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JUSTICE FOR CHILDREN

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It is evident that any discussion about justice and, more particularly, justice for children who have been sexually abused, is fraught with difficulty. It is problematic for three central reasons. First, there is arguably a good deal of confusion about how we understand both the concept and operation of justice itself: where are the parameters of justice and what must be done, how must it be done, and what must be achieved to demonstrate its effective accomplishment? Second: what is the relationship between justice for children and their needs, interests and welfare? There is widespread concern, for example, that the criminal justice system, geared as it is to the adult world of legalistic arrangements for deciding upon guilt or innocence, is emotionally harmful to children who enter its domain. It is also argued that for those sexually abused children who endure the distress and confusion of giving testimony, and for those many more who are never heard, the criminal justice system actually fails to deliver justice (see, for example, Plotnikoff and Woolfson, 1995; Westcott, 1995; Mitchell, 1997; Westcott and Jones, 1997). Additionally, it is contended, even family proceedings under the Children Act 1989, with their emphasis on children's welfare and an inquisitorial rather than adversarial process, cannot but revert to a narrowly defined contest between interested adults and their respective lawyers. A crucial concern with identifying 'significant harm' in the context of rights and responsibilities, must necessarily neglect the subtleties and complexities of children's socio-emotional experience and fail to engage adequately with their broad-ranging therapeutic and welfare needs (Audit Commission, 1994; DoH, 1995a; Parton, 1997). It is thus suggested that children's welfare becomes invisible as the law and its operations inevitably focus upon adult conceptions of justice, which concentrate upon the right to a fair contest, proof of facts (on the balance of probability) and the apportionment of responsibility (King and Trowell, 1992; King and Piper, 1995). Third, in any discussion about children's rights and welfare it is impossible to avoid a

long-running debate about how children's perceived vulnerability and their relative immaturity may be accommodated while, at the same time, according them those rights which are routinely enjoyed by adults (see Veerman, 1992; Franklin, 1995; Franklin & Franklin, 1996; Fox-Harding, 1997; Smith, 1997a for a detailed discussion of this area). Such accommodation usually takes the form of adult discretion in allowing children to exercise their rights, conditional upon an assessment of their age and understanding. In commenting upon the child's right to justice in the context of the criminal justice system, Westcott and Jones (1997, p. 172) suggest that:

> 'What *is* apparent is the need for more open and honest debate about what 'justice for children' is actually taken to mean by the different actors involved in child protection and criminal justice.' (Original emphasis)

This is a view with which we must agree, given the complexities of attending to children's rights and best interests to which we have briefly referred. We would argue, however, that justice in a limited legalistic sense is informed by substance, process and outcome. Substantive justice depends upon a respect for legal rights as these are identified in statute law and evolved through common law. The administration of justice requires that its process is experienced as enabling appropriate participation and fair treatment. This, in its turn, necessitates an understanding of the process, an appreciation of the individual's role within it, the opportunity to exercise choice insofar as this does not conflict with the public interest and the ability to have an effective voice in 'getting justice done'. Achieving a just outcome requires, at its most basic, that wrongdoing is acknowledged, that the wrongdoers are identified and made to face the consequences of their actions and that reparation is made to society and to the person who has suffered harm. These characteristics of justice are equally relevant whether individuals are caught up in the procedural machinery of child protection enquiries (DoH 1991a), legal intervention in family proceedings under the Children Act 1989, or the criminal justice system.

For children, however, achieving justice is a particularly equivocal business which cannot but reflect the ambiguous and contradictory ways in which childhood is understood and children are treated in different situations. Where children are the subjects of professional and judicial activity which is primarily concerned with their welfare needs, it is arguable that their rights are eroded by presumptions about their lack of cognitive, emotional and experiential competence to make decisions in their own best interests (see, for example, Freeman, 1992a; Dickenson and Jones, 1995; Lyon and Parton, 1995; Roche, 1996; Smith, 1997a). Adults, having achieved maturity, are prone to think that they have a better understanding of children's best interests than children themselves. However, when children as victims

of sexual abuse encounter the criminal justice system, the relationship between rights and welfare is argued in rather different ways. It is suggested, first, that the criminal justice system does not differentiate *sufficiently* between children and adults in terms of enabling children to participate effectively in achieving justice. Second, because children's immaturity relative to adults is *not* adequately recognised and accommodated, justice will be frustrated. Third, in failing to respond to the particular vulnerability of sexually abused children, the criminal justice system may cause distress and confusion and, at its worst, perpetuate a sense of continuing abuse. The arguments and dilemmas may be summarised thus:

> 'From police and social services staff, trained and embedded in child protection experience and values, protecting children was seen as an essential and irreducible priority. For those in the criminal justice system, it was an important element within a broader picture. The higher priorities lay elsewhere. The aim in care proceedings must be to *"protect the interests of children"*; in criminal proceeding that aim must be to *"respect their interests and protect the interest of defendants"*.' (DoH 1995b, 2.4; original emphasis)

Recent policy, legislation and case law have at least acknowledged the issue of justice for children. The question which now demands attention is: how far have such developments achieved an effective response to children's rights and welfare needs in such a way that children themselves might experience justice as being done? The following discussion will refer to children, while recognising that *particular* groups of children are likely to encounter additional difficulties in achieving justice, as will some especially vulnerable adults.

THE CHILD'S RIGHT TO BE HEARD

The United Nations Convention on the Rights of the Child

The UN Convention on the Rights of the Child, to which the UK became a signatory in December 1991, had by June 1996 attracted ratification by 174 countries, representing 'a level of commitment unprecedented in the history of the UN' (CRO, 1995, p. 12). The significance of the Convention is that, following ratification by 20 States, it assumes the status of international law for the signatories concerned (see CRDU, 1994; Childright, 1995; CRO, 1995; Jenkins, 1995 for detailed discussion of the Convention and its implementation in the UK). A wide range of rights are enunciated by the Convention, but for our purposes the most significant are the right to protection from all forms of physical or mental violence, exploitation and abuse (Article 19); the imperative that in all actions concerning children by any State agency,

including social welfare institutions, courts, administrative or legislative bodies, the child's best interests shall be a primary consideration (Article 3); and the child's right to be heard (Articles 9(2) and 12). Clearly, listening to children must be accompanied by a willingness to hear and to respond, if children are to experience justice as we have described it. Article 12 of the Convention states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the rules of national law.

More recently, Article 1.2 of the European Convention on the Exercise of Children's Rights has reinforced the message that a child's right to be heard necessitates information and participation in legal proceedings:

> 'The object of the present convention is, in the interests of children, to protect their rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority.' (Representing Children, 1995, p. 10)

Such rights should not be understood simply as formal imperatives which require compliance. Essentially they reflect an awareness of children as thinking, experiencing subjects who are capable of forming a view about their own best interests (Veerman, 1992; Freeman, 1993). Sir Thomas Bingham, speaking in the English Court of Appeal,[1*] makes a similar point about the Children Act 1989. He asserts that the purposes of the Act are not solely legislative, but are intended to convey a policy declaration about the attitudes which should direct courts and other agencies in dealing with children, including an emphasis on enabling children's views to be communicated and explained through independent representation.

The Children Act 1989: Enabling Children to be Heard?

The Children Act 1989 was hailed as a 'Charter for Children' (DoH, 1993, p. 3) and, together with the Children (Scotland) Act 1995, has generally been

* Cases are listed on p. 33.

interpreted as a vehicle for children's empowerment (Bainham, 1990; Hodgeson, 1990; Freeman, 1992b; Hough, 1995). The Children Act 1989, for example, requires local authorities to ascertain the wishes and feelings of children whom they are 'looking after', or proposing to look after, and to give them 'due consideration' having regard to the child's age and understanding, (ss. 22(4) and (5)). Similarly, in considering whether to make, vary or discharge an order under s. 8 or Part IV (care and supervision) of the Act, a court must have regard to the ascertainable wishes and feelings of the child as one element of the 'welfare checklist' under s. 1. Children may initiate legal action by seeking the discharge of an emergency protection order (s. 45(8)(a)), applying for a contact order in care proceedings (s. 34(2)), requesting that a care order should be discharged (s. 39(1)) and applying for leave to make a section 8 application in relation to where they should live and with whom they should have contact (s. 10(2)(b)).

For many children who are subject to legal proceedings under the Act, the UN Convention's insistence that their views should be represented in court will be met by the provision of a *guardian ad litem*. Independent representation of children by *guardians ad litem* has been available since 1984 as a result of Regulations made under the Children Act 1975. However, the Children Act 1989 introduces a *presumption* that a guardian will be appointed unless the court is satisfied that it is not necessary to do so in order to safeguard the child's interests (s. 41). The *guardian ad litem's* role is enhanced in a wide range of specified proceedings (s. 41(6)) and that person is charged with playing a proactive role in advising the courts on case management and other relevant matters (DoH 1991b, 1992). Indeed, the *guardian ad litem* has such an influential role that if a court departs from a guardian's recommendations it must clearly express the reasons for doing so.[7] Additionally, where a guardian and child disagree about the latter's best interests and the child is considered to be capable of instructing a solicitor, the child may give instructions direct and the guardian may seek separate legal representation. Rule 9 of the Family Proceedings Rules 1991 governs arrangements for a child to begin or defend proceedings, or to be joined as a party in existing proceedings, without a *guardian ad litem* or 'next friend', and applies to those situations where a child wishes to remove a *guardian ad litem* who has already been appointed (see Hamilton, 1995, for a fuller explanation of these procedures).

In family proceedings it is accepted that a court requires as much information about the child and his or her circumstances as possible, in order to make a judgement based on the paramountcy of the child's welfare. Justice for children in this context may therefore require that their story is told for them where they are unable to tell it themselves. We should note two developments which enable the court to gain as complete a picture as possible about the child and the issues which have attracted legal intervention. First,

the severely limited admissibility of hearsay evidence in criminal proceedings is completely abrogated in civil proceedings relating to the upbringing, maintenance or welfare of children (Children Act, s. 96 and Children (Admissibility of Hearsay Evidence) Order 1993). This means that a court may hear evidence about something which was said, documented or taped outside of the court and which is reported by a witness who has knowledge of such information, rather than the person who was directly responsible for the statement or other recording. Second, recent case law has clarified the circumstances in which usually privileged information may or must be disclosed to parties in family proceedings. Thus, it is now well established that when the court grants leave for documents to be disclosed to an expert, it also has power to direct that the resulting report must be disclosed to the court and all the parties.[3] Further clarification is now available about when it is acceptable for a *guardian ad litem*, a social worker or the court to pass on information, most usually to the police, which has been disclosed by a parent and which bears upon the issue of 'significant harm' and the child's welfare.[4] The issue of disclosure is complicated but further clarification can be gleaned from McEwan (1995), Brasse, (1996) and the Children Act Advisory Committee (1997).

THE CRIMINAL JUSTICE SYSTEM

Children who have been abused may be the only source of evidence against an alleged perpetrator. This is likely to be particularly so in situations involving sexual abuse where secrecy and power are central to the abusive regime (Wells, 1989; Wattam, 1991; National Commission of Inquiry into the Prevention of Child Abuse, 1996; Wade and Westcott, 1997). Concern was beginning to surface in the 1980s about the appropriateness of arrangements for hearing children's evidence in criminal proceedings, both with regard to children's effectiveness as credible witnesses and the emotional consequences of their involvement in the criminal justice system (Spencer, 1987; Lawrence, 1988). A limited response to these concerns can be found in the Criminal Justice Act 1988 which allows children to give their evidence via a live television link to the courtroom and administrative measures designed to achieve speedy progress for child abuse cases (Mitchell, 1997).

The Pigot Committee Report (Pigot, 1989) provided the opportunity for changes in policy and legislation through a series of recommendations which sought to accommodate both the requirements of the criminal justice system and the interests of child witnesses. The Committee supported the use of videotaped interviews with children, conducted jointly by a police officer and social worker and made as soon as possible following an allegation of abuse, which could then be used in court as the child's evidence in

chief. It further recommended that, in criminal proceedings, cross-examination of child witnesses should also be videotaped, thus protecting a child from any contact with the court and its 'criminal environment'. Initial interviews with children would have the dual purpose of investigating allegations and recording evidence. Currently, then, there exist a number of measures which are designed to improve the adequacy of children's evidence and to protect them from those potentially distressing requirements of the criminal justice system which are routinely imposed upon adults. The Criminal Justice Act 1991 extends the use of the live television link for children up to 17 years old who are appearing as witnesses in cases of sexual assault. Following the Pigot Committee's recommendations, it allows initial statements to be videotaped and, with the trial judge's permission, introduced in Crown and Youth courts as the child's evidence in chief. The *Memorandum of Good Practice* (Home Office DoH, 1992) provides guidance for those conducting videotaped interviews with the aim of ensuring sensitive investigation and evidential acceptability. In cases of alleged sexual or violent offences which involve child witnesses, the Director of Public Prosecutions can issue a notice of transfer which directs the case to the Crown Court for trial without first requiring committal proceedings in the magistrates' court (s. 32A CJA 1988 as amended by CJA 1991). This provision thus avoids the possibility of a child having to face cross-examination in two sets of proceedings and should also have the effect of expediting trial. Additionally, courts are required to: 'have regard to the desirability of avoiding prejudice to the welfare of any relevant child witness that may be occasioned by unnecessary delay in bringing the case to trial' (CJA 1991, Schedule 5(7))

This provision, of course, echoes the no-delay principle in s. 1(2) of the Children Act 1989. Prior to recent legislation, case law had established the convention that younger children were generally incompetent to give evidence in criminal proceedings. Children considered too young to take the oath were therefore subjected to a 'competency test', during which a judge attempted to determine a child's understanding of the truth. Not only did this leave the assessment of a child's competence at the mercy of judicial discretion, but it necessarily raised a doubt about the child's veracity. The Criminal Justice Act 1991 has changed all that. Now, children under 14 years old give unsworn evidence and all children are *presumed* to be competent witnesses unless they are proved to be otherwise, (s. 52, CJA 1991). In recent cases[5] where a defendant has appealed on the basis that very young children are incompetent, the courts have found that age alone is not sufficient proof of incompetence. The test in *R v. Hampshire* [1996] QB 1 has been followed in determining that a child is capable of giving intelligible testimony if he or she is able to understand questions and to answer them in a manner which is coherent and comprehensible (Childright, 1998). A child's

right to give testimony is now comparable to that of an adult, a position which is further emphasised by the Criminal Justice and Public Order Act 1994. (The Children's Legal Centre (CLC, 1992, 1994) has produced excellent guides on law and practice in relation to child sexual abuse and the criminal justice system.)

THE LEGAL FRAMEWORK: JUSTICE FOR CHILDREN?

Recent legislation and case law arguably demonstrate a laudable intention to promote justice for children. Legislative implementation, however, has attracted considerable criticism and demands for more radical reform. Concern has been expressed for a number of reasons, some of which relate to administrative and organisational shortcomings and some of which arise from the inherently adversarial nature of the justice system. All in all, it is contended that the legal framework continues to frustrate the UN Convention's imperative that children should have an effective opportunity to be heard and fails to recognise adequately their welfare needs.

Delay

Despite reference to minimising delay in both the Children Act 1989 and the Criminal Justice Act 1991, this continues to be a source of concern. The Children Act Advisory Committee (1994/95) notes that the average disposal time for public law Children Act cases has persistently increased since implementation of the Act. In her investigation, Dame Margaret Booth (Booth, 1996) identifies a number of significant factors which contribute to delay, including lack of adequate resources, poor administration, lax procedures for transferring cases from the family proceedings court, listing problems, lengthy hearings, the instruction of experts and, most fundamentally, the lack of firm case management in which magistrates, clerks, *guardians ad litem* and the judiciary all play a crucial role. The criminal justice system has attracted similar attention. Davies *et al.* (1995) identified an improvement over Davies and Noon's (1991) findings regarding the time taken from committal to trial. The Crown Prosecution Service Inspectorate (CPSI, 1998) similarly points to a general improvement in the progress of child witness cases. However, although a 'fast track' procedure exists for police and the Crown Prosecution Service to identify and expedite child witness cases, this is not uniformly established. In its recent study, the Crown Prosecution Service Inspectorate (CPSI, 1998) found that the police identified only 57.88% of child witness cases which could benefit from special arrangements, compared to 66% in Plotnikoff and Woolfson's (1995) research. It is

argued with some force that, for children particularly, the passage of time exacerbates uncertainty and anxiety and adversely affects the detail and quality of their evidence when it is finally heard (Flin *et al.*, 1993). Westcott and Jones (1997) have launched a trenchant attack on the lack of urgency in tackling delay, suggesting that this represents 'yet another damning indictment of policy and practice in this area' (p. 173).

Supporting Children

Cumulative research suggests that children often experience child protection investigations as confusing, distressing and disempowering, whether such intervention is conducted under the protective mantle of the Children Act 1989 or is integral to the functioning of the criminal justice system (Roberts *et al.*, 1993; Farmer, 1993; Roberts and Taylor, 1993; Farmer and Owen, 1995; Butler and Williamson, 1994; Wade and Westcott, 1997). In specified proceedings under the Children Act, *guardians ad litem* can provide support, guidance and advocacy throughout the legal process. Plotnikoff and Woolfson (1995) suggest that child witnesses might benefit from similar arrangements in criminal courts. However, this much admired system of independent representation is itself in danger of erosion as a consequence of growing curbs on legal aid (Cooper, 1997; Timms, 1998). The criminal justice system presents particular difficulties for children which could be ameliorated by appropriate support. Even at the initial stage of an investigative interview, evidential requirements cannot but cause a degree of discomfort and difficulty for children who are struggling to convey the substance and detail of their abusive experience. Clearly an interviewer can do much to support children in this situation, but Davies *et al.* (1995) identified a tendency to rush children into questioning without allowing them time to tell their story in a 'free narrative' form, to ask closed questions and to finish the interview without properly addressing the child's understanding of its purpose and what to expect next. Advantage may be taken of the *Memorandum's* (Home Office DoH, 1992) recommendation that a supportive adult can accompany a distressed or very young child during the initial interview(s). It is also recognised that a child giving evidence via a television link should receive appropriate support. Unfortunately, however, a practice direction from the Deputy Chief Justice (1991) states that the child's supporter should ordinarily be a court usher. Only in exceptional circumstances will judicial discretion allow the presence of an alternative supporter and it is clear that practice varies enormously between Crown Courts (CPSI, 1998).

As might be expected, children generally have only a limited understanding of the criminal justice system (Aldridge, 1997). Provision of information, familiarisation with the legal process and physical environment of the court,

and the emotional support which is available from a consistent adult supporter, have been partially met by NSPCC and Victim Support initiatives (CLC, 1992; Mitchell, 1997; Aldridge, 1997). Unlike the *guardian ad litem* arrangements in family proceedings, support for child witnesses depends on individual initiatives, resulting in patchy implementation and in some children receiving no help at all (Plotnikoff and Woolfson, 1995; Davies *et al.*, 1995).

DELIVERING JUSTICE

It is frequently argued that a child's ability to give a coherent account of his or her views or experiences is impeded by obstacles which are embedded in the Anglo-American system for delivering justice. This system is characterised by a contest between opposing parties in which procedural and evidential rules are designed to ensure 'fair play' and to establish the truth of the matter in question according to the relevant burden of proof. Critics assert that this adversarial approach misses the subtleties and complexities of children's needs and undermines their participation in the process of accomplishing justice. The criminal justice system has attracted much critical comment in this context. Frequently heated criticism points to a lack of regard for the welfare needs of child witnesses who are caught up in the adult-centred administration of criminal justice. Thus, there appears to be widespread confusion and local difficulty about arranging therapy for sexually abused children who may subsequently give evidence in a criminal trial. Withholding therapy anticipates, and attempts to pre-empt, a claim by the defence that the child's evidence has been 'contaminated' and cannot constitute a reliable account. The Crown Prosecution Service, however, has made it clear that there is *no* prohibition on responding to a child's need for therapeutic help, provided that the local CPS is informed and prosecuting counsel is aware of the arrangements (see CPSI, 1998, 7.25 and 7.26). Social workers and others who are concerned about the need for therapeutic intervention pending a criminal trial may thus refer to clear policy if local difficulties arise.

Concern has been expressed that any deviation from guidance in the *Memorandum of Good Practice* may prompt the defence to request a ruling of inadmissibility in respect of videotaped evidence. The introduction of the *Memorandum* makes it clear that lack of strict compliance is not an automatic ground for inadmissibility, and judicial discretion in this matter is governed by the interests of justice. Further clarification is provided in *G v. Director of Public Prosecutions*[6] where the prosecution's intention to introduce videotaped interviews with two young children was challenged by the defence. While the court found that the *Memorandum* should be followed, videotaped interviews would not be excluded only because of a failure to comply with the guidance.

It has been noted, with some outrage, that defence barristers attempt to discredit a child's evidence by intimidation, accusations of falsehood and aggressive questioning (Westcott, 1995). The use of language and questions which are inappropriate to a child's age and understanding has also fuelled criticism of the police, defence barristers and the judiciary. Commentators assert that this adversarial approach to child witnesses is oppressive and reminiscent of the power differential inherent in their experiences of abuse. While we appreciate the protective intentions behind this critique, there is evidence to suggest that the case may be overstated. Davies *et al.* (1995) observed 150 children giving evidence in criminal proceedings. Although half of the defence barristers were judged to be unsupportive of child witnesses compared to none of the prosecution barristers, and 17% of the former used age-inappropriate language, only 34% of children were rated as being 'very unhappy' during cross-examination. Despite the discomfort felt by some children, the vast majority were judged to have given effective testimony throughout their evidence insofar as they spoke clearly and gave a detailed, consistent account. Although these findings do not obviate the importance of improving practice, it appears that most children are able to give an effective account and suffer discomfort, rather than serious trauma, while they are giving evidence.

Defence lawyers may attempt to use a further avenue for discrediting the evidence of child witnesses and thus frustrating their right to be heard. This involves making a case for the disclosure of files which are held by Social Services in anticipation of identifying information which will cast doubt upon a child's truthfulness and reliability. While recognising that the judiciary must have discretion to order disclosure in the interests of justice, the courts have stamped firmly upon defence counsels' attempts to go on 'fishing expeditions' for discrediting information. As Beldam LJ asserted in the Court of Appeal[7]:

> 'These cases make it clear that it is not proper to issue a witness summons for disclosure of a document or documents, still less for the whole contents of a file or files for the speculative purposes that material may come to light which could discredit a complainant. In the present case there is no evidence that the appellants ever considered whether there were reasonable grounds for the application.' (p. 49)

As will be evident, many critics of the criminal justice system focus upon an apparent conflict between the welfare needs of sexually abused children and the requirements of justice within an adversarial system. They point to a failure to implement the Pigot Committee's recommendation (Pigot, 1989) that cross-examination of child witnesses should also be videotaped, thus removing the need for a child to attend court and clearing away any contention that subsequent therapy may 'contaminate' a child's evidence.

Combined with an entrenched reliance upon *oral* evidence, this failure places children at the mercy of adversarial practices and exposes them to hostile cross-examination by the defence. This situation may be compared with the emphasis on children's welfare found in proceedings under the Children Act 1989. In Re P,[8] which concerned care proceedings following allegations of sexual abuse, the judge refused to order that a child of 12 years old should give oral evidence and be cross-examined. Her judgement was upheld by the Court of Appeal:

> 'Nevertheless, courts are increasingly aware of the further grave damage which can be done to a child who has been sexually abused, or indeed a child who has not been sexually abused but for some reason has spoken of being sexually abused (and such a child may well also have been damaged), if she or he is subjected to the trauma of questioning by a stranger whose task is to attack her or his truthfulness in this supremely sensitive area. I would expect that in most cases where the child, whether or not a family member, is of N's age or younger, the court would favour the absence of oral evidence even though the concomitant were to be the weakening, or sometimes perhaps the fatal weakening, of the evidence against the adult.' (p. 454)

This welfarist approach has been transposed to criminal proceedings by way of suggesting that a child's welfare must be paramount even if this means that a suspected abuser avoids prosecution (Hoyal, 1995). However, it must be acknowledged that a concentration upon protecting vulnerable children may, despite its virtuous intentions, *also* frustrate their right to be heard. As we have noted, children's rights to privacy under Article 16 of the UN Convention and their rights to express their views and to intervene in s. 8 applications, may all be undermined by adults' unwillingness to concede children's strengths and ability to make decisions in their own best interests (CRDU 1994; Lyon and Parton, 1995; Davies *et al.*, 1996; Smith, 1997a). While much concern is expressed about child witnesses having to attend a criminal court, equivalent concern has been voiced about excluding children from family proceedings courts (CAAC, 1994/95, 1997). There is some uncertainty in individual cases about whether care proceedings should be heard in advance of criminal proceedings against the child's parent(s). The Court of Appeal has made it clear, however, that children's welfare should be prioritised and that care proceedings should be completed as quickly as possible unless particular circumstances warrant waiting for the conclusion of a criminal trial.[9]

CONCLUSION: MAKING SENSE OF IT ALL

Piecemeal tinkering with our current arrangements for delivering justice is insufficient for those who argue that an adversarial system must necessarily

compromise an effective response to children's needs, both in family and criminal proceedings. They point to the advantages of a completely different model most usually practised in Europe. Thus King and Piper (1995) comment favourably upon the French and other European legal frameworks for working with and supporting families and children. The essentially inquisitorial rather than adversarial approach to justice allows a broad-ranging and flexible quest for relevant information; the supportive, ongoing and reviewing role of specialist children's judges transforms 'legal intervention' into a *process* of enquiry and response rather than a once-and-for-all contest between opposing parties; the continuity and oversight provided by children's judges ensures ongoing and responsive familiarity with families such that intervention can be rapid, flexible and developmental; children's welfare is the subject of continuous judicial review in contrast to episodic and heavy-handed intervention (see also Cooper *et al.*, 1995; Hetherington *et al.*, 1997). In the context of the criminal justice system, Spencer (1997) similarly identifies the inquisitorial characteristics of European models. He refers to arrangements in France and Holland for records of pre-trial police and judicial interviews with witnesses and defendants to be maintained in a dossier which is admissible as evidence. Whether a child witness has to face the defendant or give evidence during a criminal trial is a matter for judicial discretion and, in any event, aggressive cross-examination is avoided by the convention that witnesses are questioned by the judge and not by prosecution or defence lawyers. Spencer also cites Norway, Israel, New Zealand and Australia as allowing child witnesses in sexual abuse cases to give the whole of their evidence prior to trial. He concludes:

> 'In the broadest terms, it looks as if the inquisitorial and the accusatorial (adversarial) systems are converging on one aspect of the law relating to children's evidence. This is the necessity of providing for at least some child witnesses, something on the lines of the Pigot scheme, under which all the child's evidence is taken ahead of trial, the defence are given at that stage a chance to put their questions, and the child thereafter takes no further part in the proceedings.' (p. 103)

It is important to note three points about the current passion for seeking solutions in alternative models of justice. First, we have to concede that there is not a perfect solution. Reviews of European family justice systems acknowledge their strengths and weaknesses (Cooper *et al.*, 1995; Hetherington *et al.* 1997). The desirability of ongoing judicial involvement and review in child care cases has already gone through the mill of exhaustive debate in this country (Review of Child Care Law, 1985; Brasse, 1995a, 1995b; Hayes, 1996; Smith 1997b, 1997c). Similarly, it is worth considering whether an adversarial system of criminal justice does, overall, protect the interests of individuals such that anyone anticipating involvement, as

witness or defendant, would want justice to be administered in this way (Spencer, 1997). Second, we think there is evidence from legislation and case law, governing both family and criminal proceedings, which indicates a responsiveness to children's welfare needs. But, and this is a big but, crucial to this accommodation must be the implementation of the Pigot Committee's recommendation (Pigot, 1989) that *the whole* of a child's evidence should be given before trial. Such an arrangement would, at a stroke, obviate many existing difficulties such as the delay between an allegation of abuse and trial, the patchy availability of support over a long period, the length of time child witnesses have to wait in court before giving evidence, and all the anxiety and uncertainty which is associated with the process of delivering justice as it is currently managed (National Commission of Inquiry into the Prevention of Child Abuse, 1996; Utting, 1997, Mitchell, 1997). Similarly, an adversarial system can accommodate initiatives that are designed to support child witnesses and to help them give effective evidence, and also incorporate closer team work between the prosecution service, police and welfare professionals. Children's Advocacy Centres in the United States exemplify how this might be achieved (Siddall, 1997; Hughes, 1997).

Our third point concerns a crucial aspect of enabling children to be heard, which depends less on looking to alternative systems for administering justice and more on examining how adults can listen to children. In the midst of critical attention to deficiencies in the criminal justice system few commentators pay attention to engaging with children's own wishes about what they want to happen. An interest in *researching* children's experiences of professional intervention tends to concentrate on their welfare needs, rather than focus upon their rights and how children might be empowered to exercise them. For example, there appears to be little discussion about enabling children to choose between the alternatives for giving their evidence, via video-recorded evidence in chief, live link television arrangements, or in the courtroom (CLC 1992; CPSI, 1998) or of the importance of gaining children's consent to videotaped interviews (Home Office/DoH, 1992, para. 2.29; O'Neill, 1997). Similarly, the Crown Prosecution Service Inspectorate (CPSI, 1998) comments critically upon the failure of police to provide the CPS with information about the wishes of the child, family or carer which should inform decisions about prosecution (paras 7.18 and 7.19). Adequate explanations, appropriate information, facilitating understanding and enabling children to participate effectively in the process of administering justice depends not only on systems but on adults who intervene in children's lives. Tunnel vision, which sees only vulnerable children and their need for protection, may obscure this obvious point in both family and criminal interventions.

There has clearly been much activity aimed at improving justice for children. It may be the case that our adversarial system of justice cannot 'stretch'

sufficiently to satisfy its critics. However, we think there is some way to go before we can reach this conclusion. In the meantime, ten years after the Cleveland crisis, it is apparent that much of the debate about justice for sexually abused children still resonates with the child, not as a person but as an 'object of concern' (Butler-Sloss, 1988). This will continue to be a barrier to justice no matter whether an adversarial or inquisitorial system governs family and criminal proceedings. Children are unlikely to be heard while adults are arguing vociferously above their heads about how best to protect their welfare.

CASES

1. *Re S (A Minor)* (Independent Representation) [1993] 2 FLR 440 CA.
2. *S v. Oxfordshire County Council* [1993] 1 FLR 452 FD.
3. *Oxfordshire County Council v. M* [1994] 1 FLR 175 CA.
4. *Cleveland County Council v. F* [1995] 2 All ER 236 FD; *Oxfordshire County Council v. P* [1995] 2 All ER 225 FD; *Re EC* (Disclosure of Material) [1996] 2 FLR 725.
5. *R v. Hampshire* [1996] QB1; *Director of Public Prosecutions v. M* [1997] 2 FLR 804.
6. *G v. Director of Public Prosecutions* [1997] 2 FLR 810.
7. *Re a Solicitor* (Wasted Costs Order) [1996] 1 FLR 40.
8. *Re P* (Witness Summons) [1997] 2 FLR 447; see also, *R v. Highbury Corner Magistrates Court* ex parte D [1997] 1FLR 683 DC, where it was found that a magistrate acted prematurely in refusing to issue a witness summons for a 9-year-old boy to give evidence in assault proceedings. The balancing act in deciding whether harm to the defendant should be outweighed by a child's interests should be performed by the trial court when the issue arises for determination.
9. *Re TB (minors)* (Care Proceedings: Criminal Trial) [1996] 1FCR 101CA.

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