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FROM THE CHILDREN ACT 1908 TO TODAY – ANY PROGRESS FOR CHILDREN IN COURT?

MICHAEL SIEFF FOUNDATION: YOUNG DEFENDANTS CONFERENCE

TUESDAY 28TH APRIL 2009

It is very generous of the Michael Sieff Foundation to have organised this important conference and the fact that so many are here today is a tribute to the very hard work and determination of the trustees of the Foundation and those who have helped them organise it. The topics to be covered are wide ranging and in some cases controversial. But this is such an important subject not only to those children who come into contact with the Youth Justice System but to the whole of society that intense debate is necessary. Nor should we shy away from controversy. Very diverse views are held and need to be examined, however difficult they might at first sight appear. Nor can we be complacent – the history of the last 100 years shows how much change has been needed. But on the other hand, we must not forget the foundations on which all that has been achieved – the Children's Act of 1908.

In the introduction to the commentary on that Act written by Judge Clarke Hall and Arnold Pretty, the authors point out that whilst the development of the legal status of a peasant, from that of a mere chattel belonging to the manor on which he was born, to the full rights of citizenship, had long been secured before 1908, the legal status and position of the child had, until the 19th century, remained unchanged for centuries. The age of criminal responsibility was 7, the power of a father over a child was almost wholly uncontrolled and the penalties for

breach of the law were severe. But that has to be seen against the background of the 19th century. It was only gradually during the 19th century that it was recognised that the position of a child in respect of offences committed was different, both in kind and degree, from the position of an adult and needed different treatment. It was also during the same period that restrictions were imposed on child working and rights to education and a life free from ill usage and parental cruelty conferred.

It is in this context that the achievement of the Children Act 1908 must be seen. Its principle achievement was to consolidate into a single statute all the laws relating to children and establish the principle that juveniles should be dealt with in courts distinct from those dealing with adult criminals.

Of course, like any reform, there were those that did not think it went far enough. Some felt, like Sidney and Beatrice Webb, that the Act should have given greater emphasis to preventative measures. Although the Act provided that culpable neglect and wilful cruelty should be punished as crimes, nothing had been done to put in place a mechanism for prevention. Writing about it twenty years later they commented that this was similar to Parliament's centuries old view on vagrancy – punishing it as a crime but doing little more.

> "The Home Office, which took a lot of trouble to draft the statute, apparently overlooked the fact that no array of penal statutes will, in themselves, amount to a framework for prevention."

They pointed out the fact that despite the work of local authorities and the NSPCC inspectors little had been done to prevent neglect, especially by poverty stricken parents.

I shall return in a moment to the issue of the importance of preventative action. May I first say something about the great achievement of the Act? It appears that although the establishment of separate children's courts had been first advocated in this country in 1873, the practice of having separate courts for children originated in America with the establishment of a seperate children's court in Chicago at the end of the nineteenth century and brought about the landmark of a separate Act for children. It was Section 111 of the Children Act 1908 which made the same provision in England and Wales. It made clear that juvenile courts had to sit either in a different building or a different room from that in which ordinary sittings of the court were held or on different days. It also provided that those under the age of 16 should be kept separate from adults charged with crime (unless charged jointly) and that only those directly concerned with a case, other than bona fide

representatives of newspapers or news agencies should be allowed to attend. Although it appears that the design of courtrooms was not changed, this was a truly landmark recognition that children, when appearing before the courts, had to be dealt with separately. It is important to reflect how much depends on the basis set out in Section 111.

Over the following century our modern system has essentially been built upon this foundation with the development of specialist training for those who sit in youth courts, the redesign of the architecture of the courtroom, the adoption of different procedures and a very different approach to punishment. Time could not possibly permit a review of that development, but it is important to take into account the fact that the emphasis on dealing with Youth Courts and to crime amongst the young over that period has shifted and has sometimes gone round in a circle and been contradictory. May I take an example? When in 1927 a committee under Sir Thomas Malony reviewed the treatment of young offenders he described the juvenile court in these terms:

> "Before it appeared boys and girls under 16 were often wayward or mischievous and in some cases serious offenders; were sometimes dull of mind or under-developed, but more often full of vitality and intelligence, though misdirected, were all by virtue of their youthfulness hopeful subjects for care and training. The decision of the Magistrates with regard to the immediate future of these boys and girls must to a large extent influence their whole lives."

Recognising the importance of Magistrates, it recommended the appointment of more women and proper procedures for selection of panels. It tackled the issue of whether a child understood the charges and commended as wise the practice of giving a liberal interpretation to the requirements of the law. It recommended that the importance of keeping the interests of the child distinct from those of adults by stating that the "time had come" for juvenile courts to be in an entirely separate building and stressed the importance of the court layout. Although expressing these apparently forward looking sentiments, the report endorsed the practice of whipping and recommended its extension to more offences and to those under the age of 14. Like much else in the law, there has been no straight line logical development. I take that as a mere illustration of the way attitudes have changed.

But let me turn to today and look at the position which has been achieved on those firm foundations and highlight some of the key achievements:

- The training of all who sit in the Youth Court is now of a higher standard and the aim of the Judicial Studies Board is to ensure that we remain at the forefront of such training.

- We have achieved the use of unsworn evidence, the removal of the requirements of corroboration and the very sensible adoption of video recordings and Livelink have made the giving of evidence by children, , much more straight forward and made it easier to be accepted.

- Steps are taken to familiarise those attending court with what happens; there are many imaginative ways that have been developed, particularly by the Witness Service, in achieving a greater understanding of what will happen so as to lessen the apprehension of a witness. It is now accepted that such visits are essential.

- We are also trying, perhaps with not enough success to ensure that children are not kept waiting before giving evidence. The timing of trials is governed by a number of extraneous factors, but it is an objective each court seeks to achieve.

- The range of sentencing options available to a court are considerable. In view of the current consideration by the Sentencing Advisory Panel of responses to its very important Consultation Paper on Principles of Sentencing Youths, I will say no more than that this is a subject where intense debate is also necessary. One of the principal differences in dealing with children as opposed to adults, is that there can be a considerable difference, as you all know, in maturity between children of the same age. It is, perhaps, an essential feature of the sentencing of youths that the court in arriving at the sentence must take into account that factor as one of the most important in addition to the others. As the Maloney Committee observed in 1927, the decision may well affect the rest of the life of the child.

- We are also open constantly to review and scrutiny of the system. A good example of this if I may say so is the work of Joyce Plotnikoff and Richard Woolfson who in 2004 provided valuable research into the changes that the Government was introducing and provided hard evidence on which steps could be taken to remedy such shortcomings. I look forward very much to their current research which is due to be published later this summer.

Reference to such research shows that we can never be content with the current position as regards the Youth Court, the position of juvenile defendants and juvenile witnesses. There are no doubt many issues which you will wish to discuss today on which, as a judge, it would not be appropriate for me to comment, such as the age of criminal responsibility, as these are matters of policy which must be for Parliament. Nor is it appropriate for me to comment on where, if anywhere, the line should be drawn in determining which cases are to be tried in the Crown Court rather than the Youth Court.

But it is appropriate for me to say that there is much that we can still do to improve the procedure and practice in the Youth Court and above all prevent youths from becoming 'customers' of that court.

First, may I suggest that we do ensure that juvenile defendants have sufficient information to understand what will happen in court? It is, of course, primarily the responsibility of the advocate that will defend them to ensure that this is done. I think more can be done to ensure that the advocate is better equipped and assisted in providing such an explanation. It is also essential, given the accepted importance of parental responsibility, that the parents also understand what is happening and the long term implications. We therefore need to examine in more detail the work so far done towards the production of a "Young Defendants Information Pack" – both to support the advocate but also to ensure that the defendant and the parents of the defendant have the right information not only to deal with the case in which the defendant is appearing but, perhaps what is much more important, also to consider the longer term consequences.

Second, it is also evident that in addition to the special provisions that have been made for child witnesses and to which I have referred, that those who question those who give evidence, including juvenile defendants, should ask questions in a way the witness understands. It is not always easy for a person unfamiliar with questioning children to remember that questions must be asked in a way the witness understands and should not, for example, be full of conditional or subordinate clauses. It is not always easy for people unfamiliar with questioning children to get it right. There is also a more difficult and possibly more controversial issue, namely where the child has learning difficulties which are not such as to entitle him to an intermediary, as to how such difficulties can be communicated and taken into account. If such difficulties are communicated, then they must be communicated to all – the court and the defence lawyer. No doubt this will help in approaching questioning. But when such difficulties are communicated, is it right to permit a course through which the provision of such information does not merely allow that to be used as a consideration in

evaluating the evidence, but can form a basis for obtaining external evidence to cast doubt upon the reliability of that testimony? We need to be very careful in examining where such a step will take us. This is an extremely complex question which needs careful consideration.

We must not forget the position of those who are just beyond the scope of the Youth Court. Do we do enough for those in the next years? A recent report by the Transition to Adulthood Alliance raises this important question. Can we stop at any defined age?

But may I return finally to the issue raised by Sidney and Beatrice Webb – the question of preventative measures. It is clear to me that the system of justice administered through the Youth Court is one that is directed at a number of objectives set out in statute, including punishment and the prevention of further offending, but of course that is only to be achieved after a juvenile has committed an offence. It really is important to stop children coming to court and that we look at prevention prior to the child appearing in the Youth Court.

This, of course, can be expensive but it need not always be so. It is, of course, invidious to mention just one such programme but I have been very impressed by the achievement of Kikz, an organisation which provides sporting activities for young people. The support of this from leading and well known sportsmen, as well as many others, has been very generous, but I think it is also becoming evident that it is having a positive impact on local youth crime and anti-social behaviour. We should ask how much more effective is that kind of programme than other preventative measures.

Finally, I hope the best way to look forward on this centenary of the Children Act is to not only consider the issues you are going to look at in today's discussions – developmental maturity, the rights of juvenile defendants and the structure of the current court system, but I also hope you will find time to give attention to preventative activity. It is, perhaps, with such encouragement that we may hope to see less business in the Youth Court. But we should acknowledge that we will never achieve a system where we will not have Youth Courts. There can be no doubt that we need to examine all aspects of the Youth Court critically to ensure that it provides a fair, yet firm, means of dealing with those who we cannot prevent from committing crimes when they are young.
