

The Michael Sieff Foundation

working together for children's welfare



CHILD DEFENDANTS **Is the law failing them?**

Report on the Conference

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Hosted by
The Chambers of Michael Lawson QC
22 Essex Street, London WC2R 3AA

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TOPICS AND SPEAKERS

Chairman: Lord Justice Kay

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1. BACKGROUND TO CONFERENCE

Dr Eileen Vizard, Trustee, The Michael Sieff Foundation

Two of the recommendations made at the Foundation's successful three-day residential conference on *The Needs of Offending Children* held in September 2001, are being taken forward by the Government: a child defendants' pack to explain in simple terms the functions of the court system; and guidance for pre-trial therapy which many child defendants need. Wider questions, also being followed up from the September 01 conference, include overwhelming support by delegates for raising the age of criminal responsibility from 10 years, which is among the lowest of the European countries.

All the issues raised indicate that changes are needed to the juvenile justice system. But what should these changes be and what are the right solutions to the technical legal, logistical and inter-agency dilemmas which arise? These topics are specifically examined at today's conference which has a predominantly legal focus: *Child Defendants - is the Law Failing Them?*

2. WELCOME

Michael Lawson QC

How a country deals with juvenile crime is one of the benchmarks of its social development. In England, juvenile crime is a blight on our society, and the way we deal with it is less than satisfactory. We need to examine the underlying philosophy. Our view is a confused one. We like to convict, and then treat the criminals to prevent them from re-offending. Other countries take a different approach - preventing young people from entering the criminal justice system at all.

Today, we will be looking at what the law is doing about juvenile crime in this country, and considering whether young people should be put into the criminal justice system. The fact that so many of the country's top legal minds are here today, including a large number of High Court Judges, is a measure of the importance of our subject.

3. Keynote speech - Rights of Child Defendants

Lord Chief Justice Woolf

I would like to start by thanking both The Michael Sieff Foundation and Chambers for organising this conference. The importance of the subject, under discussion today, is indicated by the calibre of people who have given up their time to attend the conference. I read with great interest the 'Report on the Conference' hosted by The Michael Sieff Foundation on 'The Needs of Offending Children' last September. If today you manage to produce a document that is as good as the report of that conference, it will have been a very valuable day indeed.

Children within the law

Children occupy a special place within the law. This has not always been the situation. In fact it is probably right to say that it was only in 1908 that the first real change was made but the watershed, as far as I am concerned, came in 1933 (the year I was born). That was the year in which Parliament laid down a principle which I still regard as being of the greatest importance and bears repeating - namely that contained in the Children and Young Persons Act 1933, section 44(1):

“Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him/her from undesirable surroundings, and for its education and training.”

That has been the flag that everyone hoists, or should hoist, in court cases involving children. Unfortunately it has not always been given effect to as well as it should. However, that principle has remained unqualified now for almost 70 years. In 1998 there was placed alongside section 44 a second principle. That second principle is contained in the Crime and Disorder Act 1998 section 37:

(1) It shall be the principle aim of the youth justice system to prevent offending by children and young persons

Balancing the principles

The section goes on to make it the duty of all bodies in the youth justice system to have regard to that aim. As I see it, what we are concerned about today is balancing the principles to ensure no harm is done to the older principle. However we have to accept that, at least in the past, in the way we have conducted proceedings involving the young and in

the way we have punished them, we have not been as successful in achieving a balance as we should have been.

As to our procedures, I acquit the magistracy of failure because of the way, on the whole, Juvenile Courts operate, but I certainly could not in the past have acquitted Crown Courts. The reality of our shortcomings was proclaimed by the European Court of Human Rights in *T and V v UK* following the Bulger trial. The European Court came to the conclusion that the way that trial was conducted, did not constitute cruel and unusual punishment, but did result in an unfair trial contrary to Article 6 of the Human Rights Act. That trial was conducted by one of this country's most humane judges and I know he would have conducted the trial in as sensitive a way as the system would permit, but the European Court gave out a loud message that what we were taking for granted should not be taken for granted.

Full participation in trial

I think that credit should be given for the fact that, in a very short space of time after the judgment, my predecessor, Lord Bingham, issued a Crown Court Practice Direction. The Direction stressed the importance of ensuring that the trial process should not subject the young accused to avoidable intimidation, humiliation or distress. It reminded the court and those representing a young defendant of their continuing duty to explain each step of the trial to the young accused and ensure as far as possible their full participation in the trial.

Subsequently the Home Office and the Lord Chancellor's Department issued joint guidance in March 2001, the Good Practice Guide, making specific reference to the Practice Direction and the need for the Youth Court, (where the majority of youth cases are held), to follow the principles embodied in the Direction. We all know that there

has been a very recent high profile case where we can see the progress that has been made by courts in recognising the principles stated by the European Court and Lord Bingham.

Young defendant's pack

Many other positive steps have followed, including the introduction of the excellent Young Witness pack that I would like to see extended to provide similar guidance for young defendants. There has also been the successful initiative, which I applaud, to halve the time which elapses between arrest and sentence and the greater recognition that there are cases where what is needed is treatment and therapy.

The improvements in case management for young offenders are only part of what is required. There are bigger and more difficult problems to tackle. Here I quote my only statistic: recent figures show that 76 per cent of males under 21 and 58 per cent of women under 21 re-offend within two years of being released*. This is a terrible indictment of the system and we must find ways to break the repetitive cycle. Here I do believe that new structures, including the Youth Justice Board and Youth Offending Teams, introduced by the Crime and Disorder Act, are very positive steps.

Their arrival on the scene has resulted in recognition that failures in education, lack of training and lack of employment, especially when linked to drug abuse, do influence behaviour; as does a breakdown in the family unit. Working often with the voluntary sector, new initiatives are being tried out almost daily. What I find encouraging is that problems of young offenders are beginning to be tackled in a more holistic manner. However, much remains to be done and I refer back to the remarks made by Michael Lawson earlier that if we are really going to see change, then we need to look at taking some of the youngsters out of the Criminal Justice System.

One of my major concerns remains - what happens to young defendants when they are given a custodial sentence? This is a matter of some importance at a time when we have higher numbers of offenders in custody than ever before and the number could rise dramatically because of the Government's recent initiatives. Let me say straight away, these initiatives have my support and the support of the senior judiciary as a whole but we must recognise they will increase the number of youngsters in custody.

Regrettably, there can be no denial that action was necessary. Street crimes, crimes which can terrify the public were doing just that. This is a situation which cannot be tolerated. If resources are provided, then I do believe there is a need for the new powers (under sections 130/2 Criminal Justice and Police Act 2001). To remand to secure accommodation could be of value in tackling the repeat offender. It is not in offender's interest that the system should appear unable to tackle them.

However, what is important is that while in custody and after release, there is proper action to tackle offending behaviour. Education and training are essential. A properly structured bridge back into society is critical. I attach particular importance to mentoring and monitoring schemes.

We need to have open minds to new approaches such as restorative justice. In the longer term we have to consider whether the judiciary's involvement with the child after he or she has been sentenced should cease with the conclusion of the court proceedings. A possible change in the future is a continued involvement between the sentencer and the sentenced. A continuing responsibility on the part of the Judiciary to monitor the progress of the child concerned could help in breaking the vicious cycle of offending, punishment, release, re-offending and punishment again. To this end the sentencer should be given flexibility as to the action taken.

Tariff reviews

May I turn to an encouraging note based on my experience with the youngsters who, having committed murder, have been detained during HM's pleasure. As a result of a transitional situation for the last year, I have considered on average more than one of these tariff reviews each week. On the one hand, it is deeply disturbing to read of the offences that these youngsters have committed and the traumatic consequences for the families of their victims. On the other hand, they have given me a greater insight into how young people can change and develop, particularly if the right sort of support and structures exist.

Again and again I read reports showing dramatic improvements and changes in behaviour as a result of very commendable work of the institutions where these offenders are detained. The necessary incentive for change comes from positive interest, support and concern for a young offender's development. The consequence is that in many

* Lords Hansard text for 5 November 2001(211105-06)

cases I am reducing the tariff.

It is important to recognise that we, as judges, have a responsibility for what becomes of young defendants after they are sentenced, a responsibility shared by society as a whole. We need to recognise that we have a continuing duty and we are accountable for failures resulting from inadequacies in our current system of punishment and rehabilitation.

Need to balance responsibility

We need to balance our responsibility for the welfare of young defendants with the responsibility of the Judiciary to take into account the needs of society as a whole and the victims of a crime in particular, in determining what punishment suits the crime. Punishment for street violence in particular needs to be robust. It is also vitally important that young offenders acknowledge and recognise their accountability for the suffering of the victim as a consequence of their actions. It is a sad fact that young offenders are responsible for a substantial amount of crime in many areas.

The recent initiatives announced by the Lord Chancellor and the Home Office, supported by the senior judiciary, outlining cross-Government action for attacking street crime, including the earmarking of courts to specialise in dealing with street crime in the ten areas with the highest street crime, are fully justified. They will fast-track cases and provide victims and witnesses with support and facilities. The courts will have a vital part to play in ensuring that thorough and effective preparation of cases takes place. The courts will have powers

to monitor the behaviour of young defendants whilst on bail.

It is an example of a holistic approach to criminal justice problems of which I approve. However its real success will depend on what we achieve with the offenders after they are sentenced. If, as I fear, after the youngsters are sentenced, because of the pressure on the Prison Service and lack of resources, the offenders are merely warehoused and left languishing in overcrowded secure accommodation, the initiative will not achieve the intended long term change we need.

Find the way forward

For young prisoners themselves, the Youth Justice Board has demonstrated what can be achieved, by focusing on ensuring that the necessary education and training and support are made available. However the publicity with which the new initiative was announced was strangely silent as to what is to happen to youngsters when they are removed from our streets. Are the underlying problems which usually result in their descent into crime to be tackled?

We have to learn the best way to deal with these youngsters and this is where your task to-day starts as I leave to return to court. You have the task of bringing your collective expertise to bear to find the way forward. To identify ways in which we can achieve the proper balance between the two statutory principles to which I have referred. I wish you success and hope the results of conference reach the audience they deserve.

4. Age of Criminal Responsibility

Mr Justice Toulson, High Court Judge and Chairman designate of the Law Commission

The age of criminal responsibility in England and Wales is 10 - lower than many countries. However, the defined age does not reflect a jurisdiction's approach to young offenders. In Scotland it is 8, but no child under 16 may be prosecuted except on the Lord Advocate's instructions. The issue is much broader than the simple question of raising or lowering the age. A more effective solution – for the Government and the public – would be to outflank the age issue and introduce methods of keeping young offenders out of the criminal justice system without changing the age of criminal responsibility.

Current situation

Within the context of today's discussion, criminal responsibility is best defined as the age below which a person cannot be prosecuted. I will start with the current situation in England and Wales.

Since 1963, the age of criminal responsibility in England and Wales has been 10. At common law it was 7. The Children and Young Persons' Act 1969, s4, provided for the age to be raised to 14 for offences other than homicide, but a change of

government in the following year resulted in a change of policy; the section was not implemented and it was subsequently repealed.

At common law there was a presumption that a child under 14 was 'doli incapax'. This required the prosecution to prove that the defendant knew that what he was doing was wrong before he could be convicted. This rule has now been abolished by statute.

A comparative study* of other jurisdictions carried out by Benjamin Dean shows a range from 7 to 18 years. So we are at the lower end of the scale, but we are by no means in isolation.

Data limitations

The Scottish Law Commission points out that there are limitations in considering the data. For instance, it is often difficult to be confident that one is comparing 'like with like'. Some countries use the age of criminal responsibility in its narrow sense (ie, age of criminal capacity). The level at which the age is set is in no way an automatic indication of the way a child is dealt with after committing an offence. It may or may not reflect a repressive or rehabilitative perspective on behalf of the authorities.

In the UK the most recent detailed study has been by the Scottish Law Commission. Its Report on the Age of Criminal Responsibility No 185 (January 2002) and its earlier Discussion Paper No 115 (July 2001) can be found on the internet (<http://www.scotland.com.gov.uk>). The current position in Scotland is that the age of criminal responsibility is 8, but no child under the age of 16 may be prosecuted except on the instructions of the Lord Advocate. The Scottish Law Commission has recommended that no child under 12 should be able to be prosecuted. There are a series of children's hearings, so although the age of criminal responsibility is lower than England and Wales, the practical likelihood of coming before a criminal court is remote.

I have recently been involved in a study of children's developmental ages with the Royal College of Psychiatrists, but it is important to realise that, when the age of criminal responsibility went up to 10, this was influenced more by public opinion than by any scientific data/professional opinions. Any debate on public responsibility is bound to take place in the context of public perception which is driven by gut feeling and headline cases, not detailed analysis.

Crime, and particularly juvenile crime, is understandably a major topic of public concern. National newspapers recently ran a front page picture of an 11 year-old-girl in Bristol throwing a brick through a supermarket window. The report said that she had been arrested and released 30 times. These images stick and influence ordinary people far more than detailed Home Office data. Anyone suggesting this behaviour should be decriminalised would encounter a torrent of opposition – making it unlikely that any Home Secretary would contemplate such a proposal.

Looking at youth crime in more detail, the statistics show a worrying rise in juvenile street crime. According to an article in the *Economist* (23 March 2002), the Home Office estimates that robberies will have risen by 29% in London in the year to March 2002 and a quarter of all suspects are 11 to 15 year olds. The profile of gang members in Britain is getting younger. At The Michael Sieff Foundation conference in September we were told that only about 10% of robbers are caught. In 2000 the incarceration rate for those convicted of robbery was over 70%. However, of male young offenders discharged from custodial sentences in 1997, the reconviction rate within 2 years was 76%. In summary, robberies by young people are increasing at a worrying rate; the vast majority are not caught; and the vast majority of those who are caught, re-offend.

Offenders are victims

The position in relation to murder is different. A consultation paper on tariffs in murder cases issued by the Sentencing Advisory Panel in November 2001 stated that murders committed by offenders under 18 are rare and the overwhelming majority are teenagers rather than 10 to 12 year olds. Between 1991 and 1999 a total of 170 young offenders were sentenced to detention at Her Majesty's pleasure. Only 5 of them were aged under 15. The consultation paper continued :

“From the literature on children who commit murder, it appears that the circumstances in which their offences are committed vary quite widely, so that with such small overall numbers it is not possible, as in the case of adult offenders, to identify a consistent pattern. What does appear to be a common factor among these young offenders is that they tend to come from seriously dysfunctional families, many are the victims of abuse, and they are often themselves seriously disturbed.”

* A Comparative Study about the Age of Criminal Responsibility in other Countries Benjamin Dean, Appendix 1

There is an argument for saying that, since people's developmental patterns differ, the criminal law should only apply to a person once he/she has reached an appropriate developmental stage rather than an arbitrarily chosen chronological age; and therefore there should not be a definitive age of criminal responsibility. Instead, the issue of criminal responsibility should be argued out on a case by case basis, regardless of age.

Despite the instant attractiveness and innate fairness of this proposal, its merits are outweighed by the difficulties it also presents, both in principle and in practice. First there is a definitional problem. How should the appropriate developmental stage be defined, or, if a precise definition is not possible, how should it be measured, so that it can be applied to each case? It will be interesting to see the final conclusions reached on this topic by the Royal College of Psychiatrists' working group which is considering the whole subject of young offenders. However, child and adolescent psychiatrists would probably agree that psychological assessment of moral development raises some intractably complex issues.

For effective parliamentary reform, a clear, concise definition would be needed. This was illustrated in the application of the 'doli incapax' presumption, which took a very broad approach to the question of the age of criminal responsibility, and in practice became virtually a dead letter. As long ago as 1978, Professor Glanville Williams wrote in the Textbook of Criminal Law that

"juvenile courts pay little attention to it, though it occasionally achieves prominence when a child is tried in the Crown Court for homicide and the judge has to direct the jury."

Youth justice process

If the question of a child's criminal responsibility required a more detailed investigation of their level of moral development on a case by case basis, as a practical matter it is likely to slow up considerably the process of youth justice. Would the question be decided as part of the trial or at a preliminary hearing? Logic might suggest that if an issue is to be decided whether a person has sufficient development to be amenable to the criminal law, there should be a preliminary hearing, as with the trial of an issue of fitness to plead. But that would present further complications.

In serious cases, would a jury be empanelled to decide the question? If so, what would they be told about the case itself? Would the evidence go into what the defendant was alleged to have done

(with the alleged victim potentially having to give evidence and be cross examined both at the preliminary hearing and at a subsequent trial) or would the tribunal be kept ignorant as to the facts relating to the alleged offence?

Another major problem was summed up succinctly by Professor Glanville Williams in relation to the 'doli incapax' rule :

"The objection to the rule is that if a child has been brought up without a knowledge of ordinary moral notions he needs control the more, not the less."

Implications for society

This point applies to adults as well as children. Indeed, why confine the suggested approach to children and young people? Why should it not apply to adults who have significant development immaturity and cognitive limitations? This also opens up a sea of questions about some of our most dangerous offenders (eg, killers or rapists with borderline personality disorders) who may be so precisely because they have never achieved the level of moral/mental development expected of ordinary citizens. Ought such people to be subject to criminal liability and what are the implications for society if they are not?

This moral problem has engaged legal and moral philosophers down the ages. The great common lawyer Oliver Wendell Holmes said in a famous series of lectures delivered in 1882 :

"For the most part, the purpose of the criminal law is only to induce external conformity to rule...In directing itself against robbery or murder for instance, its purpose is to put a stop to the actual physical taking and keeping of other men's goods, or the actual poisoning, shooting, stabbing and otherwise putting to death of other men. If these things are not done, the law forbidding them is equally satisfied, whatever the motive..."

*"It is not intended to deny that criminal liability...is founded on blameworthiness...Such a denial would shock the moral sense of any civilised community; or, to put it another way, a law which punished conduct which would not be blameworthy in the **average member of the community** would be too severe for that community to bear. It is only intended to point out that, when we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct, we should expect there more than elsewhere to find that the tests of*

liability are external and independent of the degree of evil in the particular person's motives or intentions."

Scope of criminal code

Holmes was at this point dealing with the applicability of criminal law, rather than the separate question of what should happen to a particular defendant who commits acts prohibited by the criminal code; and he was arguing that the scope of the criminal code should be set by reference to the standards of average members of the community.

How society should treat one of its members who infringes the code is another matter, and here, of course, personal considerations must come into account. On this approach, the age of criminal responsibility should not be subject to individual variations, but should reflect the age at which society judges that its members should generally have reached a sufficient level of development to make it appropriate for the criminal law to apply to them. The developmental age of the individual child or young person should be taken into account, not in determining whether the criminal law should apply to him/her, but in deciding what to do in the case of a child or young person who breaches the criminal law. This is the approach currently adopted under English law and I am not persuaded that it should be changed.

Human Rights

If the age of criminal responsibility were raised, there would have to be some way of detaining, if necessary, children who commit seriously anti-social acts, both for their own training and for the protection of society. (Children under 10 may be placed in secure accommodation under the Children Act 1989). Conversely, they would be entitled to an appropriate form of 'trial' before any such finding was made against them.

Most other European countries have a higher age of criminal responsibility than we do, and if we raise the age here, we must also have a way of making sure that the 11 year old repeatedly putting bricks through supermarket windows can be restrained at the same time as protecting her rights. Fairness is an important criterion of any system. In Scotland, where the age of criminal responsibility is just 8, the progressive children's hearing system is oriented towards non-custodial solutions. Conversely, a regime which has set a high age of criminal responsibility will not necessarily adopt a rehabilitative approach.

Conclusions

Determining the age of criminal responsibility is ultimately a pragmatic question. As Professor Glanville Williams wrote (*Textbook of Criminal Law, 1978 p 588*):

"What is the magic of the age of 10? Why not 12, 14, or 16? Of course any age must be arbitrary. The governing considerations are pragmatic. At what age does one wish to be able to administer legal punishment to a child?"

The focus of the age of criminal responsibility debate should not be so much on abstractions as on the practicalities of how society can best tackle the problem of its young offenders. Are we likely to do better by deploying controls (and, if so, what form of controls?) over young offenders other than those currently available through the criminal justice system? At present we are not doing well and it is therefore important to explore the reasons for our present failures and how the system might be improved. However, it has also to be recognised that, especially at a time of rising youth street crime, any proposal to raise the age of criminal responsibility would understandably be thought by many people to 'send the wrong signals' and that it would be necessary that any alternative system should, and should be seen to, give proper consideration to public safety.

There is more than one way forward. We could take a leaf out of Scotland's book and develop methods with care to be used in nearly all cases without raising the age. I suspect this is more viable. Criminal responsibility can also be understood as the 'age at which a child is fully treated as an adult in the criminal courts'. We could keep the age of responsibility low, but make sure that we are dealing with children in a way to keep them out of the criminal courts altogether. I remember a 12-year-old on trial for murder in the Criminal Courts who couldn't understand what was going on and should not have been there.

I would like to see all criminal proceedings go through the Youth Court, and replace the murder/manslaughter charges with one of culpable homicide. In practice, this would mean moving towards a system which takes children out of the criminal justice system. Instead of concentrating on the age of criminal responsibility, we could outflank it with other methods. If these were carefully piloted and developed, we could then convince Government that they do not represent a huge political risk and push them through.

5. Trial by Jury for under 16s

Vera Baird QC MP

The system is broken. Young offenders should be taken out of the Crown Court because they cannot cope with the trial and all the panoply that goes with it. There is a cruel contrast between the protection of witnesses and the treatment of young defendants. Young offenders should be tried in private in the Youth Court by a judge appropriate for the level of crime.

A defining case

I agree with the earlier speakers that the criminal justice system for young defendants is broken and the question is how to fix it. Of the four or five trials for under-16s I have experienced, the defining one for me was the case of two 14-year-old girls in Manchester who killed an elderly lady, put her body in a wheelie bin and shoved it in the canal.

The case involved considerable psychiatry. One of the girls - represented by me - was suffering from post-traumatic stress disorder because her family had been the victims of a vendetta with a criminal gang. She had seen her mother kidnapped and burned and her father pulled out of a car and smashed over the head with a baseball bat. It was also agreed that she would, in addition, be traumatised by the events in the old lady's house when she was killed, whether she participated or not. The issue between the doctors was whether she was suffering from such grave PTSD that her responsibility for what she had done would have been diminished within the meaning of the Homicide Act 1957.

There was also a serious issue about whether she could give evidence. To do so, she would have to relive the events, which had traumatised her, in detail. In addition there were several volumes of social services notes about her history, including allegations that she had been involved in under-aged sex and that she had used a great deal of highly sexual language. In turn she had alleged that at an early age she had been sexually abused by a number of males including members of her family. All of that might have played a role in the jury's decision whether she suffered from diminished responsibility and she would have been asked about and cross examined on it all.

Young woman – or confused child?

The judge called the defendants young women and this is what they looked like. But this girl was profoundly disadvantaged and her mature appearance belied the confused child she really was, as one suspects it often does with people of that age.

Some of the witnesses were boys and girls of the same age, around 14 or 15, who happened to be on the street when the girls came back with the old lady who they picked up in a supermarket and helped her home with her bags. The girls squirted her with shampoo, said one or two rude things and then went into the house where the killing and the action followed. It was those minor incidents on the street and the fact that the girls had been in the house at the relevant time which was their evidence. They were, of course, entitled to all the protections afforded to young witnesses in a serious case. They gave their first statements on video, were cross-examined on a television link and everyone was very nice to them. Reflecting on their evidence, it was trivial, not profoundly personal to them nor even about serious incidents. No doubt it was exciting because by the time they came to court they knew that it had occurred just before the killing. But it was not something to affect them personally in any significant way, so that they were in any danger of being disturbed by the experience of testifying.

No protection measures

My client, being a defendant, was not entitled to any of the statutory witness protection measures which those witnesses, of the same age, about those small matters were. There was no question of her evidence in chief being videoed and she was not entitled, under the legislation, to use the television link for cross examination. Even when the Youth Justice and Criminal Evidence Act 1999 comes fully into force later this year, no defendant will be entitled to any of the extended witness protection measures it introduces. She would have had to give all her profoundly intimate and upsetting evidence in a court, in public, with the press and innumerable adults present.

This was post-Bulger and I think we did all the right things. A pre-trial review tried to sort out the most supportive and protective environment for these girls to be properly tried, in a way that met the T & V criteria – so they could understand their trial, instruct their lawyers and take decisions in

their own interests. We tried to persuade the judge to move to Trafford Magistrates Court, because it dealt with children. The court room was adequate but small and had a slightly 'down-a-notch' air, with less self importance than the Crown Court with all its panoply, crests and so on. The judge would not do that but he did, very sensibly, pick the smallest court in Manchester Crown Court where everyone was on the same level.

The judge in T & V got into trouble because the dock was elevated. The children sat with us, nobody wore the ridiculous Jacobean costumes, we looked quite ordinary and human and tried hard to speak in English. People did say 'ipsissima verba' "ratio decidendi" and, of course, referred to the judge as 'my lord', so all of that formality was impossible to switch off. But we all did our best and the judge went many extra miles.

Stresses of court

He managed to get each girl a room with en-suite loo on the judges' corridor - and they could do what they wanted. My solicitor was the mother of a girl about the same age and she brought pop posters to stick on the walls, a drinks machine and some teddy bears. We were next to the Recorder and I wondered what he made of the pop music that my client played in her room during all the adjournments. We did almost everything that ingenuity could devise to make this child settle and be reasonably at home. The judge sat school hours in order not to tax her powers of concentration any more than school does. A woman usher who didn't wear a gown was personally responsible for each girl, and it was always the same face for fetching and carrying to and from court.

We made an effort and this model has been replicated many times since. At the time it was a ground-breaking case. But did it do any good? Did it really help to alleviate the girls' stress at being on trial in a public court?

Although a small court, it was in public. The judge felt strongly that the public should be present and so were the press who balloted for the few available places. It was a cut-throat between the two girls, with each saying the other committed the crime. Their immediate families managed to be civilised about this, but more distant relatives were unable to do so and there were skirmishes inside and outside the court - of a verbal kind and once almost physical. One man came into the public gallery and my client was sure he was the uncle of somebody who had abused her on an earlier

occasion when she had been out too late at night, taking too much dope and drink and generally misbehaving. The police subtly and informally got rid of him. Another person who came into the gallery was a relative of the co-defendant who had screamed at her in the immediate aftermath of the killing, blaming her for the other girl's misfortune at being arrested.

There was undoubtedly an amount of voyeurism from the public who attended; people had come to look at these 'horrible' girls who had done this terrible thing to a poor woman. My client understood this well, though she could not have articulated it. The mood in court was palpably excited, scandalised, intimidating and unsavourily like a day out beside the guillotine - all as she knew, directed at her. Prior to the trial, the press had been extremely adverse. It was a horror story and they made the most of it, with inflaming language and embellishment of the facts. Of course, the kids had seen themselves (albeit unnamed) in the press and knew that the journalists were there looking for more of the same.

Although the judge let them come and go more or less when they wanted if it wasn't too disruptive, compare and contrast their situation with the kids who were giving fairly insignificant evidence. They were brought to court in a police car, which is exciting, and put into a little room with a friendly usher. I'm sure that on the video, one of the lads had his lunch pail and bottle of pop and I think there were games in an adjacent room.

Court video

When the court video was switched on, the judge leaned toward the first young man and said : 'Hello Paul, I'm the judge. Not a pretty sight am I?' Everyone laughed, and it was a bit like being on Saturday morning television. It really wasn't, I think, a traumatic experience for him and all of that protection worked. That's exactly as it should be.

But where in all of this was my young defendant? Did all that we had done - taking off our wigs and gowns and so on - make any difference? The judge was even persuaded to go a step further. I managed to get him to agree to her giving evidence by television link; although the current legislation gives the permission to do that to anyone "other than a defendant". He was persuaded that, although that section clearly could not be relied upon for her, nothing in statute said a defendant could not, in any circumstances, give evidence in that way.

Of course, a judge has an inherent duty to ensure the fairness of a trial and a wide discretion to take all the steps necessary for that to be achieved. Evidence given by television link is not hearsay. If someone on trial was disabled and unable to get into the witness box, the judge would allow his evidence to be given from the well of the court. If this girl was likely to be too distressed to do herself justice if she had to go into the witness box, he could allow her evidence to be heard over a television link? It would be heard contemporaneously and the jury could see her. I prayed in aid the Convention on the Rights of the Child. In fact the prosecution saw the sense of this and did not oppose the application, which was allowed.

We had every hope that my client would give evidence, but even the judge's generous ruling did not put her anywhere near the same position as those kids who were coming with their lunch pails. They had never been in this heady atmosphere in the court at all. They were just brought into their small room, from outside, waved to the judge on television, gave their few words and left.

Fair trial rights

Even while giving evidence by television link, my client would know that the audience who had been gazing at her in court would be looking all the harder at her at that time. She would still feel they all wished her ill and she would not be able to get that out of her mind. She would know she had to come back into court and face them again afterwards and that some of the things she had to say would have made them even more horrified about her. So I don't think that, even going as far as everybody tried, we were able to put her in a position where we could really say there was equality of arms – a very important aspect of the fair trial rights given to every defendant under Article 6 of the European Convention on Human Rights.

In the end, she took the decision not give evidence. It was a bad decision. We tried to talk her into it but she repeatedly said that she would kill herself if we pressed her - and she had attempted suicide many times before. In terms of trial tactics, I don't think she comprehended that, since she had not spoken in interview, she needed to present her side of the case. The other girl had blamed her in detailed police interviews from the start. If we look again at criterion number three from the Bulger judgment, I am sure she couldn't make decisions which were in her own interests.

Children are very immediate in their thinking. This girl certainly could not balance in any sensible way the fact that her entire future could have hinged on giving evidence, with the fear that she would blush and stammer in the witness box when talking about being sexually abused. It just was impossible for her and that, I am afraid, is because a jury trial in public is very stressful and, for many children, that stress is so high it cannot be managed out by any available protective measures.

A year ago, I would have said that our task ought to be to persuade the Lord Chancellor to "fix" criminal trials for young defendants by allowing them witness protection measures. I spoke to him at the time of this case and he was slightly taken aback by the idea that their absence meant there were inequalities inherent in young people's trials. I raised the issue also with Paul Boateng, then a Home Office Minister of State, who later wrote to say that the Home Office didn't think judges had the power to allow defendants to give evidence on television links.

I spoke to Jack Straw when he was Home Secretary and he put forward the only sensible partial argument against allowing these protections to a defendant. He thought there could not be a total absence of the defendant in the flesh in the trial. Seeing her on television link would not allow the same weighing-up process that is so important for a jury. He thought, as I did, in this particular trial that, unless she was kept out of it entirely, then the benefits of giving evidence on TV link are very limited - because you take her out of the court atmosphere and then put her back in it.

He had the most sensible proposal, but by the time I became an MP, Auld was on the stocks anyway and the only responses I could get about balancing the equality of arms was that Auld would think about it. I don't think he did. A year ago, I would have been saying we should all campaign to make those changes, but I don't think so now.

Youth Court

After a long opportunity to reflect on this case, and having stayed in touch with my client who was convicted, I am satisfied that no step we took made a significant difference, and none I can foresee taking would make a difference either. Levels of stress were brought about by the presence in court of large numbers of people – 12 jurors, a judge, a clerk, ushers, and 12 counsel, lawyers, sometimes social workers and psychiatrists.

From time to time, as I told the Court of Appeal, there were 50 or 60 people in that court. Even though it was the smallest that could be made available, we did from time to time ask the judge to exclude the public entirely, but he thought not. If you are going to exclude the public, you might as well do what I think should be done: move all young defendants into the Youth Court and out of the public arena entirely and not try any more to come up with tinkering ideas about how they should be protected.

It is a difficult area. I am very much in favour of jury trials. They are a right. It is harsh to deny what is a better quality of trial from that in the magistrates' court. The balance is usually in favour of allowing jury trial. However, I think that the stress factors change the balance, in the case of a young person.

Judge and magistrates

I agree with Lord Justice Auld wholeheartedly in his recommendations 48-51 that the Youth Court should sit with an appropriate judge for the level of crime being tried - be it a High Court judge or a circuit judge, with magistrates. My only disagreement is that he thinks this should not occur if a young person is charged with an adult and the interests of justice require that the young person and the adult be tried together. Then he thinks the trial should be tried in the Crown Court. I have never understood why it shouldn't be the other way around; try the adult in the Youth Court in order to

protect the young person from all of the difficulties.

The purpose of the Youth Court as the Crown Court is to dispense justice. The two courts observe the same principles of evidence and procedure. Auld thinks they should be administered jointly as one criminal court. I do not think it is an impossibly soft option to allow an adult to be tried with a child, rather than impose all the panoply and almost certainly an unfair trial on a child in the Crown Court. The denial of jury trial to the adult is clearly an interference with his civil liberties but if he will have better trial than a child in the Crown Court, the balance of social good requires him to tolerate that.

I am told by the Solicitor General that almost all consultees for the Auld report felt that young people should be taken totally out of the Crown Court; the only live issue of contention was at what age that practice should be applicable. So I have a good deal of optimism that there will be change and that it is the only kind of change available to protect children and to give them fair trials.

I am afraid I am quite satisfied we did not try that girl fairly. I do not know if the result would have been different if we had, but she simply was unable, damaged as she was - and damaged as, almost by definition, such children are - to cope with the stresses of a public trial.

Jury trials for 16 year olds should not occur and I hope very soon they won't.

DISCUSSION

Dame Elizabeth Butler-Sloss:

Picking up on what Roger Toulson said, I am not happy with the children's panel in Scotland for a number of reasons, and I'm entirely satisfied it would not work in this country. A lot of children before the criminal courts come from severely dysfunctional families and have had very unpleasant experiences of abusive behaviour. It doesn't mean that some of them do not need to be punished. But punishment and looking after them and dealing with their welfare ought to be seen as separate matters to be dealt with in separate courts.

All magistrates have to do two sorts of work: adult crime or the Youth Court, and some do the Family Proceedings Court. I cannot see why magistrates should not be able to do both the Youth Court and the Family Proceedings Court, and move at an

instant from one sort of work to another in the same court, if necessary on the same day. I suggest extending the powers of the Magistrates Courts and the Children Act to meet this scenario.

Care proceedings take a child up to the age of 16 and occasionally beyond. So all children from 16 downwards, with whom we are primarily concerned, could potentially be within care proceedings if local authorities choose to make the application. Take a child aged 12,13, 14 before the Youth Court, with a series of offences and social workers knowing the long family history. I would like to see Section 37 of the Children Act extended, to require the local authority to give a report on the welfare of the child and whether it should intervene. I would like the Youth Court to have the power to seek a Section 37 report. When the child

comes back, they could have the dual role of Youth Court and Family Proceedings Court, and decide whether the latter court should take over or whether it is a sufficiently worrying case to go up to the circuit judge or even perhaps to the High Court judge, within the care proceedings.

This would require a local authority to be obliged to take care proceedings. Some local authorities who are over-stretched have children who should be in care but are not, for lack of resources. Then something dreadful goes wrong and 12 months later, in a hurry, they take care proceedings, or in some cases none at all.

I would like the Family Proceedings Court go ahead on the care proceedings and to see whether the child should be the subject of a care order. It may be the child is dangerous and should be locked up, and that could be done under Section 25 of the Children Act without a criminal offence. It may be necessary to extend the criteria of Section 25 to lock up but, if the Family Proceedings Court's view is that the child should be seen to be punished - for the child's good and for society to know this behaviour cannot be tolerated - the court should have the power to send this child back to the Youth Court (which could be themselves and they would deal with it); or get another court to deal with the case, with whatever penalty appropriate for the child, **but in the context of welfare.** I would like this easy interchange of moving between the two courts to see what can be done with all children up to the age of 16, because care proceedings can be issued.

In Scotland you can't do that. The Sheriff deals with the offence; the children's hearing purely and simply deals with the welfare of the child and they are quite independent of each other. I would like to see this ability for magistrates to be trained in the same way to operate in more than one sphere. It would require changes in the rules and also some primary legislation. I do not think it's all that difficult to manage with goodwill and it is a way to look forward.

Although my interest is welfare, I do recognise that punishment is an important element and that children shouldn't think they are getting away with it because they are being dealt with as needing help. This could be achieved by being able to move to the Family Proceedings court, but back to the Youth Court if punishment is necessary. To do this would need extending the powers of the Youth Court into the Children Act; but also extend the powers of the Act to deal with these children. Local

Authorities would have to be required, in cases where the criminal court (Youth Court) thought there should be care proceedings, to take up the challenge and not just say: No, we're not going to make an application.

Roger Toulson:

I think it is true of many aspects of the law that, if we're not careful, we get into little compartments and think of the criminal law and the welfare of children separately. It's very helpful to start thinking whether we should break down some of these barriers. The greater degree of specialisation today has a danger of leading us to think more within narrow channels rather than looking at the wider picture.

Eileen Vizard:

Thank you, Elizabeth, for this extremely interesting suggestion. Do you envisage children charged with all manner of offences, including serious ones - murder, manslaughter and so forth - also being dealt with in this flexible way between the two courts?

Dame Butler-Sloss:

I must say this needs to be looked through with a great deal more care. I have asked Rupert Hughes - who was in the Department of Health and shares my views - if he would put something on paper* to show Roger Toulson in his new role as Chairman of the Law Commission, and push it around. I don't know whether you can treat murder- or wounding with intent - in that way, but I would like to think it would be a matter for the Youth Court who would first see the case. It may be that, even within the Youth Court, there could be a much more in-depth section 37 enquiry rather than the enquiry in dealing with the sentence in the Youth Court.

Arran Poyser:

An earlier point was made about judicial monitoring of offenders post-sentence. This has parallels with the Re S and Re W (House of Lords 14 March 2002) appeal which attempts to monitor care plan implementation. I pose the question: What practical purpose would this serve and what would be the point of monitoring?

Roger Toulson:

I remember being taught in criminology at university that there wasn't a single idea in penology which hadn't been tried out. There is no new idea, but it is important that ideas are applied

* Young Offenders: Justice and Welfare - a Review of the Balance. Rupert Hughes. Appendix 2.

sensibly, where appropriate and not across the board. That general principle has relevance to your question. In my Western Circuit certain orders are monitored by a circuit judge. In some cases an offender made subject to a drug treatment and testing order, has to reappear in court, usually one month after the initial sentence and then spaced at longer intervals. Circuit judges who are doing this tell me they think it highly salutary, because the offender knows he will be reappearing before the same judge.

I don't think it's right to do this routinely in every case, because judges would get swamped in the workload and it would become perfunctory and lose its purpose. I think there are cases where it's appropriate and there can be a real value for the offender to know he is reappearing before the same judge. It can also be informative for the judge to know to what extent his orders are working. We all talk about the great experience of sentencing judges, but what most do not know is how well their sentences have worked.

Asked if monitoring, used selectively, would include the judge having re-sentencing powers if things were not working well, **Roger Toulson** replied: I think there must be power to re-sentence, carefully circumscribed by legislation. There's got to be some stick as well as carrot. If he doesn't behave, the defendant must know he is liable to be re-sentenced, otherwise there's no point in monitoring; it's not purely for information purposes. Also, the circumstances which may lead to re-sentencing must be defined.

Lord Justice Kay:

I'm a huge fan of this approach for several reasons. One of the powers of sentencing under-used in the past, is to defer sentence. In the right case there was the option to say to the defendant that I was going to let him go away but he would have to come back before me and I would be looking for certain things to be addressed. On that basis I would decide what would happen to him. In the cases where I used that power, it was a useful sanction. The fact that defendants knew they would report back, worked well. Experience in the different area of US drugs courts, where people had to come back regularly before the same judge with powers of sanction, not only to change the sentence but even to impose short periods of custody in the middle of a long-running review, seemed to produce real benefits.

I think you will find the probation service endorses that view. They tell judges on courses that if they

can say to the defendant: Do you remember the judge has asked for a report? - this can be used for good. It is no longer the situation the minute a defendant walks out of the court that he thinks "that's it" as far as the judge is concerned. This is certainly beneficial in the right sort of case.

I also think it is beneficial to the judiciary. We get little, if any, feedback after sentencing. We do not know whether the course we took was a good one. So next time we are faced with the same situation, we cannot draw on our experiences because we do not know whether it worked last time.

Eileen Vizard:

To endorse what you said about judicial follow-up after sentencing, in my previous work with convicted adult sex offenders and the probation service, I know that to be absolutely true. It has an amazing impact to be able to name the judge and say he is following the case with interest and that any breach will be taken seriously.

Dame Butler-Sloss:

If we have flexibility in how we deal with children, I do not think the age of responsibility is all that important. A younger child with a high IQ, emotionally and intellectually able, who chooses a course of conduct, should not get away with it at the age of 11 or 12. In contrast, a 14-year-old who is not very bright would be far better in the care system, because that child may have technically mental capacity, but not the sort of background to understand entirely the consequences of what he or she has done. I worry about the age of responsibility because I think it does not meet the problem we have. If we do not have to go exclusively down the criminal court path with children, then I do not think it matters terribly under the age of 16 – as long as it is not below 10.

Roger Toulson:

I'm very interested in Elizabeth's proposal for effectively twinning the two courts. At the September Michael Sieff Foundation conference, a point made again and again was that offending children are stereotyped as either poor little victims or little monsters. That is how they tend to be portrayed in the press and our court system almost encourages that approach. I think we all know that very often the offending child is a victim too, but this cannot be read as a complete exoneration of what they have done. Therefore, bringing the two courts together seems to be an idea worth developing.

Elizabeth's comment about the bright child who may be emotionally and intellectually developed but whose conduct may merit some punishment, is echoed by some work in other jurisdictions. Although the general trend in recent years has been toward the age of criminal responsibility being raised, it has not been universal. Some countries have debated lowering it, for the reasons given. For a child who may deserve some punishment, in a society where people are developing younger and quicker, is it in their or indeed society's interest to keep pushing up the age? It enables one to finesse the question in a way which is not intellectually dishonest by leaving a relatively low age level of criminal responsibility if, in practical terms, the court can adopt what seems to be the appropriate method for the child and society in the individual case.

Personally I would like the age of criminal responsibility raised to 12 but that is an entirely instinctive feeling. However, I don't think it's of primary importance - if we get these other structures right.

Dame Butler-Sloss:

I would not like to see it raised. I do not think it is necessary as long as you can be flexible about whether to charge and convict the child. If you can charge and choose not to proceed because the child needs help, then I do not think you need to raise the age.

Roger Toulson:

I would hate this whole subject to go down the track of whether it should be 10 or 12 because, once it's seen in public that this is what the argument is about, the opportunity for constructive development of the law will be lost.

Lord Justice Kay:

One feature that attracts me about Elizabeth's solution is that, as I understand the Scottish experience, the decision whether the child is prosecuted or not and is going to be treated as a criminal or not, is made by the Lord Advocate and is therefore an administrative decision, albeit taken at a high level. Under Elizabeth's proposal it would still be a judicial decision and I think that that is an attractive feature.

Ben Rose:

You indicated the process for dealing with a young offender would be to charge them and then take a decision whether to proceed through the criminal court or the family court or a welfare process. What

then happens to the charge? Does it evaporate, or does it in some way hang around their heads, as this would have implications later in life.

Dame Butler-Sloss:

The problem is that the child is caught in front of a policeman who has been called to deal with an incident. The child has to be taken somewhere, presumably to the police station, and the parent is looked for. It is then decided what to do with the child who has to go to a court to be dealt with, and it seems to me that the Youth Court is realistic. At this stage, with everyone's agreement, the charge against the child may have to be put on hold while the Section 37 Children Act investigation is carried out.

Then the case must come back to the Youth Court, who I hope would be the same people dealing with the child under the Family Proceedings part of the Children Act. If it is decided the child does not need to be tried for the offence, at that stage the charge would have to be specifically dismissed on the basis that the child is being dealt with under the Children Act. If, on the other hand, there was some doubt about this, you would deal with the welfare side, and at some stage it would have to return to the Youth Court. But if it was the same court, then at some stage that court could say: "We do not consider it appropriate to proceed with a crime. That will be dismissed and there will be no stain on the child's record for the future." Or they say: "We do not think this is a family matter - it should proceed to the Criminal Court." In this case it would go to trial and the child either is, or is not, convicted.

Ben Rose:

I am concerned about the significance of that report. As a defence lawyer, I am concerned about the facts which may be included or omitted and what other representations may need to be made. In a sense it has a bearing in terms of the potential criminal process that other reports prepared by local authorities, such as pre-sentence reports, do not otherwise have.

Dame Butler-Sloss:

It does not seem to me to be beyond our powers that, if a Family Proceedings Court took the view that a child should be tried, then you could carefully excise the inappropriate material in what had been the welfare part of the case and put it before another youth court panel who would deal with it afresh, without the information that might be detrimental to the child.

I suspect that in serious cases, where it may be necessary in the public interest that the child is tried and for society to see that justice is done, you may not go through the family proceedings court to any great extent. But I would like every child aged under 16 at least to have the opportunity for the court to look to see if this is a child of low educational ability, from a severely dysfunctional family, who was sexually or physically abused at a young age, who is suffering from post-traumatic stress syndrome - or whatever else it may be. And should this have an impact on whether the child continues to be tried for the offence?

Roger Toulson:

I think this could be made to work procedurally within the criminal framework as well. The child or young person is charged and brought before the Youth Court; there would have to be an indication whether the facts were contested or not, but he does not have to be made formally to plead guilty or not guilty. In other parts of the criminal justice system, an indication of acceptance of responsibility can be made without it being a plea of guilty or not guilty - for example the caution system.

If there is no dispute as to the facts, the panel would immediately consider whether this needs to be dealt with through the criminal process or the welfare system. If the facts are contested, it does not necessarily follow that the court should consider this a plea of not guilty and proceed to the Youth Court. They might say: "We think it may well be the case we can deal with this as a welfare issue, recognising there are factual issues in dispute." They would then constitute themselves as the Family Court, resolve the disputed questions of fact and then, if necessary, switch back to being a Youth Court to bring about a conviction. It's not beyond the wit of man to bring procedural rules into line with this concept. At the end of the day, there either would or not be a formal criminal finding of guilt on the record.

Ben Rose:

What becomes the role - in a criminal jurisdiction - of the prosecution and the defence? If one thinks about a criminal tribunal, the prosecution will be advocating a particular course of action, and one could see that the prosecution would say: "This is a serious criminal matter, the victims have suffered." The defence may be arguing: "Look at the Section 37 report."

Dame Butler-Sloss:

In care proceedings, the local authority comes in

as the applicant. This is why I say there would need to be a requirement that the local authority picks up the baton and runs with it. If they choose not to, it would make a nonsense of this flexibility. Once the local authority comes in - either by their solicitor or usually by counsel - the local authority then presents the care case as to what should happen to the child. The prosecution would then go away; they would have no choice as their prosecution will have been stayed. This is a judicial decision of the magistrates which can be appealed and so on.

I would like to feel that solicitors representing children in Youth Courts also have the Legal Services Commission franchise to represent them in public law cases; this is, I understand, not the position now. So the same solicitor should be a member of the Solicitors' Family Law Association, or the Children's Panel and would move from one part of the case to the other so the child has the same lawyer. Children are entitled to know with whom they are dealing. The same lawyer would then know, coming back to the different bench of the Youth Court, what he did not want them to know about the family proceedings. I think there can be protections, but of course the prosecution would have to stand to one side and see what happens.

Youth sexual offenders are frequently victims of sexual offences. Having learnt it, they try it out on others. Let us take a serious example. A child comes up, having offended on another child in the class. I remember during the Cleveland Child Abuse enquiry, there was a boy who was bugging all the other boys in the special school. He was seen by the psychiatrist, who was rather old-fashioned, as having fantasies. Eventually, the very much-criticised paediatricians found out he and his sister had been bugged by his stepfather. At age 11, he was reproducing this behaviour with every boy he came across. I wouldn't want him to be prosecuted; I would want him to be helped, but this is a very serious offence. Once you know a child is bugging other children, the first question is not 'how do you sentence him?' but 'why is he doing it?'. He won't necessarily have thought it up himself, particularly as this child was of very low educational ability. So even serious offences might need help rather than punishment.

Lord Justice Kay:

You really would have to bring about a different breed of defence lawyer who could deal with these two things. This makes the proposal even more attractive to me, as those who have a wider

dimension of looking at the case and dealing with it on behalf of the child might actually be a help. I think those with dealings in Youth Courts recognise that sometimes (and this is not in any way a criticism of them) the fact that they are focused on the criminal case, gets in the way of reaching the right solution to the child's problems. Changing that might actually be the spin-off effect from this proposal that would bring further benefits. You would get a different type of person doing this work. It would not be the person spending every day in the criminal courts with no concept of family problems.

I have always found trying young people for serious sexual offences very uncomfortable indeed. Considering some of the cases put to you as a presiding judge, I have a number of times felt that this should not be anywhere near a criminal court. This is a particular area that demonstrates the need for a better approach than the one we have at present.

Commander Roberts:

It is worth mentioning that the figures in the Economist article grossly under-represent the seriousness of the situation. If only they were that good! On the point of an alternative way of dealing with children, one of the problems facing us in London is that of children accepting the facts of the situation. Under the current adversarial system, the role of the defence is to challenge, where possible, the evidence which proves that a child has committed an offence. A successful defence lawyer thus creates the situation in which compulsory 'treatment' becomes less, rather than more, likely.

In order to become more constructive, we would need to shift to a more balanced (possibly inquisitorial) system which starts from the point at which all parties agree that an event had taken place and, in order to prevent a reoccurrence, that child - in its own interests as well as the interests of the community - requires assistance. I am deeply pessimistic about the idea of defence lawyers coming to a court, which could take an either-way decision, actually starting from a point of admission of the facts, to make it possible to get into 'we want to help this child rather than simply punish them.'

The second point is that the issue is not the mechanism by which you get children to be helped; it is the degree of compellability that is available and the quantum of services that are there to help them. In effect, whether you go via the care or the

punishment route, they are still being channelled into the same mainstream services, which do not exist in great enough quantities for the kids we need to help. This is really the end of the line, however we get to it: 'What is there to help them - and stop them doing it again?'

Dame Butler-Sloss:

Two areas that worry me - and the ultimate of the child who is either too wicked or too dangerous to be allowed to be at liberty for a certain period - are the scarcity of places in secure units and, more serious, in psychiatric units. I've had very uncomfortable cases going through the civil Court of Appeal where we literally did not have a bed for a child who continued in a secure unit but should have been in a psychiatric unit. This is serious. I opened recently a unit in Newcastle, which is the second of its type in the country and we have now gone from, I think, 12 beds in the country to 28. This is very worrying. I can believe with serious cases, you might not have to put them inside, but there is a compellability in care proceedings. That is the advantage of it. If the local authority takes care proceedings, the family has to come in on it. They do not have any choices.

Mark Ashford:

From last year, the Legal Services Commission has contracted with firms of solicitors to do particular areas of work. For reasons of value for money for the taxpayer, the Commission has imposed enormous administrative burdens in terms of documentation, file reviews and supervision by higher management. As a result, most firms have stopped doing some areas of work; for example, my firm stopped work apart from crime. To start a new area means investing a large amount of money which increases overheads.

Formerly - although I was not on the children panel, which is normal for solicitors representing children in care proceedings - if one of my Youth Court clients was made the subject of a secure accommodation application, either directly related to criminal proceedings or because behaviour was out of control and completely separate from criminal proceedings, I would have a battle with the court. But eventually the court would accept it was appropriate for me to represent in those proceedings because I knew the client well and I was familiar with the law in relation to secure accommodation.

One example was that I was the only adult in the courtroom a 14-year-old boy knew. He had never

before met anyone else, including his social worker. She had only been allocated five days earlier and the first thing she did was to make the application for secure accommodation. It seems ridiculous for that 14-year-old boy to be told: “Sorry, for administrative reasons I cannot represent you any more. Goodbye.” Another solicitor would have had to pick it up, not understanding the boy or knowing anything about the criminal cases which were the main basis of the application for secure accommodation, plus his cannabis use. If I had that same case today, I would have to say to that boy: ‘I’m really sorry I can’t represent you because the Legal Aid rules mean that we can’t get paid.’

The situation now arises that if, for any reason, the local authority steps in with either a secure accommodation application or starts care proceedings, that flexibility does not exist. Many solicitors’ firms do not do crime; it is the worst paid area to work in. I heard the other day from a social worker that Oxford has gone down to just two firms of solicitors doing crime in the whole city. In Witney, not one firm does crime. I can see why the Legal Services Commission created these new rules, but they are very unpopular with solicitors and they have had a serious knock-on effect in terms of flexibility, in particular for lawyers being able to deal with all the children’s rights issues.

I have had cases where I have felt that a child’s educational needs are not being met. There are statutory duties and I want to take the education authority to court to force better services, but I can’t do that because I don’t have an education franchise. In the case of a 16-year-old who is homeless, the Children Act says he should be accommodated; I can’t take the local authority to judicial review proceedings because I don’t have a housing franchise. To look holistically at the needs of a child before the Youth Court needs about five different franchises. That is where the problem starts, because a huge firm is needed to take this on. Most Legal Aid firms are not big and don’t have five franchises in these areas of social welfare law, and it’s a real problem to find a way of dealing with a child holistically.

On the age of criminal responsibility, I see two issues. One is just the age at which we decide we want to punish children. Obviously this is a political decision and I agree that there’s very little chance the age will be changed from 10 in the current political climate. There’s another issue related to the Thomson and Venables decision which is the

Article 6 guarantee to a fair trial, and - the phrase coined by the European Court - ‘effective participation’. I don’t think this applies only to 10 and 11 year-olds, although with most of them there would be a question about their effective participation.

I deal with many clients who are learning disabled. Since the V & T case I routinely instruct psychologists to do IQ tests. I now probably have over a dozen regular clients in the Youth Court who I know have an IQ well below 70. By medical definition, they are learning disabled. I have great concerns about their abilities to cope, even with everyday hearings, let alone trials, and even greater concerns if they have to go on to the Crown Court. The fitness to plead procedure - which is the only way of raising these concerns in court - is hopelessly inadequate. It assumes the reason for unfitness is mental illness and has no criteria to address developmental immaturity.

The US (for example, the state of Virginia) has completely revised its law on fitness to plead and has included a specific statutory criterion of developmental immaturity. We don’t have the research bases or the legal procedures to take this forward in this country. Nor do we have an answer to the question: “What do we do with young people who are causing problems to society but cannot have a fair trial within our procedures?” I don’t have an answer, but I’ve just had a client who was found unfit to stand trial simply because his IQ was low and was then found by a different jury to have done the act of murder. He is now required by law to go to a psychiatric hospital and not a single consultant I have spoken to wants to take him, because they cannot do anything about his IQ. He’s now going to be locked up in a psychiatric hospital indefinitely and all the doctors say he should not be there.

Our system is far too heavy-handed and crude in the way it deals with these cases. Unfortunately, we don’t get the average children population in terms of intelligence in the youth court. Those who are doing well at school don’t tend to play truant and commit street robberies. It tends to be those at the bottom of the intelligence range. The 2% who are learning disabled tend to be disproportionately represented in the Youth Court population.

Lord Justice Kay:

With the franchise question, you have identified a problem that needs to be addressed, which I was unaware of. In my capacity as Chairman of the

Criminal Justice Consultative Council I will obtain a transcript of what you have said and take this forward. Maybe we need a franchise which deals with children.

Eileen Vizard:

Some very interesting new ideas are being raised and they could greatly benefit this vulnerable group of children. It sounds as if their welfare needs would be addressed fair and square under these proposals, instead of local authorities saying: "There's a trial pending so we can't go near that child at the moment. Furthermore, he or she mustn't speak to anyone. We'll put them in secure accommodation" What happens to their human rights? With this proposal, the local authority would be involved, reports commissioned and these would almost inevitably show the needs of the child, so that assessments could occur.

I find the ethics around the age of criminal responsibility slightly worrying. I accept the fact that, if a satisfactory alternative system is set up, then what's the problem with the chronological age. But we need to note we are being terribly inconsistent with what we think children can do at different ages. They cannot drink alcohol, vote, go into the army, or instruct a solicitor in civil proceedings until a certain age, but we are saying it's perfectly all right for them to face the most serious charges at age 10. I don't have an answer, but I think we must look for consistency in how we deal with children. We do have some evidence on their development and capacities at a young age and I think the ethical issue needs to be introduced.

Bruce Houlder:

I welcome anything which enables a lawyer to take a more holistic approach. We do operate within an adversarial system and once the criminal process starts, there are few options available to us. Lord Justice Auld, in outlining the necessities for a restorative programme to trigger, suggests that the consent of the offender and an acceptance of guilt are necessary preconditions.

In the Youth Justice system, I question that, because in many cases where the offence is not so serious that it would necessarily merit severe punishment, if someone is willing to enter into a restorative programme, why do we require an acceptance of guilt? At the end of that programme, it may well be that part of the product is an acceptance of guilt. If there is a process to enable that kind of consent, without requiring a youth who is hostile to society and to the figures of authority in front of him, and is nonetheless willing to enter the programme, why

do we require that acceptance of guilt in advance?

Dame Butler-Sloss:

I agree and was hoping we could sideline the criminal offence. For example, a child caught by the police throwing a brick through a window and stealing something and then taken to the police station. If a Youth Court finds the father guilty of serious domestic violence and the child went out in a frenzy not being able to stand it any longer, you are not actually going to prosecute or convict the child of stealing from the window. You would say this is a domestic violence situation and what the child did was irrelevant. All it has done is trigger the need to intervene in the case.

It is important to deal with the cause of what brings the child to court and it may not be necessary to have any decision. Whether the child admits it or not may prove to be irrelevant. In cases where it is highly relevant, clearly the child has a right to say: "I didn't do it." It may be that is not the case where the welfare approach would be right and that is where you need to be able to work out which route the child goes.

The difficulty in Scotland is that you don't get to the children's panel until there has been a decision that the child has done something. I am hoping that in some cases, you could bypass any need to have a conviction.

Bruce Houlder:

Lord Warner (Youth Justice Board chairman) recently commented that lawyers were causing problems in the Youth Court by encouraging clients to plead guilty and seeking unnecessary adjournments. There has been a deal of publicity about this, particularly from one magistrate. The system does not operate that way. Someone practising in the Youth Court is not going to make money by seeking an adjournment. There isn't the facility for a lawyer with a holistic approach to operate within the Youth Courts at the moment. There is not the structure. Once that comes into place, you may be able to develop a different kind of lawyer within the system, which is highly desirable. This is the kind of lawyer all of us want to be, but the system doesn't allow for it.

Arran Poyser:

Concerning the proportion of cases where the local authority is required to take care proceedings, do we know roughly what the numbers are? The vast majority of children are only being looked after by a local authority for six weeks each year. At the other end of the spectrum, about 6,300 cases are

the subject of care proceedings resulting in a care order. These are expensive on resources and would be a significant shift of demand on resources from the youth justice system back to the local authority. Could we find, roughly, a way of scooping out the potential numbers of welfare cases where it would be necessary to bring about care proceedings?

Judge Stern:

We cannot look at this in a vacuum. Whatever we consider to be desirable has got to carry the public with it. It's a political decision. However much you want to help children and do things in the best way possible, there is always going to be a political limitation. Whatever you want to do will take resources and must be thought of in the terms: "Will the public go along with this?" That means: "How do we explain what we want to do is going to be better than what we have now?" The public, of course, is very attached to its jury criminal justice system. If you say a vulnerable section of society is going to be taken out, it will take much discussion and analysing before anything practical can be put into place. One should try to think about the practicalities as well as the desired ends.

Roger Toulson:

In Plymouth, there's an extremely good system which has been kick-started by a voluntary organisation. The moment somebody is arrested and the police think they're high on drugs, someone sees them immediately in the cells. This is a vulnerable point when they've just been caught and it could be possible to get through to them. If they admit they need help, the process of rehabilitation is started there and then in the police cell. By the

time they reach the magistrates' court, the beginnings of a plan have already been shaped. This has resulted in more drug treatment testing orders than elsewhere and a high success rate.

What is wrong about that? The problem is that, if you do not commit an offence but go to your GP and say you have a serious drug problem, on the NHS in Plymouth you get referred to someone who may see you in six months' time. So if you want to get fast-tracked, commit an offence! This has caused a serious local issue, with people saying there is discrimination in favour of the crooks and one can see this going across the community.

Of course, it is in the interests of the whole of the community to stop people burgling and this must be taken into account. I would not like to see our system changed. I would like to see the Plymouth experiment extended. But each time we say that these are the resources that need to be given to the offending person with a learning disability, people are going to say: "What about the people with the same disabilities who are not offending?"

Dame Butler-Sloss:

Maybe to bring the public with us, the proposal has to be put forward in a far gentler way - providing the opportunity with less serious offences. Then, if it took hold and the public was not too upset, it could be changed to include more serious offences. I would be astonished if children charged with murder ended up in the care system and not in the criminal system. I do believe that children with minor offences might very well go through the care system.

7. Child Defendants - the Evidence Base

Dr Eileen Vizard, Clinical Director, Young Abusers Project

The welfare needs of child offenders are not fully recognised, the principles of the Children's Act '89 are not applied fully or consistently, and psychological issues are not often considered. The report of the Royal College of Psychiatrists' Working Group on Child Defendants presents a balanced appraisal of the needs of those from 10 years upwards who appear before criminal courts on a range of charges. A framework for assessment of competence in juveniles should be drawn up, outlining the different criteria for a young person to understand what is happening in court and participate effectively. A government-led process of consultation on these issues is needed to see what can be learned and find a way forward.

Looking at what we know about attitudes to young defendants, there has been terrific public ambivalence towards children who offend. There's a fear of labelling a child as a criminal, but this is set against the preference for seeing the child as an evil monster or a thug. It is not just the public but maybe also ourselves who are mixed about the way we see defendants. Their welfare needs are not fully recognised and the principles of the Children Act 1989 are not applied fully or consistently. Psychological issues are not often considered. A report from the Royal College of Psychiatrists' Working Group on Child Defendants (April 2002) focuses on the psychological issues underpinning the capacities of children who appear as defendants and their performance. It is also firmly within a developmental framework; we are not currently seeing children before criminal courts in a developmental light. The report makes recommendations about good practice changes based on evidence and direct work with offending children.

We often do not understand the fact that children are not developmentally mature. I recommend the book by Thomas Grisso and colleagues 'Youth on Trial' which contains a lot of information, new to many of us in the UK, from research in the US and elsewhere about the capacities of youths to appear as defendants.

Development of children

The Royal College of Psychiatrists' Working Group report looks at the development of children under these headings :

1. **Physical development.** The physical appearance of a child can be very deceptive, and physical and psychological maturities do not necessarily correlate. A big, hulking, post-pubertal child may not necessarily be fully developed cognitively and that is often not appreciated.
2. **Intellectual development.** There is a high prevalence of learning disability among child defendants. We have known this for years but it's still not recognised through adequate assessment. An average IQ does not mean mature judgement – or the capacity to think ahead about your best interests 5-10 years down the line.
3. **Emotional development.** We do not expect these capacities to be fully developed until late teens, maybe adult life. Emotional maturity, self control, deferment of gratification, insight, empathy and remorse are all qualities which -

when we're assessing the likelihood of re-offending, risk and dangerousness - need to be taken into account.

4. **Social development.** Social factors have always been associated with delinquency and moral development, which is an important part of a defendant child's capacity to make informed judgements about the position in which they find themselves and their offending. Moral development has in some studies been shown to be deficient in children who subsequently go on to develop what may be described as a psychopathic profile (callous, unemotional type children). Full moral development is not expected until adult life. Many of us continue to learn what are the right and wrong things to do.

Underpinning these developmental issues is extensive research evidence, notably from the excellent JUSTICE report several years ago on children who kill :

'There is extensive research evidence that important developmental changes continue through the teenage years' (JUSTICE '96, Keating 1990 ; Rutter & Rutter 1993).

'...young people's thinking tends to become more abstract, multidimensional, self-reflective and self-aware with a better understanding of relative concepts (Rutter, Giller & Hagell '98).

This seems obvious, but in the context of taking the public with us, it is important they are aware that children before the courts are developmentally immature.

Distorted understanding

There are worrying variations - described in detail in the Grisso book and elsewhere - in the cognitive capacities of youths with learning disabilities as trial defendants. In other words, they have a very distorted understanding of what's going on around them. In certain US states there are systems for assessing the competence of children to stand trial.

A key foundational component of what they call adjudicative competence (fitness to plead) is the competence to assist counsel or instruct a solicitor. That is important for us to think about. Can we really say that some of the impaired and learning disabled children whom we all deal with and who appear before the courts, really understand the ins and outs of instructing a solicitor and the consequences for them of giving the wrong instruction and so on?

With delinquent children, there is enormous worldwide literature showing a strong association between learning disability, psychiatric disorder and criminal behaviour. We tend to forget that at least 40% of sex offenders and other offending populations have some kind of learning disability. It means they cannot understand what's going on around them in the same way as a child functioning at a superior level.

A framework for competence in juveniles has been outlined by Grisso under four headings:

1. **Understanding the charges and potential consequences.** These are subdivided into the ability to understand and appreciate the charges and their seriousness, to understand dispositional consequences and the ability to appraise realistically the likely outcomes.
2. **Understanding the trial process and ability to understand without significant distortion the roles of participants** - the judge, defence attorney, prosecutor and so on. Leaving aside the different terminology, you have to bear in mind that children and young people have various impairments and, for them, everyone in authority tends to merge. It is difficult for them to make the distinctions we make so readily. If you have the kind of impairments these youngsters may have, making those distinctions may be impossible. It may seem much simpler just to be compliant - as many learning disabled defendants are - and just nod your head.
3. **Potential for courtroom participation.** Think of some of our young and their ability adequately to trust or work collaboratively with their lawyer. Many have antisocial personality and conduct disorders in the making. They cannot easily trust and work collaboratively. The ability to tell their lawyer a reasonably coherent account of the facts and the charges, may not be as easy as it sounds - nor the ability to reason about the available options by weighing their consequences without significant distortion. Children whose cognitive, moral, intellectual and social development is not complete, would not normally be expected to have the full ability to balance these issues, certainly not in a stressful trial situation. Nor would they have the ability to challenge realistically prosecution witnesses and keep track of what's going on in the trial.
4. **Capacity to participate with attorney in a defence.** Can they testify coherently and control

their own behaviour? We are all familiar with impulsive angry young people who get into trouble because of difficulty controlling themselves and their behaviour. So can we seriously say that the young person we are dealing with is able to control his own behaviour? The poor impulse control that may have got him into trouble may also make it difficult for him to participate in a trial. And how about managing the stress of the trial - very difficult for many defendants because of the traumas they have suffered?

From a psychological point of view, to simplify things greatly, it seems the capacity to give an account of events will be dependent on at least three components :

1. **A stable mental state.** This refers not only to children who may have major mental illness such as schizophrenia or clinical depression, but those who could be suffering from severe attentional problems, severe childhood onset conduct disorder, post-traumatic stress disorder and other disorders which make it difficult for them to keep their mood and behaviour under control.
2. **Cognitive ability.** A significant proportion of defendants have a learning disability and we must bear in mind that cognitive ability is also affected by emotional and mental state. The capacity to think straight will be affected if you are psychiatrically disturbed in some way. These are not separate issues; they interlink significantly.
3. **Developmental status of the child.** I have already mentioned that physical appearances can be, and are, very deceptive. Research has looked at the earlier age of puberty in certain races. Because young people look large and well developed, or are cheeky and verbal, we must not assume they know what's going on.

Recommendations

Recommendations the Royal College of Psychiatrists' Working Group are likely to make in our report are:

1. We think this is a complex subject and today's discussions bear this out. It is a fascinating area and new information is emerging all the time. It has not always in the past been given adequate consideration. We would very much like a government-led process of consultation on the issues of age of criminal responsibility and the court context for child defendants.

2. From a Royal College perspective, these more serious cases - which we define as children who commit serious offences such as murder, manslaughter, rape, child abduction and arson - should all have a full mental health assessment.
3. The children's guardian may have a useful role in the serious cases in terms addressing the welfare issues. This may still be true in the light of Elizabeth's and Roger's suggestions today, but there may be still better ways of addressing welfare issues.
4. Some child defendants need pre-trial therapy. There are huge ethical issues in suggesting, on the one hand, they have the diagnoses and problems I have mentioned, and on the other hand saying that they cannot have therapy because in some way this may distort the evidence. I do not think that is ethically tenable.
5. The protection that is extended to child witnesses in a court context should be similarly extended to child defendants.
6. We are advocating a child defendant's pack.
7. We have not really addressed the crying need for training in these issues. Mark Ashford has

today highlighted the need for training for defence solicitors on issues to do with child development and their emotional and cognitive maturity. We have very adequate training now in relation to the Family Law Bar Association and the Solicitors' Family Law Association. On the family side, people are well trained in child development. This is not the case on the criminal side.

KEY MESSAGES ARE:

- Children are not grown up and they are developmentally immature.
- Many child defendants have serious psychological and social problems which affect their capacity to participate effectively in the trial process.
- The criminal court system was designed for adults not children.
- Justice would be better served if child defendants were dealt with in a more appropriate setting.

8. Child Defendant's Pack

Joyce Plotnikoff, independent researcher

Research shows fundamental misunderstandings of the criminal justice system among young defendants. The need for a Child Defendant's Pack is clear. The next task is to decide what the materials will be and how to deliver them. These will be explored in a scoping study which is being co-funded by the Youth Justice Board, the Home Office, the Lord Chancellor's Department and the NSPCC. This is welcome action, as called for by The Michael Sieff Foundation.

The Lord Chancellor's Department representative, at a child witness conference in January, pointed out that although young defendants are not covered by the special measures provisions in Part II of the Youth Justice and Criminal Evidence Act 1999, judges have inherent discretion to use the new special measures for young defendants.

Reinforcing what the chairman said about procedures in Scotland, the Children's Hearing System is indeed available only where a child admits the offence. If they do not, the proceedings are hotly contested and fiercely adversarial in the Sheriff's Court and contested care proceedings are dealt with in the same way. In care cases, children's

evidence has to be given in person, not reported on their behalf by a guardian, so Scotland does not have all the answers.

Young defendants' needs

Moves to supply materials to young defendants informing them about courts began with the Lord Chief Justice speaking at the launch of a video for young witnesses in July 2000. He asked for something similar to be done for young defendants. We have known for a long time that young witnesses do not understand the criminal justice system. You will all be familiar with children coming to court to give evidence and thinking they

are going to be punished. Misunderstandings of terminology are common: my current favourite is 'prosecutors are people who get paid for sex'. Why do we think that young defendants are any better at understanding the court process?

I was asked to speak about the need for materials for young defendants at the Sieff conference last autumn. Home Office figures show that over 140,000 young people are prosecuted each year and about 50,000 young people are sentenced for an indictable offence. About 5,000 a year appear in the Crown Court. We have had information for young witnesses in one form or another since the early 1990s, most recently the NSPCC Young Witness Pack. Information for children in public law care proceedings was published by the NSPCC in 2001. There has been nothing for young defendants since 1985 - before Youth Courts were established.

Content and delivery

What the materials will contain and how they are delivered pose difficult questions. If you consider what the European Court said in *T and V* and also the obstacles to participation, looking at the ability to participate in the trial poses problems about preparation and where it might begin. The Lord Chief Justice's Practice Direction on Children and Young Persons in the Crown Court (2000) emphasises lawyers' duty to explain each step of the trial to the defendant. Surely that duty must extend backwards into preparing the child for the trial and not just explaining what is happening when it's going on?

When I was doing research for the Sieff conference, I could not find research about young defendants' knowledge of the system conducted in this country. I had to draw on information from the US, Canada, Australia and South Africa. I am encouraged that Sue Bailey is going to do research here. Have we been afraid to scratch the surface of 'fitness to plead'? NACRO told me what many here would agree with: many young people leave court without remembering a single thing that happened - due to the formality and also because the terms used are not normally within their comprehension.

Overseas research

For a lot of children, it is possible to help them participate more effectively in the trial. However, research findings from other countries show that we cannot assume that because a defendant is older,

he or she will understand more; or that because they have been through the court system a few times, they will understand it better.

The research indicates that the ability to instruct a lawyer can, to some extent, be taught in preparation; but it means the child must be able to understand the advocacy role. Children seem to understand their representative 'is here to help get me off', but they have a problem in differentiating that role from the authority figures in the court.

Young people do not understand issues about client confidentiality or the concept of legal rights. When children were asked (in the US research) what it means when the police say 'you have the right to remain silent', they think it's conditional; for example: 'I can be quiet until somebody asks me a question which I have to answer'.

Canadian research showed that children of all ages had a problem understanding the implications of a not guilty plea and the burden of proof. Many think that they have to prove their innocence, not that it is the prosecution's job to prove their guilt. The foreign research highlights some fundamental misunderstandings but we simply don't know the level of understanding (or otherwise) of young defendants in this country.

Scoping study

The good news is that the recommendation of The Michael Sieff Foundation has resulted in action. The Youth Justice Board is co-funding a scoping study for the development of a Young Defendant's Pack, together with the Home Office, the Lord Chancellor's Department and the NSPCC. An invitation to tender has been issued. The scoping study is necessary to explore what we need to do in terms of the information to be included and, critically, how it will be delivered. It will also explore questions about the defence lawyer's role, the timing of giving information and who is the most appropriate person to assist the young person go through the material, if it is not the lawyer.

9. Decriminalisation of 'Less Serious' Offences

Christopher Kinch QC

Isn't there something fundamentally wrong with a system where we pay lip service to the idea that we must act in the best interests of children, but put them through a process that treats them as mini-adults? By decriminalising minor offences, we would be taking them out of the criminal justice system because it is the best thing to do, in the hope of leading those young people towards becoming responsible citizens and not just a quick fix to save some public money.

Perceived concerns

Why are we considering decriminalisation? The perceived problems have been well rehearsed and no one seems content with things as they are. The concerns with the present system of dealing with children accused of crimes are seen to be :

- Children do not understand. They feel alienated and disconnected from the proceedings, both in Youth Court and Crown Court. Form and content, style and language are all perceived as obstacles to the child's participation.
- The public perception - fuelled by the media but not always without elements of truth - concentrates on delays, repeated offences and what are thought to be trifling sentences at the end of proceedings, despite the numbers of young people incarcerated in this country.
- The Government view the system as 'inefficient and expensive' (Audit Commission Review, 1996). The view is held that the system is failing victims as well as young people who, far from being guided away from offending, are contributing to the discouraging figures on re-offending.

Adversarial system

All of this background is part of a more fundamental question: Whether we should be looking at children as part of the adversarial system of criminal justice? Isn't there a real problem caused at the foundation of the present adversarial system by sweeping children into it and where inevitably they will be caught up in the strategic and tactical manoeuvring surrounding the trial process?

In this context there is nothing devious or dishonest in the behaviour of defence lawyers. They are professionally negligent if they permit a client, of

whatever age, who wishes to contest a case to be convicted on anything less than compelling admissible evidence. They are charged with securing the best outcome for the client and in a criminal trial the best outcome is a verdict of not guilty. So the question is posed, whether there isn't something fundamentally wrong with a system where we pay lip service to the idea that we must act in the best interests of children, but we put them through a process that treats them as mini-adults.

Are we right to assume that public interest may justify this where the most serious crimes have been committed? Certainly in those cases the balance must be more clearly weighted in favour of prosecution. In the case of less serious crimes, we can perhaps learn something from the successful family unit where a misdeed by the child receives from the parental tribunal a swift enquiry, immediate judgement and, we hope, proportionate punishment without diminishing the family bond or the child's security. The present system produces a child behaving like the apocryphal barrister's son who, when challenged about a recently broken window, says : 'Firstly, I deny that the window is in fact broken. Secondly, if it is broken, I was not there when it happened. Thirdly, if I was there, it was not me that broke it. Fourthly, if it was me, it was an accident.'

Defining decriminalisation

I searched for a definition for decriminalisation. It involves removing certain conduct from the umbrella of the criminal law. In the community at large, and looking beyond the cases of children, the pressure for decriminalisation for some offences is often a response to pressures of public interest and policy.

Consider the debate now and in the recent past over drugs and prostitution. Is cannabis really no more

harmful than tobacco or alcohol? Would police time be better spent targeting hard drugs? Would there be amenity and public health benefits from licensing brothels in the hope of getting prostitutes off the streets? These are the sorts of arguments that fuelled debates on these issues.

As a stratagem, decriminalisation comes under fire for sending the wrong message to the public, or opening the floodgates to more offending. Where it has taken place, one asks whether the results appear adverse to decriminalising certain types of behaviour.

What we are contemplating is something different from that type of decriminalisation - a response to specific problems in the adult world. I believe the case we are invited to examine is moral and philosophical as well as pragmatic, for taking many child offenders right out of the criminal system. If the way in which a child in need manifests that need is in antisocial behaviour, should that child be singled out for treatment that is different from those who manifest their need by harming themselves or truanting? We would be taking minor offences out of the criminal justice system because it is the best thing to do, in the hope of leading those young people towards becoming responsible citizens and not just a quick fix to save some public money.

Obstacles

There are a number of obstacles in the way:

1. **Public perception:** going soft on youth crime and a question, when dealing with minor offences, of education and learning from the experiences of other jurisdictions overseas.
2. **Treatment of victims.** Who will persuade victims of minor offences that, what to them are major nuisances, are being taken seriously – and how will they do it? Having your car scratched, your wallet stolen, your windows broken, may not register in major incident rooms but they generate great depth of feeling in communities.
3. **What other sanctions would be available?** A child may think that, if he's not being taken through the criminal courts, he has free rein. Boundaries are essential. There's a school of thought in family jurisdiction that in care proceedings children can be empowered in an unhealthy way by being the centre of proceedings revolving around them in which blame is directed elsewhere - perhaps at the parents - with no recognition or discussion of their own culpability or responsibility.

4. **Who decides what is a minor offence?** Are we talking about small thefts, minor assaults, criminal damage? Do we need a statute to deal with those issues? Is it something the police can decide? Do they need advice from the Crown Prosecution Service? Or should there be a presumption against prosecutions below a certain age in a range of offences with the consent of the Director of Public Prosecutions required to start proceedings? The idea developed this morning of switching from one division of the Youth Court to another is certainly a stimulating prospect but, concentrating on minor offences, there is a great deal to be said for a degree of certainty and an early decision so that the child and his/her potential advisors in the criminal field know where they stand.

A way forward

So what is the way forward? Any new system would have to meet a number of objectives:

- It would have to do better than the current system in engaging the child and the parent or carer.
- It must address the concerns of victims, and public perception.
- It must have some sanctions to reinforce disapproval of misbehaviour.
- It needs to be convention compliant.
- Politically, it needs to be, at worst, cost neutral.
- It must reach conclusions as quickly as possible.

What options are we looking at? I read about Youth Offender Panels coming into operation this year. A key element is there has to be a plea of guilty before the accused child can be referred. It is a difficult concept for advocates to contemplate, but is 'acceptance of guilt' essential? Should consent to a particular programme be sufficient to allow the child to be drawn into the system in the hope of benefit for him/her and the community?

Family Proceedings Courts already concern themselves with, and have considerable experience in the upbringing of, children in difficult circumstances - not just when a child is at risk of harm, but also when a child is beyond the control of parents. They have the advantage, with the child not being in the dock on trial, of having a more relaxed view of evidence, allowing hearsay and other forms of evidence. They can operate swiftly.

Scotland's experience

The Scottish Law Commission's report on the age of criminal responsibility in January 2002 provides food for thought. The philosophy is that the prosecution in criminal courts of 12-16 year-olds should be a very rare event, reserved for the gravest crimes. The vast majority of offending behaviour can better be dealt with by an agency charged with the consideration and application of training measures appropriate to the child's needs.

In 1999-2000, Children's Hearings in Scotland dealt with over 30,000 referrals. That figure is to be compared with 105 actual prosecutions in 1999.

Of course, they still have problems. There needs to be proof of the offence on the criminal standard, or an admission of guilt, before a referral on the grounds that the child has committed an offence can take place. That is one aspect which I understand the Scottish Law Commission would like to see changed because at present a number of cases fall through the net.

If there is to be lobbying for change following our discussions, we must draw on the experiences of other countries too, but particularly Scotland, which is so close to our own situation.

10. Youth Justice and the Proposed Auld Reforms

Bruce Houlder QC, Chairman, Criminal Bar Association of England and Wales

Lord Justice Auld said that progress toward restorative justice has been most evident in the youth justice system. His *Review of the Criminal Courts* calls for the development and implementation of a national strategy to ensure consistent, appropriate and effective use of restorative justice techniques across England and Wales. Little is said about the youth justice system in his review and for that reason I have ridden on the back of some of his basic ideas and given a few reflections of my own.

It is rather difficult to see from the Auld report what its implications are for youth justice. I am conscious that I come remarkably ignorant of the Youth Justice Process. The system is so secret because Youth Courts are held behind closed doors. Also, the legislation that attaches to it is unusual and those who practise in the field are the only ones who really know the orders and procedures which operate. It may have been daunting for Lord Justice Auld to address the implications for youth justice, although when one looks back at his terms of reference, it is not surprising he did not go into detail in this area. He did comment that most progress made towards restorative justice has been in the youth justice system and he is obviously interested in restorative justice techniques.

Recent progress

We have made a lot of progress in the last few years. The Crime and Disorder Act 1998 included the creation of Youth Justice Boards and their reparation orders. Since then, the Youth Justice and Criminal Evidence Act 1999 has enabled courts to make referrals to youth panels to deal with sentencing on restorative principles. Auld is calling

for a national strategy to ensure consistent and appropriate and effective use of restorative justice techniques across England and Wales.

A lot has been achieved towards improving circumstances for young offenders. We have already referred to T & V, not only Lord Bingham's observations, but also the Strasbourg judgment. We know that much has changed in the way we try young offenders. It is rather extraordinary to find in the Youth Justice and Criminal Evidence Act of 1999, that when it comes to 'special measures directions in case of vulnerable and intimidated witnesses', it makes no mention at all of the position of the defendant. As I understand it, the reasoning in the House was that the defendant is to be represented by a solicitor or a barrister and therefore does not need special protections. But that defendant is the one who is likely to suffer most at the end of the proceedings, is terrified throughout those proceedings, is unlikely to understand everything which is happening, and needs more support and help than at present.

The defendant too should, in certain circumstances, be afforded special measure protection. Young

women make up an increasingly large proportion of the young offenders coming before our courts and their special needs must also be considered.

In the Act, the category of witnesses which gets protection includes any person up to the age of 17, except the defendant.

Auld identified six stages at which a restorative approach might be applied to a case as it approaches or makes its way through the criminal justice system. Where he does that in Chapter 9, he is not specifically addressing youth justice. A feature of almost all of these six principles is an acceptance of guilt, an informed consent to the process, a recognition of the harm the offender has done and a desire to make reparation for it. Other features include some rehabilitation, some involvement in the community and, in an appropriate case, the victim's willing involvement in the process. In New Zealand, those restorative principles are sometimes applied to serious and persistent offenders as well – people who in this country, we would probably argue, should receive punishment.

I agree with almost all that Lord Justice Auld has said about restorative justice – although I do not see why we should have an acceptance of guilt before someone moves through the process.

Resourcing issues

The key to the success of any new project will be the willingness of government to provide proper resources. He addressed this, although specifically not asked to look at the cost. This did not prevent him from saying that proper resources would be necessary and that the lack of them has blighted and impeded so many initiatives already in our criminal justice system.

The introduction by the Youth and Criminal Evidence Act 1999 of mandatory referral to a Youth Offender Panel for all offenders who plead guilty - unless the crime is serious enough to warrant custody or an absolute discharge - is a march in the right direction. A lot of money, £340m, has already been given to the Youth Justice Board. I hope that if they keep pace with their enormous task - and they do seem to be making progress - the government will sustain progress with the funding needed to carry it forward. Nor do I ignore many other projects, including those in the voluntary sector such as Sure Start, the Children's Fund, the government's 10 year drug strategy and other preventative support systems that are now helping to move children away from a life of crime. I agree with Sir David Ramsbotham that 'there has got to

be a partnership between all those responsible for the care of those who come into the criminal justice system before, during and after sentence. Unless those three run together as a continuum, then whatever prisons may be able to do with the time and resources available, this will be little more than a brief intervention.'

It's a pity to have heard from a solicitor this morning that there are only two firms in Oxford still prepared to do criminal work, as a result of funding and of the criminal defence service. I doubt whether that service would be able to cope in the holistic way we are talking about with the criminal justice system; it is not set up or designed to achieve that.

Court structure

An important part of the Auld review concerns the court structure. He argues for a unified court structure and the Bar wholeheartedly agree. We agree too when he says that there should be different treatment of adult and young offenders. We have some qualifications to make about the extent to which we involve the public. I am not entirely persuaded that we need to do without juries. If the crime is sufficiently grave and a prosecution is necessary, I do not accept the argument that what makes the difference when young people are involved is whether or not 12 ordinary people are present during the hearing. The proceedings can be just as intimidating, whether those 12 people are present or not. They do offer some value in a society where so many of us know so little about our criminal justice system, in providing some form of education to the public about what really matters to them – and that is youth crime.

The Home Office, about 18 months-two years ago, commissioned a research project into confidence in the criminal justice system. It demonstrated that jury service did most for a citizen in instilling faith in the criminal justice system.

Distrust of the amateur

The Auld report, from time to time, betrays a distrust of the amateur. One of his consultants, Professor Spencer of Cambridge University, was rather more forthright on Radio 4's 'Law in Action' programme in December, saying that it was 'the triumph of the cult of the amateur'. That does come through in the report; he does not trust magistrates to sentence in the Crown Court and proposes a major diminution of trial by jury.

When a young man, I was invited to go into a juvenile court where my father was giving medical evidence and I found it very educational. There should be a way of allowing members of the public to see how magistrates work and how people are treated. No wonder tabloid newspapers write about young offenders and magistrates in the way they do. They are not allowed to see how they work.

Those here today are professionals in this field. We have very little experience at the Bar of the Youth Court. The only barristers you see there are newly qualified, without the experience or depth of understanding that are needed – just the wrong kind of advocate who should be practising in a court where you need dedicated and experienced professionals. As you have heard, fewer solicitors are able to devote their time to appearing in a juvenile court. There's a lot of waiting around and it's not profitable for solicitors. It's a pity they have sustained recently such a tax in this context.

Holistic approach

We should move towards a more holistic approach and I accept some of the comments made today about the way we as lawyers tend to approach proceedings. We do not in the Criminal Bar have the training that the Family Law Bar Association gives; maybe we should do more about that.

I represented a young man of 14 about a year ago in a serious case in the Crown Court and became concerned about how best to protect him. He was being afforded the best possible T & V-type hearing by the High Court judge who presided, but the father insisted on being present with his son. Every time I went to speak to the lad, I found him with his anorak over his head and knees, rocking backwards and forwards. When I came into the room, he removed it. It eventually became clear that, unless I could get his father out of the room, I would not get anything out of this young man. Just before he was going to be called into the witness box - which was going to be a fairly frightening experience - he pleaded guilty. We spent two days with him because I was seriously concerned he might be pleading guilty for the wrong reasons. He was bound to be convicted, but the presence of his father was somewhat sinister.

We had to be careful that the instructions we took from that client were verifiable, correct and accurate and represented his free will. Interestingly, the mother was only allowed to come once the young man had pleaded guilty. This made me wonder what the young man may have said

about his father if he had been in the witness box. These are the kinds of issues that barristers and solicitors have to face and they should not be lightly dismissed by critics.

Juries

I can see the value in having judges at all levels sitting with experienced magistrates in the youth justice system. In the appropriate case we could have a High Court judge, or an experienced Crown Court judge, coming down into the youth court to try a case. In an appropriate case, if a young man or woman wants a jury, they should have one. The same safeguards could be put in place. There is no reason why 12 people are any more intimidating than a dozen lawyers in the same room. They are the mothers and fathers of our children and the teachers of good citizenship that we look to change our society for the better.

That is what any restorative justice system is about. Just as Sir Peter Crane said at the last conference about the need for sentencers to have proper feedback on the success or otherwise of their sentencing policy, and as Sir John Kay said today, so ordinary people who expect to have a say in how our sentences work should have the opportunity to be better informed. It need not necessarily be done in a way which is consistent with the protection and welfare considerations when we try children. At the last conference, Sir John said that a Crown Court trial should be the last resort; Sir Robin Auld agrees and so do I.

I am sure the Bar can do something about the posturing and adversarial style of advocacy it deploys; we are all learning fast. The Bar as a whole is already being trained; we are about to have our fourth course on vulnerable witnesses. In that respect, the Bar is changing to deal with the needs of a modern society.

Confidence in the law

Part of Sir Robin's terms of reference was to promote confidence in the rule of law. That is why I chose the theme of secrecy and questioned whether our youth justice system should be quite as secret as we like to make it. The culture of denial that possesses young people when they appear before the court is not, as has been suggested recently, the product of the legal advice they receive, but I suggest it runs much deeper than that. Sometimes it's simply because they are being told what to do, or what not to do, by their parents who cannot believe their little boy or girl could possibly be guilty of anything. Or it can be simply, from the

child's perspective, a retort to adult values.

We really must do more to involve peer groups in persuading children and young people that crime is no solution. Until young people are involved in persuading other young people that there is no future in crime, there is unlikely to be change. They should be the ones to teach their contemporaries that crime is nothing to be proud of and everything to be ashamed about. Real education in that area is the voice of one young person to another. School exclusions, not really my area, do not seem to provide a total solution. It might do for the children left in the school who have a better quality of education as a result of the exclusion of others, but it totally prevents the possibility of change to the advantage of all of us. For that reason it should be a last resort. The peer group is a far more potent weapon in preventing crime.

When I started at the Bar 33 years ago much of my time was in the Youth Court. Judges are not the professionals in this field; magistrates, youth workers, those who concern themselves from day to day with youth justice, are the real professionals. Judges often prefer to grapple with the familiar forms of sentencing rather than the unfamiliar. Maybe there is a case for removing youth justice to a different kind of court. How you make up that court can be entirely imaginative.

Little is said about the youth justice system in the Auld review, and for that reason I have ridden on the back of some of his basic ideas and given a few reflections of my own. I hope that one or two of them have struck a chord with you.

DISCUSSION

Lord Justice Kay:

Another aspect of the Auld report that may have an impact on some of the topics we have been discussing is one of his principal recommendations - that there should be a Criminal Procedure Rules Committee with responsibility for constantly reviewing the procedures throughout criminal courts, particularly if it becomes a unified court system. There are ways in which that could be helpful. It's a nonsense, for example, if the use of a video link for a young defendant charged with criminal offences depends upon whether, hunting through all the books, you can find some authority where a judge has said enough to support the use for someone to have seen fit to report it.

In a system with a codified procedure, these are the sorts of issues that we can tackle and we can achieve a lot. To do it by legislation means looking years ahead to fit into the legislative programme. I think the reason that video links for young defendants was not in the legislation when it was passed, was because we had a new government that wished to show it was tough on crime.

We shouldn't be in that sort of situation. With a code of procedure we can do a lot; if there is no statutory prohibition to a procedure, then we can include it. The procedure would then be laid before Parliament. The senior judiciary are strongly in favour of going down this route, the Lord

Chancellor's office supports it and we now have to persuade the Home Office that this is a sensible way.

Sally Averill:

I am interested to hear about the ways the law is failing youth defendants. My concern is trying to achieve a balance between doing justice for young defendants and satisfying victims who have an increasing voice in the criminal justice system. I have recently been involved in the tariff review procedure, co-ordinating responses from bereaved families. They were asked to say how murders affected them and what they think should happen to the youths in terms of the tariff. Overwhelmingly most families seem to want information: has the defendant accepted that he killed this person? While we are saying that acceptance of guilt is not essential to move on to restorative justice, I do not think we should underestimate the effect that defendants accepting the crime has on victims. That seems to be the first step for them – an acceptance that a crime has been committed and they are victims.

Christopher Kinch:

That point is well made, particularly when dealing with serious crimes. With the brief I covered on minor offences, there may be a different balance. You should be able to persuade the community at

large that there is more benefit in the long run if the alleged young offender takes part in a programme, whatever his attitude. That way, at least something is being done to address what is perceived as the offending behaviour. The process has a preliminary - sometimes very drawn out - of forcing a verdict on him through the criminal process. I acknowledge that with cases such as very serious assaults or murder, the victim only finds solace if the perpetrator, of whatever age, has acknowledged causing that harm.

Harry Ireland:

We are moving more and more towards the principles of restorative justice. Part of that is about reparation and involving the victim confronting the young offender with the consequences of his or her action. A lot of the victims want acknowledgement from the young accused that what they have done is wrong and are sorry for it. If we are to engage properly with them and involve the victims, the first element is that acknowledgement of guilt and some contrition.

Bruce Houlder:

How could that come easily to someone at a young age? It's not easy to acknowledge guilt and all that comes with it. Often it needs skilled people to move someone in that direction. If that process is to work and have real effect, it is not going to take my advice to plead guilty, because that would not address the consequences of offending and what was actually done. If a young offender has agreed to some restorative programme - perhaps initially as a way of avoiding prosecution, with a commitment and some way of holding him within it - then may be towards the end of the process the victim or the family can be called in and find a young man who has changed radically over the weeks and months into someone who can accept responsibility for what has been done. That seems to me a lot more valuable than just having to plead guilty because of the weight of the evidence against him.

Eileen Vizard:

One problem with offenders is that there are psychological processes of denial at work and these can be intense. Just because somebody is convicted of an offence doesn't mean they really accept they've done it or that it meant anything. For instance, in work with sex offenders there used to be modules of treatment, and you wouldn't take

anyone on to a programme until they had done a module on victim empathy. This isn't the right way to look at it, because over time someone who is in denial can be worked with and begin to recognise that what they have done is serious. They may then come to a point of saying the right thing to a victim. I would not be in favour of a system which pushed a confrontation at the early stages, when treatment and longer-term work would have a better and more effective result.

Mrs Justice Rafferty:

I suspect that what victims and their families want is somebody being convicted of, or pleading guilty to, the offence labelled 'murder'. I haven't heard any mention yet of one of the greatest evils in the criminal justice system - the mandatory sentence of life imprisonment, or detention for life, for murder. In my view the sooner that disappears, the better for everybody. How much does it matter to a youngster or a vulnerable individual, that he/she is having to enter a plea of guilty to a terrifying word like 'murder' because there is, at the back of it, the expectation of 'life'?

Lord Justice Kay:

I think we spend a lot of time in the High Court level of the Crown Court arguing about things which are all to do with whether we can avoid a mandatory life sentence or not. The arguments are often a nonsense. We are trying to fit within two distinct labels conduct which covers a wide and varying range of circumstances. The differences are gigantic, because many of our manslaughter sentences are ludicrously low and murder is a fixed penalty, so there's a huge gulf between the two. That's bad enough at adult level. With children, many of the cases do not fit comfortably into one label or the other and it becomes even worse. The idea of doing away with it at that level and having culpable homicide - where you would look at what it was that had been done and not what artificial label you happen to apply - is very attractive.

If we could begin to go down this road, we could improve our homicide law a lot. Most members of the public understand murder to be something that it isn't. To most of the public, murder is intentionally killing someone; it isn't of course anything remotely like that, and only a very rare case where that is so. When you come to young offenders, our present approach becomes untenable, and something has to change.

Eileen Vizard:

This bears out the fact that, if it's difficult for us as adults to understand those distinctions, there's very little chance of developmentally immature children understanding it.

Wendy Joseph:

Over the past eight months I've prosecuted four youngsters in three separate trials involving murder or manslaughter and I've become increasingly worried as those trials have gone on. What has been evident in each is that there was an issue of fact that required determination. This morning we spoke about ways of dealing with a child who needs to be punished or helped, but a lot of us come into the system at a different point – the point where we have to determine whether the child is liable to be the subject of any punishment or help at all. What makes me most anxious is that once a child says 'I didn't do it' and there has to be a determination of fact, that child is entitled, by right, to a series of protections under the law. It's the law we are being anxious about and are saying it's undermining the child; but the law is also there to protect him or her just like any other citizen. I am anxious we should not take away from children the rights they are entitled to – convention rights, human rights in the widest sense – in an effort to protect them from the system.

I am impressed with much of what I've heard as to how we could deal with it, but I wonder whether the answer isn't just to be more flexible - not to say 'we could have this system, or that system' but a whole range of systems. For example, it doesn't follow that because a jury trial is wrong for one child, it's wrong for another. It doesn't follow, if a jury trial is the right option, that it's necessarily right to have the jury sitting in the courtroom with the child - and it isn't necessary, as far as I can see.

We could be talking about taking the child out of the courtroom and putting him on video. There are other options. Perhaps we could take the jury out of the courtroom and allow them to watch the proceedings on video. Perhaps we could stop the public or the press coming into the courtroom. I don't see why there can't be a whole battery of options at our disposal.

Lord Justice Kay:

I don't think any suggestions have been made on the basis of avoiding the rights of the child. In other words, if a child is denying they have done

something, you can't by some devious means punish them or alter their life on the basis that we really know that they did do it. There may be circumstances where you say, what is needed for this child makes it irrelevant whether they did what is alleged; so let's forget about the process of deciding whether they did it or not. We'll assume they didn't and set about dealing with the problems that are manifest now that the child is in this situation.

Wendy Joseph:

The gravest stresses to a child are in the most serious trials where you will not be able to take the child out of the system. We (counsel present) don't often see a bit of shoplifting; we're looking at murders and it's at that level we are trying to find a way to protect a child from the stresses of the system without taking them away from its advantages. I find this very difficult.

Lord Justice Kay:

You are seeing a tiny proportion of the cases that go before the Crown Court. The statistics show that the vast majority of cases are because the young person is linked to an adult. These are cases of a different kind and a problem which needs to be dealt with. A different route may be needed from the one when you are considering only the child's interests. But there are many other cases where it's important to see that this child doesn't offend again in the future. What the victim wants varies according to the scale of criminality. If your car is broken into, you don't want it to happen again. I endorse the view that, with serious crime, it's critical to get recognition by the jury, or even better by the accused, because it starts to take a little of the pain away for the victim or the family.

Grantham Pulford:

You mentioned the numbers of youths who go to the Crown Court. In crude terms, we're talking about 5,000 a year. Of those, 4,000 go because they are jointly charged with an adult and that causes a real problem in terms of the Auld recommendations. If you accept that you can do something for those who are not jointly charged, it still leaves 4,000 out in the cold. I was interested to hear what Vera Baird said about the adults riding on the coat tails of the youth in to the Youth Court rather than the other way around, as happens at the moment. Is this a feasible idea?

Bruce Houlder:

In a unified court system, you could adapt the court proceedings to what you want them to be. You don't have to call it a Youth Court or a Crown Court. As long as you make up your mind what form of trial is needed - be it a judge sitting with two justices or a jury - it's the atmosphere and how you create the court that matters. Is it suitable for the defendant who happens to be under 17? If it is, that's fine. But you must take into account the rights of the adult offender and, as Sir Robin Auld says, it's also important that where a young person is jointly charged with an adult, both should be tried together. Otherwise, all sorts of complications could arise. So keep people together but adapt the forum. Auld offers us immense flexibility and we must seize the challenge.

Dorothy Gonsalves:

The main issue is whether to withdraw the right of jury trial to young people who are going to be in an enhanced youth court for serious offences. And are you going to withdraw the right to a jury trial from the co-defendant adult, too? That would be controversial.

Bruce Houlder:

I don't think you should withdraw from an adult something he should have were he not alleged to have committed a crime with a young offender. It might be more expensive to have jury trial for them both, but if Parliament decides that's the individual's right, then he should have it.

Eileen Vizard:

I don't think we are looking at expense here, it is the principle. Do you accept what Auld said, that you should remove youths from the charged atmosphere of the Crown Court and have them dealt with in a court with a judge and two experienced lay magistrates without a jury - or not?

Bruce Houlder:

What Auld said was that, if jointly charged with an adult who goes to the Crown Court, the youth should go too. I see no reason why you can't have juries in a Youth Court setting in circumstances where an adult would have been entitled to a jury trial. That would be an extension of the current jury system. It's how the court is structured, not whether there's a jury or not, that matters to the accused. These days the Crown Court could also adapt itself, to being just as user-friendly as the Youth Court.

Lord Justice Kay:

I think we are far too keen to say the child must be tried with the adult. Our instincts say that two people who have committed a crime together must be tried together. Sometimes this is essential to do justice and other times it's not nearly such a strong factor. We could cut down the numbers by a more sensible approach to the issue.

Vera Baird:

The assumption is always that the child should go before a jury. Yet it's appallingly difficult to protect children sufficiently in the Crown Court. If you were of the view that an enhanced Youth Court was the way ahead for young people, but that jury trial should be preserved for everybody else, then those difficult cases where an adult and a child were inseparable would have to be dealt with on a 'balance of goodness' basis. Is it more of a disservice to remove him from the jury trial - given that the aim of magistrates is to produce a just outcome and to follow the usual evidential procedures - or more important to protect the child from exposure to the atmosphere of a Crown Court? How do you balance those two factors? My first instinct is to say that it's more important to protect the child, than to protect the jury right in those few cases.

Lord Justice Kay:

One very good Auld proposal is that in some circumstances the defendant should be able to decline the option of being tried by a jury and be tried by a judge alone - unless the judge deemed that the interests of justice required a jury trial. Perhaps in such cases, if the defendant consented to be tried in the Youth Court, that could happen. I think I'm right in saying that most people in the consultation process were in favour: if the defendant was prepared to be tried by a judge alone, that should be possible unless the judge said the interests of justice required it, in cases where the public may not be happy for the case to be tried by a judge. Another concern was cases getting through to the Crown Court that should never have gone there.

Most cases require the filter of magistrates to conclude that their powers are not sufficient. The ones that worried me were cases where that filter had been bypassed and the case was transferred by the prosecution under provisions without any normal judicial filtering.

12. Therapeutic Help for Child Defendants – Development of Practice Guidance

Jenny Gray, Children's Safeguards Unit, Department of Health

The Government has authorised the preparation of draft guidance, followed by consultation, on the provision of therapeutic help for child defendants. The scope and nature of therapeutic work with child defendants will be similar to that set out for child witnesses. It will need to address any different requirements for child defendants. Draft guidance is being prepared for discussion with key stakeholders prior to consultation.

Cross-government Action

In August 2001, the Government agreed that officials could begin a process of discussion and consultation with professionals, to develop practice guidance on therapeutic help for child defendants. This cross-government work is led by the Department of Health, in collaboration with the Home Office, Youth Justice Board, Lord Chancellor's Department, Court Service and Crown Prosecution Service. At the last Michael Sieff Foundation Conference, Keith Bradley announced we would be taking this work forward and this signalled the start of a process for us.

The guidance has its origins in the T & V vs. UK 1999 judgment in the European Court of Human Rights, expressing concern at the continued trauma suffered by those two boys during their time on remand. We want to use this opportunity to look at the issue more broadly: to look at the provision of information to help young people understand the process, through to recognising that some - particularly those suffering from physical or mental health disorders - need very specific and specialised therapeutic help.

The brief is wide and the guidance is intended to be permissive, in terms of being clear that there is no legal reason why help cannot be provided. This is an important message from government. I was involved in the development of guidance for child witnesses and, when this started, there was considerable resistance from some quarters to providing therapeutic help to a child before he/she gave evidence in a criminal court. It's interesting to see that some of the mythology about the negative consequences of this action have disappeared and today these practices are being accepted as normal for child witnesses.

I see the process in relation to child defendants as being similar. We are beginning to think about

making changes without compromising the whole system, moving forward on an incremental basis, seeing if things work and then using that information to inform further policy development and perhaps legislative change.

In the first instance the work will focus on the provision of services to young people whose cases have been committed to the Crown Court - some 5000, of whom 95% are boys. Relevant recommendations from the Auld report, and the Government's response, will need to be addressed.

The scope and nature of therapeutic work with child defendants is likely to be the same as that for child witnesses in the published practice guidance *Provision of Therapy to Child Witnesses Prior to a Criminal Trial* (Crown Prosecution Service et al, 2001): namely, the provision of information about the trial process, counselling services and psychotherapy. It will also address any differences in the nature of services required for child defendants compared with child witnesses.

Beginning a process

We are starting from a basis of being clear about young defendants' right to have the therapeutic help they may need prior to a criminal trial, as well as thinking about putting it into operation. In practical terms we must define who is responsible, at what points in time and what kinds of materials - such as the production of a pack - might be needed to provide the tools to enable those working with young people to do their job effectively.

The Government is commencing a four stage consultation process to assist the development of the practice guidance:

1. Dialogue with representatives of key stakeholders to establish their views on the process, by which their organisations and professional bodies can best be included in the

initial stage of developing draft guidance, as well as identifying suggested areas for inclusion in the text.

2. Discussion with key stakeholders to establish what might be included in the practice guidance, what barriers to change might be (and how to address these) and what would assist successful implementation.
3. Issuing the draft guidance for public consultation.
4. Consideration with key stakeholders of the consultation responses when finalising the practice guidance.

Group involvement

It would be helpful to establish a list of who should be involved at each stage, the best ways of involving the different groups of stakeholders and what are the suggested key areas to be covered by the practice guidance, given that it will be a parallel document to that for child witnesses.

Following guidance from key people and with permission from our ministers, we will put this out for consultation next year, consider the responses, and then finalise the guidance.

DISCUSSION

Joyce Plotnikoff:

Mark Ashford said this morning that he had effectively blocked pre-trial therapy for a child in secure accommodation because of particular concerns about guaranteeing confidentiality. How do you see that being addressed?

Jenny Gray:

That's an issue we're looking at carefully. We're taking legal advice about confidentiality and he has offered to send me recent judgments to help our deliberations. So the issue is firmly on our agenda and we are looking at how to phrase the guidance to comply with professional codes of practice and address the implications of concerns about disclosure and certain information being withheld.

Sally O'Neill:

The idea of pre-trial therapy for young defendants is attractive, but in reality will be enormously difficult to use. There may well be a perception by those defending children, in the current system at least, that by embarking on any sort of therapeutic help there's a risk the child may be brought around to an acceptance of guilt which is not necessarily legally or morally right and could affect a 'not guilty' plea. There could be resistance because it's perceived as undermining the child defendants' position within the criminal justice system. It could undermine the ability of those defending to maintain innocence in the face of professionals trying to help with other problems which they will inevitably relate to their presence in the criminal justice system. The disclosure of confidences by the child within that therapy could be an insurmountable obstacle.

Eileen Vizard:

That is such an important point, but it takes me

back 12 years to what we were told would be the effect on child witnesses of having therapy. We went through a lot of this when producing the recent guidance. There's a difficulty in accepting that, if children have therapeutic needs, they have a human right to treatment. What happens in the case of child witnesses is that they become better, more credible witnesses. We have to find a way around this because of the level of impairment they have. Our knowledge base is growing and we can't turn the clock back. My own view is that we have to go forward because child defendants have a right to help. If it means that, in the process, they develop some insight into the plea being put forward, then so be it.

Sue Bailey:

This needs bringing into the context of reality in spending your working life either in local authority secure accommodation or around the Youth Courts. Residential social workers religiously spend their time saying to young people who enter their establishment: "Don't talk about your offence". Then you walk around the units and they talk about their offences non-stop. I go into cases where the prosecution, the defence and the judge have found ways around this; confidentiality has been maintained and there has been pre-trial therapy.

Where psychiatrists are forced into releasing that information, it would be crucifixion of that child's chances of being dealt with either in terms of not re-offending or their emotional development. I wish this project well, but unless there is a confidentiality part to it, and unless we can persuade all parties in the legal system that mental health professionals do not, by offering therapy to young people, intervene with due process, and that psychiatrists do intervene with due process, then

there will be the same tussle we had about child witnesses. There has to be a belief system with this, otherwise it won't work.

Grantham Pulford:

Many a defendant who is in need of therapy might plead guilty. Would you not find, as a defence lawyer, there may be advantages in your client having received some therapy if you're in the position of mitigating on their behalf? It could be a chance to show genuine remorse.

Sally O'Neill:

I can see there are many advantages for all child defendants in having pre-trial therapy. As far as pleading guilty is concerned, any therapy and expert reports will be helpful to everybody. It's difficult taking instructions from a child defendant in any event. I know this is simplistic, but they are going to feel under a lot of pressure to admit what they've done, because adults are accusing them of it. It seems there's a real risk with therapeutic involvement which is inevitably going to impinge and hinge on the criminal allegation, that there will

be more pressure on them, with hindsight, to acknowledge they have done something wrong. This isn't necessarily the case, or indeed their perception of it at the time.

Roger Toulson:

If in need of therapy, the child ought to have it and the court system should not act as an obstruction. Those defending can give their own advice to the child and it may be not to co-operate. That's a matter for them. But I don't think the court system should place a bar on such treatment. I was horrified in one case where, for months, the child killer was not allowed to see his mother because she was a prosecution witness, and for many months no real attention was given to the question of therapy because that had to hold fire pending the outcome of the criminal process.

Lord Justice Kay:

An in-built problem is that those most in need of therapy will be those who have committed the most serious offences, for whom delays will be longest. This needs to be addressed.

14. RESPONSE ON BEHALF OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Harry Ireland, Chief Crown Prosecutor, Staffordshire

As well as being the Chief Crown Prosecutor for Staffordshire, I also am responsible for taking a lead for CPS nationally on youth offender issues as well as advising upon and preparing policy and devising and presenting training on youth offenders. In responding to the issues raised today, I make clear that CPS is not a policy making body; it is a Government department with accountability to the courts and, through the Attorney General, to Parliament.

I would like to talk briefly about specialism. This has been mentioned under various headings and is something the CPS fully endorses. So far as the ability to advise on files involving youth offenders is concerned, the CPS insists this is done by youth specialist prosecutors who have been in the Service for two or more years and have undergone internal training. What has become apparent today is that there are some gaps in that training, not least relating to the issues about the cognitive development of children and how to relate to them in court. For example, many prosecutors have made the mistake of automatically equating guilt to an offence of violence when seeing a youth offender in the dock who is six feet three in height and seeming to have all the attributes of an adult.

There are therefore issues I can take forward to assist in training within CPS from what has been said today.

Generally speaking we have an intensive training programme on policy and the law relating to young offenders and we therefore hope that our specialist prosecutors are well prepared to deal with all issues arising in court. We would like to see that specialism reflected in every participant in the court proceedings so that the best informed decisions can be made. We, for example, welcome the advice that we can obtain from members of Youth Offending Teams to assist us in court and believe, if that specialism is reflected by all participants, this can only improve the quality of the judicial process within the youth court.

Mention has been made of the *Doli Incapax* rule. It is my view this often generated more heat than light and, by the time it was abolished, had run its course. It often threw up an apparent contradiction in what the rules sought to achieve; where a child from a “good home” obviously would know right from wrong and the rule was easily addressed in prosecuting, this was not the case when someone from a different background, perhaps where moral upbringing was not as strict, could present difficulties in proving an appreciation of right and wrong. This could lead to any prosecution failing on this initial ground. As both defender and prosecutor, I regularly came across this issue and felt it did not advance the arguments to any great degree and therefore supported its abolition.

European comparisons

We have now, by definition, an age of criminal responsibility of ten years. I recently attended a conference in The Hague with prosecutors from 17 European countries to look at youth justice. Within two days we were tasked to come up with our ideal youth justice system. What we produced was not dissimilar to what we have been talking about today; this alone gives me hope for our objectives of the conference.

In the youth justice system, irrespective of the age of criminal responsibility, we felt there should be some kind of responsibility and accountability for anyone who commits a criminal act. However, that did not equate to criminal proceedings automatically following. We felt there should be a flexible response to the individual and the crime looking at the nature and seriousness of the offence, the views of the victim, the background of the young offender as well as the physical and emotional development of the young offender at the time of the offence. We all agreed the long-term goal was to address the behaviour of the young offender and to try and prevent re-offending.

As a group we were taken with the Scottish system, despite some reservations mentioned today. The age of criminal responsibility in Scotland of 8 years horrified some Scandinavian delegates. However, it was clarified that in the year 2000 only two children between the ages of 8 and 11 had been prosecuted and 84 children between the ages of 12 and 15. Therefore 86 children were prosecuted during the period when just under 14,500 children were referred to the Reporter for criminal offences. That gives an indication of how a joint track approach can deal with issues. The conference felt that concurrent jurisdiction was the best way forward - and what are the issues in the case and

how best to deal with them, will define if a case will take a criminal justice or welfare track.

The last Michael Seiff Foundation Conference recommended that, in order to assess where our system stands, we should look at other jurisdictions. We had, with The Hague conference, an opportunity to do this and I have a copy* of the papers presented by representatives from the various European jurisdictions.

CPS perspective

Looking at the CPS perspective, we have to remember that even though it is our job to prosecute, we do not prosecute everybody for every single criminal offence. Looking at youth offenders, we only now become involved once the reprimand and final warning scheme has been undertaken, of course depending upon the seriousness of the offence. Outside of the obvious most serious offences (eg, rape, murder, robbery), the statutory scheme of reprimands and final warnings introduced by the Crime and Disorder Act 1998 replaced the cautioning system which had been discredited by the mid 1990s. The statutory scheme has been introduced to try and address offending behaviour.

For minor offences, depending on whether there are previous convictions, the young person is now likely to receive a reprimand. For a more serious offence, a final warning could be administered with the Youth Offending Team obliged to look at whether or not intervention is needed to assist either the offender and/or the family. It is only where reprimands and final warnings have failed – in other words, chances have been given to address offending behaviour and failed – or the offence is so serious, that we become involved.

Referral orders

The new statutory scheme is not the end of the matter. On 1 April 2002 the Referral Order Scheme was implemented into the youth court nationally, following pilots around the country. Irrespective of the offence and unless a custodial sentence or an absolute discharge is to be given by way of sentence, a referral order has to be made for an offender before the youth court, or indeed the Crown Court, who is without any previous convictions, has not previously been bound over, and where a guilty plea has been entered.

The referral order has to address various issues. It is a contract between the offender on the one hand and the Youth Offending Team and Referral Panel on the other. The Referral Panel includes two

representatives from the community who had to apply for the post and received training thereon. That particular scenario starts to address some of the concerns expressed today about the involvement of lay people within the Criminal Justice System as well as the system not addressing the relevant needs of the offender or his/her family. That is exactly what this system is now designed to do. We will see how successful it is going to be, but certainly the report on the pilot areas gives cause for optimism.

The referral order deals with two issues: the concerns about early entry into the Criminal Justice System (“Net widening”) and how the system can respond to young offenders; and whether the Criminal Justice System is the proper forum to deal with young offenders’ problems. It also deals with one of this morning’s problems: as Judge Stern said, whatever we do we have to take the public with us. From my perspective the way to do that is not by revolution but by evolution; by incremental steps, proving to the public that these initiatives will work. Then we are in a better position to deal effectively with the kind of sensationalism within press headlines that we have criticised today.

It will also assist those with the view that the age of criminal responsibility should be raised. In the present climate that is, in my view, unlikely. For example, we have all heard now of the Government’s initiative on robberies and street crime, with a fast tracking system introduced for the courts to deal with these offences quickly. Given the publicity and alleged public concern about such offences, I query how realistic it would be to ask the public now to raise the age of criminal responsibility. We must first gain public confidence in existing initiatives such as the referral order and restorative justice and build upon these.

Public interest

Even where a prosecution is recommended by the police, who still have the power to charge, we have to consider whether or not a prosecution is in the public interest. We consider issues such as the nature and seriousness of the offence, the record if any of the accused, the views of the victim and the effect upon the victim of the offence, as well as other issues such as the mental health of the accused. It may be we do not have all the information to hand initially and may have to rely on experts outside the legal system to assist us in providing us with all the relevant information so that we make an informed decision.

After a case commences, we keep it under ongoing

review to ensure that any new factors are taken into account. For example, when dealing with issues of mental health, it is often the case that it is those defending who raise this on behalf of those they represent, sending us relevant expert information to plead their cause in pursuing a course of action other than prosecution. We also take into account other statutory principles, namely the over-arching objective of the Youth Justice System under Section 37 Crime and Disorder Act 1998 to prevent offending, the necessity to take into account the welfare of the young person involved in the proceedings under Section 44 Children and Young Persons Act 1933, and of course the principles underlying the Human Rights Act 1998.

As an aside, it is interesting to note that when we considered the effects of the Human Rights Act prior to implementation, there was little case law in terms of children and young people from other jurisdictions to assist us; so within England and Wales we are still feeling our way to a large degree, insofar as the effects of the Human Rights legislation on young offenders are concerned. However, its major impact on Youth Justice to date is dealt with later.

Given its position within the Criminal Justice System, the Crown Prosecution Service has a duty to balance the rights and interests of both defendant and victim. While the rights of an accused person are well documented, victims’ rights have, until recently, been largely overlooked. That is now being addressed. We have, of course, noted victims rights under Article 8 of the European Convention of Human Rights as supported by the Human Rights Act 1998. There are also a growing number of initiatives to ensure that victims are becoming much more involved in the criminal process and have a right to be heard and their views expressed. For example we have the introduction of the Victim Impact Statement introduced in November 2001.

Trial by jury

I have mentioned earlier the effect of the Human Rights Act 1998. The case of Thompson and Venables had a huge impact on the way CPS deals with child offenders, particularly in the Crown Court. We have, of course, since then had the Practice Direction from the Lord Chief Justice in relation to such cases.

Once the judgment was published, a number of cases, particularly in London, were stayed simply on the grounds that youth offenders should not be tried in the Crown Court. We challenged this view and obtained Treasury Counsel’s opinion. We

believe that as long as the practice direction is followed and some of the more imaginative ideas are adopted when dealing with children in the Crown Court (perhaps as, for example, Vera Baird described this morning) I do not think there is any particular problem with trying young offenders in the Crown Court as the law presently stands.

However, there still are tensions about young offenders appearing in the Crown Court and our present sentencing framework available for young offenders. Sir John mentioned the issue of young offenders being transferred, committed or sent to the Crown Court unnecessarily. The issue that causes us problems with this in the current sentencing framework is the availability of a custodial sentence. Any young offender aged 10 to 14 can only be given a custodial sentence under certain provisions. An offender aged 10 or 11 can only be given a custodial sentence by a Crown Court and only if they have been charged with a grave crime or, as Section 91 Powers of the Criminal Courts (Sentencing) Act 2000 says now, a “serious” crime.

The group of young offenders aged 12 to 14 years can only be given a custodial sentence by a youth court if they are persistent offenders. For 12 to 14 year olds who are not persistent offenders, a youth court cannot give them a custodial sentence, a Detention and Training Order. Hence if a 12 to 14 year old non-persistent young offender has allegedly committed a “serious” crime, and we believe a custodial sentence should be considered, then the only way such an option can be exercised is for the 12 to 14 year old non-persistent offender to be tried before the Crown Court.

The test which we apply in making this decision on venue is in accordance with existing case law: namely “ought a custodial sentence to be available?” If charged with a “serious” crime and the answer to the question is “yes it ought to be available” (not it ought to be **given**), then the prosecution will represent that the Crown Court is the appropriate venue for trial. We know from experience that this causes problems for some members of the Judiciary and I would seek a revisiting of the sentencing framework for young offenders to make the system more coherent and logical.

Youth Court demonstration project

Arising from the Practice Direction is the Youth Court Demonstration Project. This was a pilot in Leicestershire and Rotherham Youth Courts which were trying to follow the spirit of the Practice

Direction in terms of greater engagement between the Magistrates and the offender. It included making the courtrooms more amenable for dealing with young offenders by having all participants on one level, sitting the Magistrates opposite an offender and ensuring the offender sat with his/her parents. The project encouraged greater dialogue between Magistrates and offender so that there was a proper consideration of the factors lying behind the commission of offences and what action needed to be taken to address the relevant issues. Magistrates’ Courts throughout the country are now beginning to implement this particular scheme.

Auld recommendations

Turning to the Auld Report, the CPS supports the recommendation about the district division and the use of a Judge of an appropriate seniority for all offences which hitherto would be dealt with under the grave crime provisions. Certainly I support the idea of a separate youth court where all offences would be heard. Both defending and prosecuting in the youth court have led me to the conclusion that it is totally different from the adult courts with different considerations applying; and, bearing in mind the requisite twin track approach of welfare and justice, it is essential there is such a specialist court with the appropriate specially trained people dealing with such cases.

Pre-trial therapy

The discussions sound like a time warp! Much of what was said years ago about pre-trial therapy for witnesses is now being said in respect of defendants. As far as witnesses were concerned, there were issues from our perspective about cases being lost following arguments of abuse of process because of suggestions that witnesses were being coached or trained during the course of such therapy. There were also concerns about disclosure of sensitive and confidential information. However, balanced with those concerns was the clear necessity that children who required therapy were not improperly deprived of such therapy simply to ensure a prosecution could continue.

It now sounds as though, having sorted out issues about witnesses, we are engaged in similar arguments about defendants and pre-trial therapy. I fully support Mr Justice Toulson’s view that if therapy is required, it should be given. I am sure ways can be devised to deal with any realistic concerns that exist. A working party is currently considering these issues and the CPS have representatives on this group and I am sure we will quickly see a satisfactory conclusion.

*European Conference on Youth Justice at The Hague - papers available on request by emailing: Louise.Hunt@cps.gsi.gov.uk

CHILD DEFENDANTS – IS THE LAW FAILING THEM?

SUMMARY OF ISSUES

At the outset of the conference, the Lord Chief Justice set the scene by reminding those present of two important principles, ie the welfare principle laid down in Section 44 (1) of the Children & Young Persons Act 1933 and the prevention of offending principle laid down in Section 37 of the Crime & Disorder Act 1998.

An important issue discussed at length by the conference following Mr Justice Toulson's presentation was the age of criminal responsibility, currently 10 years old for children in England, Wales & Northern Ireland. As Mr. Justice Toulson indicated, the issue is much broader than the simple question of raising or lowering the age of criminal responsibility since the actual age of criminal responsibility is not indicative of subsequent treatment of the child, whether repressive or rehabilitative.

Other speakers, including Dame Elizabeth Butler-Sloss, indicated that the actual age of criminal responsibility may not be so important if there was sufficient flexibility within a proposed new youth justice system to allow for important welfare aspects of the case to be addressed.

The whole conference was agreed that it was important to take into account the public understanding and perception of child defendants before attempting any radical reform of the legal system such as raising the age of criminal responsibility. Given current, very active concerns in the public arena about youth crime perhaps escalating out of control, it was agreed that the political climate and public opinion would not tolerate suggestions such as a raised age of criminal responsibility which might be seen by some as being 'soft on crime'. At the same time, it was clear that the research and practice evidence base in relation to child defendants in the USA and elsewhere, shows overwhelmingly that developmentally immature children and young people are not competent to participate effectively in criminal trials as presently arranged in the current UK youth justice system.

On balance, it was agreed that the time was not right for political reasons, to suggest a change in the age of criminal responsibility. However, it was noted that the age issue could be outflanked by introducing certain reforms to the existing youth justice system which would still have the effect of addressing many of the welfare and human rights issues relevant to child defendants.

A wide range of suggested changes to the current juvenile justice system were discussed and those supported by the conference are listed below as recommendations. In all these recommendations, the two principles outlined by the Lord Chief Justice, ie the welfare and prevention principles, were in the forefront of

the conference's deliberations. If such recommendations were to be taken on board, the youth justice system would be improved in many ways.

Youth Courts would have powers to order welfare reports from local authorities and to make balanced holistic decisions about the best way to deal with the offending child. There would be a new judicial flexibility to waive prosecution of children for less serious offences and, instead, activate the care system around the offending child within the family proceedings court.

In order to address the prevention principle mentioned by the Lord Chief Justice, it was clear that a holistic view of recidivist child offending would need to be taken and this meant addressing the reasons for the offending behaviour at the outset. Such a flexible, new system would require some primary legislation and a number of changes to the court rules.

The proposed new system would have considerable training implications for all levels of the judiciary, magistracy, prosecutors, barristers, solicitors and mental health experts. However, such specialist youth courts would have enhanced powers to order welfare reports from local authorities and to make balanced, holistic decisions about the best way to deal with the offending child. The conference view was that such a specialist youth court would save a great deal of wasted court time and money by allowing sensible, long term planning for recidivist offending children. At present, such recidivist children seem to rotate endlessly in and out of the youth court which has no real remit to pull in agencies responsible for their welfare. In order to address the prevention principle mentioned by the Lord Chief Justice, it was clear that an holistic view of recidivist child offending would need to be taken and this meant addressing the reasons for the offending behaviour at the outset in the youth court.

New powers for the youth court, a revision of certain aspects of the Children Act 1989, a simplification of the current Legal Services Franchising system to encourage more firms of solicitors to take on work with child defendants, the same solicitor and the same barrister to represent the child in both criminal and family proceedings where possible and full mental health assessments for all children facing serious criminal charges were some of the measures agreed by the conference.

It was strongly suggested that the same legal protections afforded to the child witness should also be afforded to the child defendant and that a child defendants pack would help to provide highly relevant information to children and young people facing criminal charges.

The conference discussed possible changes to certain charges such as murder and manslaughter and concluded that these charges would be better replaced by a charge of culpable homicide. The advantage of such a new charge would be that the mandatory life sentence which accompanies a murder conviction, even for children, would

be abolished, allowing more appropriate judicial discretion in sentencing children convicted of such a very serious offence.

The research and evidence base from the USA in relation to child defendants shows overwhelmingly that children and young people, no matter how large and physically developed they may be, do not understand many basic features of the court system in which they will be tried. The absence of any real child developmental framework in UK law to address the obvious cognitive, emotional and social deficits of offending children was contrasted with work in the USA on adjudicative competence where the concept of developmental immaturity is an integral part of assessment of the child's capacity to participate in the trial. The conference suggested that the law in relation to these and other matters involving the child's competency should be reviewed.

There was very strong support at the conference from the judiciary present and from all others for some form of judicial monitoring of the progress of the sentenced child. The many legal and psychological advantages as well as cost savings of having the same judge review selected cases were set against minor changes to court procedure which would be necessary to ensure that such cases were scheduled to be seen by the sentencing judge. The impact on the sentenced child of knowing that the same judge would be keeping tabs on his case was agreed by all disciplines present to be considerable and to be likely to enhance compliance with any court orders made.

A whole range of training needs were identified by various disciplines present at the conference and these recommendations are listed below. Central to the proposed training schemes was the need to train those working in the youth courts in relevant aspects of child development including developmental psychology and also to provide training in the principles of the Children Act 1989 and the relationship of the Act to the needs of the offending child.

Finally, picking up on the prevention principle again, the conference discussed the need to bring the general public along with any proposed changes to the current youth justice system. It was agreed that the unhelpful stereotypes prevalent in the tabloid press about offending children as either helpless victims of adverse circumstances or evil monsters who can never change, need to be challenged carefully through a strategy to raise public awareness of these issues. Suggestions were made by the conference about how such a strategy could be devised but it was clear that this recommendation would need planning and careful long term implementation if it was to succeed.

RECOMMENDATIONS

AGE OF CRIMINAL RESPONSIBILITY

It is recommended that new methods of keeping children and young people out of the criminal justice system should be devised, since public opinion will not support an increase in the age of criminal responsibility at present.

REVIEW OF COURT SYSTEM

The Youth Court

1. The Scottish philosophy (that prosecution of 10-16 year olds should be a rare event, reserved for the gravest crimes) should be adopted within a new youth justice system in England & Wales.
2. All criminal proceedings involving a child or young person should proceed before a youth court unless a child defendant facing a grave charge elects to be tried at the Crown Court.
3. 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.
4. The same legal protections should be available for child defendants as are now available for child witnesses.
5. There should be a Criminal Procedure Rules Committee with responsibility for constantly reviewing procedures throughout the criminal courts, including the youth courts.
6. All children between 10 – 16 years old who are facing serious criminal charges should have a full mental health assessment.
7. A child defendants pack should be commissioned and made available to all children facing criminal charges.
8. It is recommended that there should be a further study of possible ways of integrating youth courts and family court proceedings in appropriate cases.

Transfer to the Family Jurisdiction

1. 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.
2. The power to require an investigation by a Local Authority should be exercised before the child is obliged to plead guilty or not.
3. On receipt of the Local Authority report, the youth court will decide whether to continue with the prosecution or to transfer the case to the family jurisdiction. Wherever possible the magistrates should belong to both the family proceedings and the youth panels so that the case can continue as a care case if so decided with the same personnel.
4. Wherever possible the same solicitor should be able to represent the child.
5. The Legal Services Commission should simplify the franchise system in relation to solicitors representing child defendants so that:
 - a. fewer franchises are needed by firms doing this work and
 - b. the child can keep the same solicitor in both the youth court and the family proceedings court.
6. A children's guardian would be necessary for a new Section 37 case and could help the youth court with their decision whether to transfer.

CHANGE TO CHARGES

1. The charges of murder and manslaughter in relation to child defendants should be replaced by a new charge of culpable homicide.
2. Adults charged with a child should be tried in the youth court to avoid the child defendant being tried in the Crown Court.
3. The law on fitness to plead should be reviewed in the light of USA research into adjudicative competence and the experience in the USA of working with a statutory criterion of 'developmental immaturity'.

SENTENCING CHANGES

1. There should be continued involvement between the sentencer and the sentenced in relation to child defendants. It is recommended that the sentencing judge should retain a monitoring role in relation to child defendants between 10 - 16 years old who are convicted and sentenced for a criminal offence.
2. Should the sentenced child be in breach of an order made by the court, the sentencing judge should have the power to re-sentence the child and to order further welfare reports where appropriate.
3. The sentencing framework for child defendants between 10 - 16 years old should be revisited to make the system more coherent and logical.
4. The mandatory life sentence for murder, applicable even to children, should be removed and this would occur if the charge of murder was replaced by culpable homicide.

TRAINING

1. There should be training in relation to the needs of child defendants for magistrates working in the youth courts, in the family proceedings courts and other family courts, under the proposed new system.
2. There should be training in relation to the needs of child defendants for judges dealing with children facing grave charges in the Crown Courts.
3. There should be training in relation to the needs of child defendants for members of the criminal bar and higher court solicitor advocates representing children facing charges in the youth courts and the Crown Courts. This would need to be new training similar to that which is currently available to members of the Family Law Bar Association.
4. In order to ensure that the same solicitor and barrister could represent the child in the youth court (or the Crown Court) and the family proceedings court, new training for members of the criminal bar and solicitor advocates would need to include the Children Act 1989 .

5. There should be training in relation to the needs of child defendants for solicitors representing children in the youth courts and in the family proceedings court. This training should be approved by the Law Society and solicitors undertaking this work should be members of the Law Society's Children's Panel.
6. There should be training in relation to the needs of child defendants for CPS prosecutors to ensure an adequate level of specialization to take on work with children facing criminal charges.
7. There should be training in relation to the needs of child defendants for CAMHS (Child and Adolescent Mental Health) professionals, particularly child psychiatrists and clinical psychologists, to ensure that there are adequate, specialist resources for the provision of mental health assessment reports.

PUBLIC AWARENESS & PREVENTION

1. A strategy should be developed to increase public awareness of issues in relation to child defendants. This strategy should aim to dispel the current myths about offending children as either hopeless victims or evil monsters.
2. As part of the strategy to increase public awareness of issues in relation to child defendants, members of the public, including school children, could be invited to visit the youth courts and family proceedings courts to see how magistrates and lawyers deal with such cases.
3. A series of articles should be placed in the quality press, describing the legal, welfare and psychological difficulties experienced by child defendants and suggesting how the present system could be improved.
4. Linked to the process of raising public awareness, efforts should be made to educate non offending children and young people about the problems facing child defendants appearing before the courts. Informed peer group pressure not to offend should be recognized as a potent preventative force since peer groups are not always a risk factor for offending.

The Michael Sieff Foundation

working together for children's welfare



Acknowledgements from Lady Haslam

On behalf of my fellow Trustees of The Michael Sieff Foundation and Steering Group members, I would like to thank everyone who helped to make this legal conference such a landmark event and, in particular:

- the chairman, Lord Justice Kay, speakers and discussion participants who made the content so relevant and authoritative;
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Conference Steering Group

Eileen Vizard (Chair), Elizabeth Haslam, Barbara Esam, Jenny Gray, Sally Howes, Michael Lawson and Norman Woodhouse.

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APPENDIX 1

A COMPARATIVE STUDY ABOUT THE AGE OF CRIMINAL RESPONSIBILITY IN OTHER JURISDICTIONS, BENJAMIN DEAN

1. In this comparative study I have sought to investigate the age of criminal responsibility in a number of jurisdictions within the continents of Africa, Asia, Australasia, Europe and North America. In doing so I have drawn extensively from material contained in the Report on the Age of Criminal Responsibility by the Law Reform Commission of Hong Kong.¹ Although the Scottish Law Commission's Report on Age of Criminal Responsibility has recently been published,² their Discussion Paper on Age of Criminal Responsibility, which was released in July last year, has provided much comparative information.³ The appendix summarises the age of criminal responsibility in a wide range of countries.
2. The Scottish Law Commission point out that there exist limitations in considering the data concerning the age of criminal responsibility. For instance, it is often difficult to be confident that one is comparing "like with like".⁴ Some countries use the age of criminal responsibility in its narrow sense (i.e. age of criminal capacity) which may not be the same as the other ages which appear in the comparative table. The level at which the age is set is in no way an automatic indication of the way a child is dealt with after committing an offence. It may or may not reflect a repressive or rehabilitative perspective on the part of the authorities

AFRICA

South Africa

3. In South Africa, no child under the age of seven can be guilty of an offence. A child between the ages of seven and 14 years is subject to a rebuttable presumption of incapacity.⁵

ASIA

Hong Kong

4. The law provides that no child under the age of seven can be guilty of an offence. The law also presumes that a child between the ages of seven and 14 is incapable of committing a crime, unless this presumption is rebutted by the prosecution on proof beyond reasonable doubt that, at the time of the offence, the child was well aware that his or her act was seriously wrong, and not merely naughty or mischievous. This is known as "the rebuttable presumption of *doli incapax*".
5. The Law Reform Commission in its report on The Age of Criminal Responsibility in Hong Kong recommended that the minimum age of criminal responsibility should be increased from seven to 10 years of age and that children between 10 and 14 should be presumed to be incapable of committing a crime unless that

presumption can be rebutted by the prosecution.⁶

India

6. Section 82 of the Indian Penal Code states that a child under seven years of age is exempt from criminal responsibility. According to section 83, a child between the ages of seven and 12 lacks criminal capacity if he or she "has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion."⁷

Japan

7. The minimum age of criminal responsibility in Japan is 16.⁸

Mainland China

8. Under the criminal law of the People's Republic of China, a child who has not reached the age of 14 is not criminally responsible. Children aged 14 or 15 are regarded as criminally responsible with regard to the serious offences of killing of another, intentional injuring of another causing serious injury or death, rape, robbery, drug trafficking and arson. A person who has attained the age of 16 is regarded as criminally responsible for any crime.⁹

Malaysia

9. The legal position in Malaysia is set out in sections 82 and 83 of the Malaysia Penal Code. Criminal responsibility only attaches if the child is aged 10 or above. An offence is committed by a child above 10 and under 12 years of age provided he or she has “attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion”¹⁰

Singapore

10. In Singapore, a criminal offence cannot be committed by a child under the age of seven.¹¹ Between the ages of seven and 12, criminal responsibility does not attach if the child has not “attained sufficient maturity of understanding to judge the nature and consequence of his conduct on that occasion”.¹² The legal position is similar to that in Malaysia, apart from the floor age being seven as opposed to 10 years of age.

Taiwan

11. Article 18 of the Criminal Law prescribes that a child under 14 years will not be punished for his or her act.¹³

AUSTRALASIA

Australia

12. The minimum age for criminal responsibility is 10 years of age in Australia except in Tasmania. At common law, there is an irrebuttable presumption that a child aged seven or under cannot be guilty of a crime.¹⁴ In Tasmania, the term used is “under 7 years of age”.¹⁵ In the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, South Australia, Victoria and Western Australia, the minimum age of criminal responsibility has been raised to 10.¹⁶ This mirrors the position taken in the Model Criminal Code, reflected in section 7.1 of the Criminal Code Act 1995 (Cth).

13. The *doli incapax* presumption, which was abolished in England and Wales by section 34 of the Crime and Disorder Act 1998,¹⁷ has been codified by legislation in the Australian Capital Territory, Commonwealth, Northern Territory, Queensland, Tasmania and Western Australia, and survives as part of the common law in New South Wales, South Australia and Victoria.¹⁸

New Zealand

14. In New Zealand, the minimum age of criminal responsibility is 10 years.¹⁹ The rebuttable presumption of *doli incapax* applies once the child reaches the age of 10 but is under the age of 14.²⁰

EUROPE

France

15. No child under 13 can be prosecuted. For those between the ages of 13 and 18, a presumption of incapacity applies that must be rebutted by the prosecution.²¹

Germany

16. In Germany, a child aged under 14 cannot be prosecuted, while for children aged between 14 and 18, responsibility is linked with the maturity of the child on trial.²²

Ireland

17. Children under seven years of age cannot be prosecuted. For those aged seven to 14 years a presumption of incapacity applies which is rebuttable by the prosecution. The Children Act 2001, which has yet to be brought into force, provides that the minimum age below which no child may be prosecuted is raised to 12 years of age. The rebuttable presumption of incapacity is preserved for 12 to 14 year olds.²³

Scotland

18. Section 41 of the Criminal Procedure (Scotland) Act 1995 states that “It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence” and no child under the age of 16 may be prosecuted for any offence except on the instructions of the Lord Advocate. The Scottish Law Commission recommended that the existing provisions, which place restrictions on the prosecution of children under 16, should be retained subject to an amendment to the effect that a child under the age of 12 cannot be prosecuted.²⁴

Spain

19. The Spanish penal code states that children under 16 are exempt from criminal liability. Those aged from 16 to 18 are criminally responsible, but age is a mitigating factor which reduces sentence.²⁵ Children under 15 cannot be prosecuted.²⁶

NORTH AMERICA

Canada

20. The age of criminal responsibility in Canada is 12 years.²⁷ This has recently been raised from seven years of age and the rebuttable presumption of *doli incapax* has ceased to operate. Section 13 of the Canadian Criminal Code provides that:

No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.

Children who commit an offence when under 12 years of age may be subject to child welfare procedures that vary from province to province.

United States of America

21. According to the Scottish Law Commission's Discussion Paper on Age of Criminal Responsibility each of the 50 states generally adopts one of three models with regard to dealing with children.²⁸ The first model, which is followed by the majority of states, sets out that all children under a specified age (usually 14) at the time of the offence have to be prosecuted in the juvenile court. That court may transfer the case to an adult court. The second model prescribes that older children must be sent to an adult court for murder and enables the judge in the juvenile court a power to remit for other felonies. The third model requires children above a certain age who have been charged with serious offences, such as rape, murder or armed robbery to appear before an adult court. Another reason for the transfer may be a prior criminal record. They may, however, be remitted to the juvenile court. The states vary greatly with regard to the youngest age juveniles may be transferred to the adult criminal court by waiver of juvenile jurisdiction.²⁹

22. Every jurisdiction in the United States has established a juvenile court system. These courts typically deal with juvenile delinquents. The most common definition of delinquency is conduct which transgresses penal law. Delinquent children have committed acts that if committed by an adult would be criminal.³⁰ In general, the system functions through many of the existing organisations of the adult criminal justice system but often with specialised structures.³¹

23. The juvenile court system has diminished the practical significance of common law and statutory provisions on the criminal capacity of children.³² Most juvenile courts place no lower age limit on their jurisdiction. Consequently unless the common law immunity for infants is incorporated into juvenile law,³³ children under seven may be adjudged delinquent for conduct for which they lacked criminal responsibility. It is claimed that "the traditional concept of incapacity has no application" in the juvenile court,³⁴ on the basis that these courts are not intended to deal with moral responsibility and are concerned only with the welfare of children.³⁵ All juvenile courts have an upper age limit. This varies from 16 to 18. In 38 states and the District of Columbia it is the 18th birthday; in eight states, the 17th; and in the remainder, the 16th.³⁶

24. Section 4.10 of the Model Penal Code is designed to define the extent to which criminal proceedings are barred because of the alleged offender's immaturity. It excludes such proceedings absolutely if the accused was less than 16 years of age at the time of the conduct charged, relying in such instances upon the processes of the juvenile court.

END NOTES

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APPENDIX 1 END NOTES

- ¹ The Law Reform Commission of Hong Kong, Report on the Age of Criminal Responsibility in Hong Kong (May 2000). The Report can be found on the Internet at <http://www.info.gov.hk.hkreform>
- ² Scottish Law Commission, Report on Age of Criminal Responsibility No 185 (TSO: Edinburgh, January 2002). The Report can be found on the Internet at <http://www.scotlaw.com.gov.uk>.
- ³ Scottish Law Commission, Discussion Paper on Age of Criminal Responsibility No 115 (TSO: Edinburgh, July 2001). The Discussion Paper can be found on the Internet at <http://www.scotlaw.com.gov.uk>.
- ⁴ *Ibid*, para 2.35.
- ⁵ South African Law Commission, Report on Juvenile Justice Project 106 (2000), chap 3. The Report can be found on the Internet at <http://www.law.wits.ac.za/salc/salc.html>.
- ⁶ See n 1 above, chapter 6.
- ⁷ See n 1 above, para 2.26.
- ⁸ See n 1 above, para 2.27.
- ⁹ See n 1 above, para 2.21.
- ¹⁰ See n 1 above, para 2.25
- ¹¹ Singapore Penal Code, s 82. Cited in The Law Reform Commission of Hong Kong, Report on the Age of Criminal Responsibility in Hong Kong (May 2000), para 2.23.
- ¹² Singapore Penal Code, s 83. Cited in The Law Reform Commission of Hong Kong, Report on the Age of Criminal Responsibility in Hong Kong, (May 2000), para 2.24.
- ¹³ See n 2 above, para 2.22.
- ¹⁴ Sir William Holdsworth, *A History of English Law* (London: Sweet and Maxwell, 1966), Vol 3, p 372; Sir James Stephen, *A History of the Criminal Law of England* (London: 1883), Vol 2, p 98.
- ¹⁵ Criminal Code (Tas), s 18(1).
- ¹⁶ Children and Young People Act 1999 (ACT), s 71; Children (Criminal Proceedings) Act 1987 (NSW), s 5; Criminal Code (NT), s 38(1); Criminal Code (Qld), s 29(1); Young Offenders Act 1993 (SA), s 5; Children and Young Persons Act 1989 (Vic), s 127; Criminal Code (WA), s 29.
- ¹⁷ The provision came into force on September 30, 1998 (Crime and Disorder Act 1998 (Commencement No. 2 and Transitional Provisions) Order 1998 (S.I. 1998 No. 2327)
- ¹⁸ Criminal Code Act 1995 (Cth), s 7.2; Children and Young People Act 1999 (ACT), s 71; Children (Criminal Proceedings) Act 1985 (NSW), s 5; Criminal Code (NT), s 38(2); Criminal Code (Qld), s 29(2); Young Offenders Act 1993 (SA), s 10; Criminal Code (Tas), s 18(2); Children and Young Persons Act 1989 (Vic), s 127; Criminal Code (WA), s 29.
- ¹⁹ New Zealand Crimes Act 1961, s 21(1).
- ²⁰ New Zealand Crimes Act 1961, s 22(1).
- ²¹ See n 3 above, Appendix E.
- ²² Cavadino, P., "Goodbye Doli, Must We Leave You?" (1997) Vol 9, No2, Child and Family Law Quarterly 165, 170.
- ²³ See n 3 above, Appendix E.
- ²⁴ See n 2 above, para 3.20.
- ²⁵ See n 22 above.
- ²⁶ Administration of Justice Act, s 752(2).
- ²⁷ See n 1 above, para 2.11.
- ²⁸ At 55.
- ²⁹ No specific age: Alaska, Arizona, Arkansas, Delaware, Florida, Indiana, Kentucky, Maine, Maryland, New Hampshire, New Jersey, Oklahoma, South Dakota, West Virginia, Wyoming
10 Years: Vermont
12 Years: Montana
13 Years: Georgia, Illinois, Mississippi
14 Years: Alabama, Colorado, Connecticut, Idaho, Iowa, Massachusetts, Minnesota, Missouri, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Utah
15 Years: Michigan, New Mexico, Ohio, Texas, Virginia
16 Years: California, Hawaii, Kansas, Louisiana, Nevada, Rhode Island, Washington, Wisconsin
No Judicial Waiver Provision: Nebraska, New York
- ³⁰ Cole, G. F., *The American System of Criminal Justice* (Brooks/Cole Publishing Co: Pacific Grove (1991) at 689.
- ³¹ *Ibid*.
- ³² LaFave, W. R., Scott, A. W., *Criminal Law* (West Publishing: St Paul, 1986) at 401.
- ³³ In re Gladys R., 464 P.2d 127 (1970).
- ³⁴ Model Penal Code, section 4.10. Comment at 275 (1985).
- ³⁵ See n 32 above, at 401.
- ³⁶ See n 30 above, at 689.

COMPARATIVE TABLE ON THE AGE OF CRIMINAL RESPONSIBILITY¹

| <i>Jurisdiction</i> | <i>Age of Criminal Responsibility</i> | <i>Jurisdiction</i> | <i>Age of Criminal Responsibility</i> |
|---------------------------------|---------------------------------------|--------------------------|---------------------------------------|
| Belize | 7 | Bulgaria | 14 |
| Cyprus | 7 | Germany | 14 |
| Ghana | 7 | Hungary | 14 |
| India | 7 | Italy | 14 |
| Ireland | 7 | Latvia | 14 |
| Liechtenstein | 7 | Lithuania | 14 |
| Malawi | 7 | Mainland China | 14 |
| Nigeria | 7 | Mauritius | 14 |
| Papua New Guinea | 7 | Romania | 14 |
| Singapore | 7 | Slovenia | 14 |
| South Africa | 7 | Taiwan | 14 |
| Switzerland | 7 | Connecticut (USA) | 15 |
| Tasmania (Australia) | 7 | Czech Republic | 15 |
| Bermuda | 8 | Denmark | 15 |
| Cayman Islands | 8 | Estonia | 15 |
| Gibraltar | 8 | Finland | 15 |
| Kenya | 8 | Iceland | 15 |
| Northern Ireland (UK) | 8 | New York (USA) | 15 |
| Scotland (UK) | 8 | Norway | 15 |
| Sri Lanka | 8 | Slovakia | 15 |
| Western Samoa | 8 | South Carolina (USA) | 15 |
| Zambia | 8 | Sweden | 15 |
| Malta | 9 | Andorra | 16 |
| Australia (other than Tasmania) | 10 | Georgia (USA) | 16 |
| England and Wales (UK) | 10 | Illinois (USA) | 16 |
| Fiji | 10 | Japan | 16 |
| Guyana | 10 | Louisiana (USA) | 16 |
| Kiribati | 10 | Macau | 16 |
| Malaysia | 10 | Massachusetts (USA) | 16 |
| New Zealand | 10 | Michigan (USA) | 16 |
| Vanuatu | 10 | Missouri (USA) | 16 |
| Canada | 12 | Poland | 16 |
| Greece | 12 | Portugal | 16 |
| Jamaica | 12 | South Carolina (USA) | 16 |
| Netherlands | 12 | Spain | 16 |
| San Marino | 12 | Texas (USA) | 16 |
| Turkey | 12 | Belgium | 18 |
| Uganda | 12 | Luxembourg | 18 |
| France | 13 | United States of America | |
| Austria | 14 | (most other states) | 18 |

¹ Table adapted from that in Annex 2 to the Law Reform Commission of Hong Kong, Report on the Age of Criminal Responsibility in Hong Kong (2000).

APPENDIX 2

Young Offenders: Justice and Welfare - A Review of the Balance By Rupert Hughes

BACKGROUND

1. Through the later part of the twentieth century there have been two separate streams of legislation concerning the disposal of children who offend against the criminal law. These are the welfare stream—in for instance the 1948, 1975 and 1989 Children Acts—and the justice stream in the 1933 and 1969 Children and Young Persons Acts and the various Criminal Justice Acts of the 'nineties. These have remained separate although there have been various linkages at different times. In the background has been the debate, prominent in the 'sixties, as to whether the children should rather be seen as deprived or depraved. The aim of the welfare legislation is to provide services to families in difficulty, in the form of support to parents and children or, if appropriate, substitute parenting for the child. The disposal of the courts where needed is in the form of the Care Order which gives the Local Authority parental responsibility or the Supervision Order which obliges the parents/children to take particular action. The aim of the justice system is punishment and rehabilitation of the offending child and there is a battery of various Orders, recently increased, to achieve this. The statutes give two underlying objectives for youth justice—the welfare of the child in the 1933 Act and the prevention of offending in the Crime and Disorder Act 1998. There is clearly a tension between these and the courts must strive to get the right balance.

2. In the Sixties the welfare swing of the pendulum brought in, after a Royal Commission, in Scotland the children's hearings system (Social Work (Scotland) Act 1968) which has survived and in England and Wales (after a White Paper not acted on proposing a system similar to the Scottish) the 1969 Act which would have limited prosecution of children but was never implemented after a change of government. There did, however, survive in this Act the possibility of a care order as the disposal of a prosecution provided that the child was in need of care or control.

3. The 1989 Act removed the offence condition for a care order to combat the impression that care is a punishment for the child. The threshold is significant harm, or its likelihood, to the child either from parental deficiencies or lack of control. Under the Act a concurrent jurisdiction of family courts dealing with private (eg divorce, residence and contact) and public (care) family matters has been established. Care is no longer a disposal in the Youth Court which is the Magistrates court dealing with young offenders. The criminal jurisdiction is not concurrent (but might be depending on how the Government decides to implement Auld) but certain cases are transferred to the Crown Court. An exception to the above is s12(6) of the 1998 Act when a child has failed to comply with a Child Safety Order. The Youth Court can make a care order without the threshold criteria for a care order (risk of significant harm) being met, but this is an anomaly which needs to be addressed.

4. Under the law at present it is possible to provide a welfare response to a crime by a child if it is a symptom of a family breakdown situation or there is a need for specialist assessment, eg in a child sexual abuse case. This will only happen if the welfare issue is recognised early on and the case is not pursued by prosecution but referred to the local authority who can make a care application to the Family Proceedings Court. This seems not to happen. In the late 'nineties a new structure was established to handle youth offending. Under the Youth Justice Board, a quango which took over responsibilities from social service departments, interdisciplinary youth offending teams, have been set up. These have drawn largely from social services but do not have their Children Act responsibilities (ie to identify, safeguard and promote the welfare of children in need: s17/1989).

5. It would seem that the time has come to review the way in which the balance between welfare and justice is approached before, during and after any court action.

DISCUSSION

6. One way of handling would be to re-equip the Youth Court with care powers. Another would be to limit prosecution, perhaps by raising the age of criminal responsibility, thus automatically providing for the Family Proceedings Court to handle any need for orders. Neither of these is wholly satisfactory. This is because of the belief that there are some children in the lower end of the age-range where prosecution is taken (ie 10-14) who ought to have a justice disposal. The Youth Court conversely would be unable simply to take on care cases for which there is a different standard of proof, different rules of evidence, different arrangements for assessment etc. Attempts to combine the systems seem unlikely to succeed because of these differences nor would a solution be acceptable which did not provide for the court allocation to be a judicial decision.

7. The way forward seems to be a flexible system for movement and allocation between the two court systems. Unlike the Scottish and new YJB panels, it ought not to be necessary for guilt to be proved or accepted before the disposals are fixed. Instead a decision should be taken before it is necessary for the child to plead.

NEW SYSTEM

8. The process would be somewhat as follows: Care and crime cases both start in the Magistrates Court. Unlike at present, the Family Proceedings and Youth Courts would be drawn from the same magistrates. When the case was presented, the Youth court would consider whether it was likely to be one which should be handled by the Family Proceedings Court. If it was, they would direct the local authority to investigate and decide whether to apply for a Children Act order and if not, report the reasons within a fixed period (together with any services they would provide) - this would be similar to s37/1989 under which the court hearing a private law application and believing a public law application might be appropriate can direct such an investigation.

9. The Bench would then be constituted as a Family Proceedings Court to consider the report. If a family disposal was indicated, the charge would be in abeyance when the application was made and

the hearing would continue in the normal way (under the Children Act it could be transferred up to a higher court). If not, the prosecution would continue. Consideration of a s37 report would require the appointment of a Children's Guardian. For continuation of the prosecution some of the evidence of the report might have to be removed and it would be important for a new bench to be appointed. Preferably the solicitor for the child should remain and it will therefore be necessary to adjust the legal aid franchise system to allow for this (this perhaps should be done anyhow to provide a single franchise for children's work).

10. If the s37 Report indicated that action was being taken by the local authority short of a care application it would be for the court to decide whether or not continuation of the prosecution was appropriate. If the care application is brought but the court does not find the case made either from failure to meet the threshold criteria or otherwise, the court would have a similar decision. If the care or supervision order is made, the charge would be dropped, ie the prosecution would be withdrawn or dismissed.

11. How will the court identify such cases? It is from the Youth Offending Team that the information would need to come. They have in any case a duty to act to prevent offending and should be aware of cases where a care order is less likely to lead to further offences than a disposal under criminal justice legislation. They could propose to the court accordingly. It would also be possible to bring in the procedure after the prosecution has started but this would be less satisfactory.

12. The procedure would be discretionary for the Youth Court and to be used in certain situations which could be selected. Some further resources would be necessary for the courts and CAFCASS and, necessarily, local authorities would have additional involvement. This should be justified if better solutions were found for these difficult cases. Changes to the rules governing the respective jurisdictions of justices sitting as members of the youth court panels and those sitting as members of the family proceedings court panels would be required for this system. An amendment of s37 of the 1989 Act (or some other statutory provision) would also seem to be required to bring these proceedings within its scope.

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