested in making a contribution, either in person or electronically, to this continuing discussion, and anyone who would like to help with ways of taking these ideas forward. Barbara would be most interested to hear from you, either immediately or in the near future, before the idea floats away into the ether.

Can I then make a vote of thanks also to the Steering Committee who made this conference happen: Michael Bowes and Lord Francis Listowel, Liz Lovell and Iryna Pona from the Children's Society, Chris Stanley, of course, and Dr Eileen Vizard, all working under Barbara's direction, made this happen. They deserve, I think, a vote of thanks.

Finally, I know that the Chair of trustees, John Tenconi, very much wanted to be here, but a sporting accident has incapacitated him at the last minute so he was unable to make it. But thank you all very much for coming. It has been a good day and a productive one. We have plenty to work with, and we certainly have identified what a difficult road it is, but it is one that is extremely worthwhile. Thank you all very much.