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Children in the Crossfire

THE MICHAEL SIEFF FOUNDATION -

Working Together for Children's Welfare

REPORT OF THE CONFERENCE
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Report of a special Spring conference following the 9th annual conference, by Jonathan Cooley

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Summary

This conference was held at a stimulating time for those who are concerned with child witnesses. As the research of Professor Graham Davies into the effectiveness of the 1991 provisions is being evaluated, the time is right for considering subsequent initiatives.

No-one at the conference disputed the principle that *the interests of children should be the primary consideration,* but opinion was divided about whether or not those interests should be the primary and final consideration, and about where the balance should lie between the interests of particular children involved in a criminal trial and the interests of children in general who need protection.

There were suggestions to modify the present system in the hope of effecting perhaps quite significant improvements, as well as suggestions to make radical changes.

The discussions could be grouped into four inter-related areas:

- **Reducing delays – fast-track systems and timetabling, less easily breakable court fixtures.**
- **Disposing of the evidence of children at an early stage – evidence on commission and the consequent removal of problems about therapy.**
- **Reducing the discomfort of children in court – by good preparation and by various techological and human methods during the trial.**
- **More effective planning and management – decisions to prosecute, plea and directions hearings, joint management of related criminal and civil proceedings, dealing with disclosure, and making effective use of expert witnesses.**

The intractable nature of the problem was highlighted by the fact that there was less consensus than is usual at these conferences.

Discussion Group Reports and Conference Conclusions

The following eight sections correspond to the topics considered by the eight discussion groups into which the conference divided. Recommendations agreed in plenary session are bulleted and numbered. Other concerns, minority views and points of interest which emerged, as well as points for which there was insufficient time for discussion in plenary session, are in italics.

The Pre-Charge Stage

1. Alternatives to criminal prosecution should be given more emphasis and new systems (such as diversion schemes and "caution plus") developed. These could include alternatives for the child, where their complaint has not been the subject of a prosecution.

2. The Crown Prosecution Service should produce a clear policy statement about the process and criteria around the decision whether to prosecute which makes explicit the extent to which and how the child's need is taken into account in relation to public interest.

3. Where the police have not charged an alleged offender and the case has been referred to the Crown Prosecution Service for advice,before a decision is taken about whether to charge there should be consultation with those professionally involved with the care and welfare of the child.

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- **4.** Where the police decide not to charge or the Crown Prosecution Service decides not to continue a prosecution, the reasons for the decision should, unless impractical, be given, and made known to the victim. Support should be provided for the child at that point.

It was felt that there was a trend towards the dominance of the requirements of prosecution which needed to be reversed.

The logistics of the consultation in recommendation 3 were discussed at length. In particular, should it take place at the strategy discussion or at the care conference?

A prosecution does at least give a label to an alleged abuser which is useful later when he starts to move between families or between institutions. A substitute for this will need to be devised if there are to be fewer prosecutions.

We need to develop very different approaches for dealing with inter-family sexual abuse at one end of the spectrum and for dealing with, for example, large scale paedophile rings at the other end.

Although the idea of more diversion for less serious offenders seems attractive, it was pointed out that children commonly disclose abuse very gradually. Cases which appear to be less serious to begin with can turn out to be the most serious after work has begun with the offender and the child, so an early decision that a case falls into the less serious category might be unwise. Cautioning was thought to send unhelpful messages to the offender in this sort of case. Certainly it is impossible for a caution to carry with it any sort of restriction or obligation (a court order would be required for that) so the ideas of cautioning and compulsory therapy don't go together at all well. Strong legal provisions certainly need to be retained for sex offenders with clear career paths.

Cases which appear initially to be less serious can turn out to be the most serious after work has begun on them

Memorandum Interviewing

- **5.** There should be more planning on the need for, and shape of an interview, with reference to criteria such as the likelihood of a criminal trial and whether the child will be a good witness.

- **6.** Routine debriefing jointly between police and social worker interviewers after the videotaping of an interview should be encouraged.

- 7. Quality assurance of interviews should be assured by routine monitoring of a sample of videos by senior people in each agency .

- **8.** There are currently too many interviewers. There should be fewer, with more experience, and available between authorities, especially in the light of local authority reorganisation. Such services could be provided by voluntary organisations.

- **9.** More data is required on:-
  - The number of children involved in dual proceedings
  - The number of videos made, and submitted in evidence
  - The number of guilty pleas and variations in pleas
  - The number of conviction~ where videos are used and
  - Outcomes for children in related care proceedings.

- **10.** The practicalities of taking evidence on commission should be explored. The memorandum interview should be retained for the investigation stage and possibly be used as the child's evidence-in-chief at the commission hearing.

- **11.** Children should be better prepared for court by giving them an opportunity to express an informed preference for the mode of giving evidence. Where appropriate their parents and the professionals involved should also be consulted.

- **12.** Better training for judges and lawyers in dealing with children at court is required.

The fundamental principle is that the evidence of a child should be disposed of at an early stage. Among the many advantages of this are that the child will have forgotten less, therapy can begin, and because the defendant can't rely on anything going wrong at the trial there would be more likelihood of an early guilty plea.

Research suggests that children give better evidence if they have a choice about the way they do so. Some older children, for example, might very strongly want to appear at court in person and confront the defendant .

It was a central recommendation of Pigot that children should not give evidence at court by any means unless they want to do so .

It was pointed out that if a child is allowed to express a preference then either the decision of the child rules, or it must be taken into account, and in the latter case

we are back to general discretion. This would undermine the idea of introducing evidence on commission, part of the value of which is that it would be for all children.

The idea that evidence on commission could be obtained in stages, in sections appropriate to the child's capacity, was considered. With the extra complexity that this would introduce, it was not clear that this would be to the child's advantage.

If written evidence really does lead to better decisions as was suggested earlier in the conference, should we question the whole idea of recording children on video? It was felt that most of the children required to give evidence could not cope with a more abstract mode of communication.

Pre-Trial Procedures

- **13.** Under the Criminal Justice Act 1967, permission of the court is required to introduce alibi evidence, unless the details have previously been provided within a prescribed period. This has operated for 27 years without injustice, and should be extended in cases of alleged child abuse to any material issue on which the defence seeks to cross-examine any child witness, or adduce evidence.
- **14.** Revision of *Working Together* should include liaison and exchange of information between all relevant agencies (including the Crown Prosecution Service) from decision to proceed to final hearing, to include the child's needs and wishes, and disclosures by the alleged offender.
- **15.** A single care judge should co-ordinate the pre-trial process and make binding directions at plea and directions hearings.
- **16.** The need for expert evidence should be agreed by prosecution and defence at plea and directions hearings. Expert evidence should be available on matters likely to be outside the experience of the jury.
- **17.** Clear incentives to plead guilty should be published relating to discounts and offers of assessment and treatment.

Among the considerations leading to recommendation 13 *were the fact that there is usually a period of over ten months between the decision to proceed and the final hearing during which things change. There is also a need to notify social services if a defendant is out and about when the ch'ild· has been placed at home.*

One possible incentive to plead guilty would be to extend remand privileges up to the date of sentencing; these are currently lost if a guilty plea is made. It was noted that publication of discounts is already part of statute.

Although the idea of a single managing judge for related civil and criminal proceedings was strongly supported, it was thought that it would not be appropriate for that one judge to preside over two sets of contested proceedings.

Part of recommendation 15 *is an extension to the Criminal Justice Act* 1987 *which provides for preparatory hearings in certain fraud cases to include rulings which bind the parties at trial.*

Disclosure

- **18.** The decision to prosecute or not is more likely to be right if it is based on the fullest information. This suggests the fullest exchange of information between the police, the social services and the Crown Prosecution Service. However:-
  - Any material in the possession of CPS can be required to be disclosed to the defence subject only to rules that it must be material and not subject to public interest immunity.
  - If material is in the possession of a third party (e.g. social services) disclosure of it can only presently be ordered by issuing a witness summons, requiring the witness to bring along such documents as are specified. This enables the third party to be legally represented and to argue its own point of view.
  - Hence, as matters stand, the fact that the local authority and CPS are separately represented with respect to disclosure does not mean that they are in dispute with each other.
  - This approach is somewhat artificial and a single, structured, systematic approach should apply to both the prosecution and third parties, including such bodies as the Area Child Protection Committee. But the rights of third parties to argue, and to be legally represented if necessary, must be preserved together with the present restrictions of materiality and public interest immunity.
- **19.** The defence should be prevented from engaging in fishing expeditions. Documents should not be disclosed unless the defence can show they are material, and this should require them to identify the issues of the case.

  Plea and Directions Hearings should be implemented nationally as soon as possible. This should encourage the early resolution on conflicts, require early disclosure of the real issues in the case, and prevent late requests for disclosure of documents.
- **20.** Some disclosures will inevitably be ordered and systems should be established by those likely to be required to disclose, whether local authorities, public health authorities or otherwise, so that

requests or orders of the court can be. actioned without delay. With such systems in place, programming or steps to be taken should be possible at the Plea and Directions Hearings.

- **21. In** considering the need for a fair trial, a balance must be found between enabling the defence to test the credibility of a witness and ensuring fair treatment for the child. All parties should ensure that materiality is kept to the forefront, as is the need to treat vulnerable children with care and sympathy.
- **22.** More consideration should be given to the moral rights of children and their parents to have knowledge of what is disclosed and to have some say in the use made of it.
- **23.** Consideration also needs to be given to what happens to material once it has been disclosed and used. The strictest possible controls should be exercised by the court if the fears of medical practitioners are to be allayed and if proper confidence is to be maintained between patient and doctor.
- **24.** The Judicial Studies Board and the Bar Council should both be asked to establish training programmes which include the above matters. Judges should be interventionist both at the plea and directions hearing and at the trial. They must be watchful of the interests of children and intervene if they are being treated with less than proper consideration.

It was pointed out that requiring the defence to identify the issues in a case was reasonable as a condition of any disclosure by the prosecution,so that without such, identification the defence would by definition be an a fishing expedition. Identifying the issues between the parties is both sensible and necessary.

It was suggested that some kind of criminal offence might be introduced to protect disclosed material when a case is finished. It is known that videos used in court are considered by some to be a kind of pornography which has financial value, and there is even anecdotal evidence of medical reports being sold in a public house.

How strong is the argument that just because a trial is a criminal trial it must be held in public?

The possibility of holding proceedings in camera *was suggested. This happens in civil cases. How strong is the argument that because a trial is a criminal trial it must be held in public?*

Preparation of Child Witnesses

- **25.** Consideration should be given to the provision of full-time independent professional child support workers who would have status within the court system' and to whom all child witnesses would have access. Their skills and knowledge would be as specified in the child witness pack:-
  - Awareness of the needs of abused children
  - A working knowledge of the criminal justice system
  - Ability to command the confidence of the police and the Crown Prosecution Service
  - Familiarity with the rules of evidence
  - A knowledge of the *Memorandum of Good Practice.*

The post could be jointly funded by various agencies in order to preserve its independence. Practitioners would prepare children for court, explaining the purpose, what will and might happen, and the possible outcomes; they would act as advocates for children, informing them about modes of giving evidence and accompanying them when they do so; they would support therapeutic work, befriend children, protect them from 'profesional abuse' and keep families informed; and they would liaise with other agencies.

At the moment this job is being done by police officers who are not involved in the case, and by victim support workers - if at all. There are large pockets around the country where the job is simply not being done.

There was striking disagreement about the role of social services here. It was suggested that the task is their responsibility, and that there would be difficulty in divesting themselves of that responsibility in such an important area, even by some sort of agency agreement to contract-in the service. Others pointed out that in the overwhelming majority of child abuse cases there is no social worker involved at all. Far from taking the role away from social services, the important thing is to find someone to do the job properly - or even to do the job at all. It seems that the job description is in place, but not the specification of the responsibility, and there is an urgent need to identify which agency has that responsibility.

There is an urgent need to identify which agency is responsible for preparing child witnesses

Expert Witnesses

- **26.** A managing judge should oversee the appointment of expert witnesses in civil and criminal proceedings either at the pre-trial review or at the plea and directions hearing.

- **27.** There should be a court-appointed expert in criminal proceedings where it is agreed that the expert evidence will assist and inform the jury.

There seems to be a proliferation of expert witnesses, and some means of assessing their competence is needed.

It is important to use expert witnesses not just for rebuttal, but for assisting and informing the jury about issues relating to the evidence of children.

The managing judge should be able to exert some control over the numbers of expert witnesses who give evidence, as in civil proceedings. We must not allow a situation where a mass of experts can be introduced into criminal trials which will confuse, lengthen, and complicate matters beyond the understanding of the jury.

Child Development For Judges and Lawyers

- **28.** A training project should be established using videos and booklets suitable for busy professionals to assimilate knowledge of child development in short modules.

  The purpose and utility of our knowledge of child development is to raise understanding, to improve the quality of evidence for civil, criminal and child-care decisions, to improve court management and the trial, and to overcome the limitations of personal experience. The syllabus should cover:-

  - Cognition and language
  - Applied child development: memory and suggestibility
  - Preparation for unusual stressful events
  - Variation on normal development: the effects of trauma and learning difficulties, individual variation.

  There will be variations in the skills required; some will need to communicate with children directly, others will need to appraise their evidence from a distance. Existing professional educational routes could be used: the Hyman Awareness Section of the Judicial Studies Board and the professional associations. There would be a need to monitor and appraise the effectiveness of initiatives.

It was noted that not all child-care professionals have knowledge of child development so the scheme would not be just for lawyers and judges.

There should be a mechanism for transmitting information about a child's developmental status into the court process. At present there is no simple way to communicate to the court even obvious problems, like deafness, that a child might have.

Preparation for court must be developmentally appropriate. A 10-year-old, for example, would need to be shown the live link equipment, rather than have it described to them.

Solicitors have a precedent with the Children Panel- the great problem seems to be how to persuade barristers to undergo training. Perhaps different fee structures could be applied in legal aid work depending on whether or not a qualification has been obtained.

If barristers understood how bad they are at dealing with children they would train themselves very rapidly

It was suggested that barristers are very well-intentioned people who simply don't understand how bad they are at dealing with children. If it were possible to make them understand this they would probably have no hesitation in training themselves. The problem could be that the work they do requires such commitment of concentration that they have no mental resources left to monitor themselves. They would also be encouraged to undergo training if some clear advantage to having the knowledge and skills could be perceived. Perhaps the Crown Prosecution Service could take a lead by instructing counsel who have the appropriate skills. If the defence recognized the skills, they too would want the training.

Radical Approaches

At the present time vast resources are being poured into very few cases, and outcomes are not satisfactory. A new system should be needs-based, taking into account the needs of the victim, the perpetrator, families and the community.

There is a wide spectrum of offenders, and prosecution probably has a role only in the most serious cases. Part of the purpose of prosecution should be protection for the community by reduction in recidivism.

The state must show that it takes the issue of child protection seriously in both attitude and action, but without profligate prosecution and care proceedings.

Perhaps previous convictions should be brought up in court in this type of case

There should be a national organisation for investigating and tracking paedophiles; the skills required for this are beyond what is available in individual agencies. Steps should be taken to allow prosecution of British nationals for offences committed outside the United Kingdom. Perhaps previous convictions should be brought up in court in this type of case.

There should be a continual process of public education, going on indefinitely, on a range of issues, including the purpose of prosecution and the family support role of social services.

Lifetime probation with treatment should be considered

The provision of treatment services needs to be improved. Self-referral of abusers and families should be encouraged and should be possible without fear of prosecution or protection proceedings. The range of provisions offered by the juvemile justice system should be seen as a useful parallel. It must be realised that a failed prosecution is the worst possible outcome, but there should be serious sentences for the worst cases. Life sentences with compulsory treatment or lifetime probation should be considered. Early admission of guilt should allow an offender to choose treatment instead of prison.

The rules of evidence and procedure have no rational basis

The rules of evidence and procedure in the legal system have no rational basis. The whole criminal justice system should re-invent itself based on knowledge of psychology and other scientific considerations, rather than legal decisions of the nineteenth century.