



*Needy Children  
in the Criminal System.*

*A proposal to extend the  
Powers of the Court in relation to  
Needy Children in Criminal Proceedings*

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## The Centre for Child and family Law Reform

### *“As sinned against as sinning?”- Needy Children in the Criminal System.*

#### A proposal to allow the Criminal Courts to make directions under s37 Children Act 1989.

##### 1. Vulnerable and deprived children frequently also offend<sup>1</sup>.

Offending is also in many cases simply a product of non-pathological childhood and adolescence experience<sup>2</sup>. Although there is a strong and understandable public demand to punish offending, equally there is a widespread acceptance that offending behaviour often has social causes for which the child or adolescent cannot be held responsible<sup>3</sup>. The Courts already have a duty to have regard to welfare factors (*s44 Children and Young Persons Act 1933*).

Our proposal is that in suitable cases the criminal court should have the power to require the local authority social services department to conduct an investigation under s.47 Children Act 1989 to ascertain whether the child is suffering significant harm, or is at risk of so suffering, and whether the local authority should intervene to safeguard and promote the child's welfare. The most convenient way of achieving this would be to allow the Criminal Court to exercise the power of the Family Court under s 37 Children Act 1989<sup>4</sup>. This power should be available at any stage of the proceedings if the information before the court warranted its exercise. It would not of itself dispose of the criminal proceedings.

<sup>1</sup> The Social Exclusion Unit (2002) *Reducing Re-offending by ex-prisoners*, Annex D-Juveniles -www. cabinet office.gov/seu/publications/reports.-of children in custody 60% had been in care; nearly 50% had numeracy and literacy levels of 11 yr. olds and 25% had those of 7 yr olds; 40% of the girls and 25% of the boys reported suffering domestic violence; 33% of the girls reported having been sexually abused; 40% of the boys and 66% of the girls had symptoms of anxiety, depression, fatigue, poor concentration; 85% had aspects of personality disorder; 10% had symptoms of psychotic disorder,

<sup>2</sup> 33% of boys between ages 14-15 admitted in one survey to have committed a criminal, offence during the previous twelve months: Flood-Page, C Campbell, S. Harrington, V. Miller (2000) *Youth Crime Findings from 1998.1999 Youth Life Style Survey*, Home Office Research Study 209 Home Office.

<sup>3</sup> A good example of public perceptions was recorded in the Observer poll *Crime Uncovered* 27<sup>th</sup> April 2003; whilst most respondents agreed that "upbringing" and "economic deprivation" contributed to youth offending, yet 82% thought that children charged with serious offences should be dealt with in a like manner as adults.

<sup>4</sup> In their submission to the Green Paper, *Every Child Matters*, the Justices' Clerks' Society argued that they would "welcome the power within the Youth and Criminal Justice Courts to (a) order an investigation by the Local Authority into the needs of the child and to report back to the court within a set period; and (b) be able to transfer the case to a Family proceedings Court if the threshold criteria in s31 Children Act 1989 is reached if the Local Authority Concludes that it needs to commence such proceedings (Justices' Clerks Society; *Every Child Matters/ Keeping Children Safe*; Youth Justice- The Next Steps; December 2003 Ref; 55.0016

**2. The aim of the Youth Justice system is to prevent offending by children and young persons<sup>5</sup>.**

It is the *duty* of every court when dealing with a child or young person who is brought before it, either as an offender or otherwise, to have regard to the welfare of that child or young person and in a proper case take steps for removing him from undesirable surroundings, and to secure that proper provision is made for his education and training.<sup>6</sup> In this context a child means a person under the age of 14 years; a "young person" means a person who has attained the age of 14 years and is under 18 years.<sup>7</sup>

The welfare of the child is but one consideration; the public interest in punishing offenders and deterring others from offending must be weighed in the balance. If the court is of the opinion that the offence, or combination of offences, with which it has to deal are so serious that only a custodial sentence can be justified, that factor will outweigh the countervailing individualised welfare considerations<sup>8</sup>. In determining the seriousness of an offence the court is entitled to take into account any previous convictions of the offender or any failure to respond to previous sentences.<sup>9</sup>

**3. We would argue that within this framework of principles there is room for introducing the power we propose.**

We envisage that it could be exercised at any stage of the criminal proceedings; that the ensuing process of investigation could run in parallel to the criminal proceedings, and in no way hold them up; and that the criminal court could either dispose of the case with the powers already available to it, or in appropriate cases (for instance where care proceedings begin as a result of the s.37 investigation) make no order.

<sup>5</sup> S37 Crime and Disorder Act 1998.

<sup>6</sup> S44 Children and Young Persons Act 1933 as amended by Children and Young Persons Act 1969 s 72(4) and sched.6.

<sup>7</sup> Children and Young Persons Act 1933 s 107(4)

<sup>8</sup> s 79 Powers of the Criminal Courts (Sentencing) Act 2000.

<sup>9</sup> s151 Powers of the Criminal Courts ( Sentencing Act ) Act 2000.

**4.1 We propose that s37 should be adapted for use in the Youth Court, and in the Magistrates Court and Crown Court when the a child or young person is tried in those courts.**

This could be achieved by an amendment to the Children Act 1989.

**S 37 (1A) Where, in any criminal proceedings in which a child or young person under the age of 17 years<sup>10</sup> stands trial for any offence and it appears to the court that it may be appropriate for a care order or supervision order under section 31 of this Act to be made with respect to him, the court may direct the appropriate authority to undertake an investigation of the child's circumstances.**

Before making an order the court would have to be satisfied it possessed information which would justify a reasonable view that the child concerned was suffering, or was likely to suffer, significant harm; and that the harm, or likelihood of harm, was attributable to the care given to the child, or likely to be given to the child if an order were not made, not being what it would be reasonable to expect a parent to give to him; or the child was beyond parental control.

4.2 The appropriate local authority must be the authority in whose area the child is ordinarily resident; or where the child is not ordinarily resident in the area of a local authority, the authority within whose area any circumstances arose in consequence of which the direction is being given.<sup>11</sup> We suggest that the test in the case of a child who is not ordinarily resident within the area of the authority should be one that is capable of speedy resolution. Demarcation disputes between local authorities are unedifying and productive of delay which is detrimental to the child.<sup>12</sup>

4.3 Once a direction has been given the local authority must when undertaking the investigation consider whether they should: -  
a) apply for a care order or a supervision order with respect to the child;  
b) provide services or assistance for the child or his family; or  
c) take any other action with respect to the child.<sup>13</sup>

<sup>10</sup> A care order or a supervision order cannot be made in respect of a child who has reached the age of 17 years- s31(3) Children Act 1989 . We acknowledge that our proposals would not assist young persons age 17.

<sup>11</sup> s37(5)

<sup>12</sup> the simple test approved by Thorpe LJ in *Northampton County Council; v Islington London Borough Council and others* ( 1999) 2 FLR 881 resolved the problems previously experienced in applying s31(8) and s105(6) Children Act 1989 in this context. See *Re H ( Care Order: Appropriate Local Authority* ( 2004) 1 FLR 534 for a recent review of the law.

<sup>13</sup> s37(2)

4.4 We accept that the power to make an interim care/supervision order pending the delivery of the local authority's report<sup>14</sup> may have to be extended to the criminal court which makes a s37 direction. A better course may be to provide the criminal court with a power to remit the case immediately to a Family Proceedings Court (FPC) to consider whether an interim order is required.

This procedure need not be complicated in practice. Many criminal courts share a Combined Court centre with the FPC. Given a large pool of justices, an FPC could be convened quickly by the Court manager. Justices work in a culture of convening courts at short notice, and making urgent out-of-hours judicial decisions. The attraction of this of this power of remission is that a tribunal, *trained in and with a perspective of family proceedings*, would be dealing with this very important aspect of the child's care.

A interim care order has profound legal consequences. It confers parental responsibility (PR) on the local authority, and empowers them to regulate the extent, if any, to which the parents may exercise their own PR<sup>15</sup>. Provided the referral was treated as a "family proceedings", the Family Proceedings Court could exercise any of its other powers under the Children Act 1989<sup>16</sup>. Thus, pending the completion of the s 37 investigation, it could make a temporary residence order in favour of a relative; or a prohibited steps order to protect the child from removal from a safe place by an unsuitable parent. It could also regulate contact between the parent and child placed with a relative or friend. The parents/guardians/ or others with parental responsibility for the child would be served with notice of the direction and orders<sup>17</sup>.

We further propose that the court be empowered to appoint a guardian ad litem for the child<sup>18</sup>. A solicitor should be appointed in any event. This is particularly useful if an interim care or supervision order has been made, and s31 Children Act 1989 proceedings are very likely to ensue. If proceedings were not pursued the guardian's role would lapse on the court's decision to take no further action.

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<sup>14</sup>s 38(1)(b)

<sup>15</sup> sees 33(3) Children Act 1989.

<sup>16</sup> s8(3) Children Act 1989 defines "family proceedings"; this section would require amendment to include a criminal court referral for a se37 investigation. The amendment would then enable the court to make a short term s8 order, envisaged by s11(34) CA 1989. That sections provides that " where a court has power to make a section 8 order , it may do so at any time during the course of the proceedings in question even though it is not in a position to dispose finally of those proceedings".

<sup>17</sup> by analogy with the power to notify any person of any document in Children Act 1989 proceedings- see rule 4.8 Family Proceedings Rules 1991

<sup>18</sup> s41(6)(b)

4.5 Where the local authority, upon investigating the matter, decide not to apply for an order, they must inform the court of their reasons for so deciding; any services or assistance which they have provided, or intend to provide, for the child and his family; and any other action which they have taken, or propose to take, with respect to the child.<sup>19</sup> The court in this context would be the criminal court; the statutory provisions should be amended to include this requirement.

4.6 The information must be given to court within 8 weeks.<sup>20</sup> When the direction is given, a date must be fixed in the Family Proceedings Court to enable that court to consider the report, and if necessary hear any application made by the local authority arising from its investigations.

The criminal case may or may not have been disposed of by then. This is unimportant, as the purpose of the s 37 direction is to ensure that the social services investigate the child's circumstances.

There is no need for the criminal court to take any further steps, but it may wish to adjourn sentence until the report has been submitted.

If the local authority have not applied for an order, the court will be informed of what if any alternate action has been taken. If it has applied for an order, the application will proceed in the Family proceedings, County Court, or High Court.

Thus would the Criminal Court have two options which would enable a flexible response. It could sentence before the report was submitted. This might be its response if the offence was venial compared with the underlying social problem. In most cases we would expect an adjournment to enable consideration to be given to the report before sentencing.

4.7 Of importance is the return date in the Family Court<sup>21</sup>. This would be necessary to obviate administrative lethargy or delay. The parties to be

<sup>19</sup> s37(3)

<sup>20</sup> s37(4)

<sup>21</sup> Under the Children ( Allocation of Proceedings) Order 1991 art 3 (as amended) , proceedings which arise from a s37 report must start in the High Court ,if it made the direction, or else in the care centre. In *Re CE (s37 Direction) 1995 1 FLR 26*, Wall J held that when a s.37 direction was given, a return date had to be fixed for reception of the report, and also for a directions appointment at which it could be considered. It was good practice to direct service of the report on the parents and , if appointed , the guardian.

notified of the return date would be the local authority, the parents and the solicitor for the child.

At the adjourned hearing the local authority would, depending upon its decision, either apply for an order under ss31 or 36<sup>22</sup> Children Act 1989, or inform the court that it was taking other steps to assist the family, or else it deemed that no action was necessary.

If the court was satisfied that the local authority had provided a report and taken an appropriate decision in respect of the child the return date could be vacated<sup>23</sup>. The local authority would have to be required by the new rules to notify the criminal court which made the original s37 direction of its decision. That court could then either take no action or else convene a further hearing. This later option would only be necessary in the event of inaction or obvious error on the part of the local authority in carrying out its function in compliance with the s37 direction.

4.8 We envisage that provided the procedure is followed promptly save when local authority sought orders under the Children Act 1989, the adjourned hearing would be vacated.

## **5. Present Position**

At present a section 37 (1) direction may only be made in family proceedings in the Magistrates' (Family Proceedings) Court, County Court and High Court to which family proceedings have been allocated by magistrates, district judges, circuit judges or Judges of the Supreme Court to whom such work has been allocated<sup>24</sup>. The Children Act 1989 and the allocation order and direction would require amendment to extend the power to Youth Court, Magistrates' and Crown Court<sup>25</sup>.

<sup>22</sup> s36 empowers the court to make an educational supervision order.

<sup>23</sup> This would depend on the composition of the tribunal and the administrative arrangements of the court. A judge deals with the matter "on paper"; this would not necessarily be an option for justices unless the role could be delegated to a single justice or, improbably, they convened from time to time to deal with such matters in private. In any event the rules would need to require the attendance of the local authority at the adjourned hearing unless directed otherwise.

<sup>24</sup> S 92(7) Children Act 1989; Children ( allocation of proceedings ) Order 1991 as amended ; Family Proceedings ( Allocation to Judiciary) Direction 1999 as amended in 2002

<sup>25</sup> A child or young persons may appear in the adult courts if charged with a very serious offence ( s91 Powers of the Criminal Courts ( sentencing ) Act 2000 or together with an adult (s24(2) Magistrates' Courts Act 1980 );

6. 1 **There is considerable support for a link to be forged** between the Family Courts and the Criminal Courts. The president of the Family Division, Dame Elizabeth Butler-Sloss, DBE, has said,

" I believe that we must move to an overall appreciation that children in trouble need to be caught early and their problems dealt with in the context of the problems of their families. If we were able to do this we should have a chance to improve the behaviour of children; to reintegrate or in some cases, for the first time, integrate these children into the community and save years of adult offending with enormous cost to the state. I should like to see the Youth Court given the jurisdiction to require the relevant local authority to investigate the family in accordance with the requirements of the Children Act and that in serious cases the local authority should be obliged to make a care application in the family courts."<sup>26</sup>

The NSPCC have expressed grave concern about the dichotomy between the family and criminal jurisdictions.

"It is a matter of regret that the Children Act split jurisdictions between care and crime. Many children are involved in both jurisdictions, but they are treated separately. Once children in need commit crimes there is a high risk that the care system washes its hands of them."<sup>27</sup>

Other leading voluntary Child Welfare organisations have highlighted the difference in treatment of children in the two court systems.

" If there is no consistent underlying ethos and no principled framework for youth justice law and policy, it is unsurprising that tension and anomaly will arise. The difference between the systems for protecting and safeguarding the child in need and the abused child and the systems for the child in trouble with the law reflects the tension in philosophy and those that perhaps forms the core of the youth justice problem."<sup>28</sup>

In their submission to the Green Paper, *Every Child Matters*, the Justices' Clerks' Society argued that they would "welcome the power within the Youth and Criminal Justice Courts to (a) order an investigation by the Local Authority into the needs of the child and to report back to the court

<sup>26</sup> " Are we failing the family? Human rights , children and the meaning of family in the 21<sup>st</sup> century" The Paul Seighart Memorial Lecture , 3<sup>rd</sup> April 2003, British Institute of Human Rights , King's College , London

<sup>27</sup> p 21 *Review of legislation relating to children in family proceedings NSPCC 2003*

<sup>28</sup> *Children in Trouble :Time for Change:* NAYJ: Children's Rights Alliance; NSPCC; The Children's Society; NCH: National Children's Bureau; Nacro; Barnardo's ; 2003.



within a set period; and (b) be able to transfer the case to a Family proceedings Court if the threshold criteria in s31 Children Act 1989 is reached and where the Local Authority concludes that it needs to commence such proceedings"<sup>29</sup>.

## 7. Objections to the proposed scheme

a) **It is unnecessary.** If a police officer arrests a child or young person, or finds that a child or young person is in need (within the definition of s17 Children Act 1989), then good practice will result in the local authority being informed, usually by the form 78 route<sup>30</sup>.

Unfortunately it has been the experience of the authors that many local authorities fail to respond to such notifications. Nor does the police make them routinely. The CPS, when considering whether to bring a charge against a child or young person, should consider whether or not criminal prosecution is in the best interests of the child<sup>31</sup>. Again it is a fact of experience that this is an inadequate filter. Very needy children are still appearing in the Youth Court. The Youth Court now has a wide range of powers<sup>32</sup>, but these concentrate on reparation and crime prevention. They

<sup>29</sup> See footnote 4 on p1 for citation.

<sup>30</sup> Working Together to Safeguard Children 1999; DoH par.3.57 et sequ.

<sup>31</sup> ibid par.3.62

<sup>32</sup> The " menu" of Youth Court non- custodial sentences are: -

**Parenting orders**- parents to attend counselling sessions for up to 3 months ( usual recommendation is for at least 6/7 sessions of 2 hrs each) : a further requirement may be added that parents shall ensure school attendance for up to 12 months;

**Referral orders**: referral to a Youth Panel who work out with parents and child a programme of reparation and reformation. Order must be made if child pleaded Guilty; was of previous good character ;has never been bound over to keep the peace; is not sentenced to custody , hospital order or absolutely discharged.

**Supervision Order** : curfews , activity requirements; parenting orders ; "tagging" orders can all be added.  
The order is run by the Youth Offending Team

**Reparation Orders**;

**Action Plan Orders** : these are for offences serious enough to merit a community sentence. The offender may be required to attend specified activities , attendance centre sessions ; keep away from specified places; make reparation for the offence. It last for 3 months. It is run by the YOT. There are three weekly review hearings.

**Curfew Orders** ( 2-12 hours per day)

**Intensive Supervision and Training programme** : for offenders with serious criminal records ( 4 + prev.); or are at risk of custodial sentence ; or repeatedly offend on bail. It may be imposed a) on an offender whilst on bail: (b) as a part of a Community Penalty ( Supervision order) ; or to cover the non-custodial second half of a detention and Training Order.

**Attendance Centre Orders** ( for over 14 - 12 -24 hours : for under 14 may be less than 12 hours) - purpose is to provide the offender with " supervision , appropriate occupation or instruction"

are not designed to address the deeper-rooted social problems of the family as a whole.

Although the Government has indicated in its Green paper *Every Child Matters*<sup>33</sup> that it intends to reform the Youth Justice system by extending the range of community sentences, which may include residential placements and intensive fostering for children and young offenders, it is unlikely that these will provide the scope for intervention possible in a care plan under a care order.

**b) The Government have anticipated this lacuna in the law in the paper *Youth Justice: The Next Steps*.**

The paper certainly presages means of diverting children and young people caught up in the criminal justice process to more welfare oriented treatments. Pre-trial there may be the possibility of supervision or intensive supervision and surveillance whilst on bail, or remands to foster parents or bail hostels.

These are short-term measures whose object will be to ensure the attendance of the child at trial; to prevent further offending; to protect the child and witnesses; and to *start* an ameliorative development of the child's circumstances.

These measures would not involve a global approach to the functioning of the child's family, or provide any long-term support or alternative placement for the child of the kind possible under Children Act 1989 supervision or care order. Our proposal is not intended to supplant the Government's own proposals, but instead to provide a useful additional means of helping the child *at any stage of the criminal proceedings*.

**c) It will require additional resources.**

We envisage some increase in the number of s37 referrals; this may generate additional work for guardians and social workers. A number of these cases would have been referred in any event by other agencies sooner or later. Our intention is simply to provide another source of referral for children in need to those who can best help them. It must be borne in mind that s37 is merely one of several means of alerting local

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<sup>33</sup> The Government's response to Lord Laming's enquiry into the death of Victoria Climbié.

authorities to the existence of children at risk<sup>34</sup>. The costs may be offset against the savings accruing from the diversion of work from the criminal to the family court; crime reduction as a result of improving the child's social circumstances; and the additional contribution the child may make to the community consequent upon improvement his life chances.

**d) Lack of guardians**

We recognise that recruitment and retention in an over-stretched service is a major problem. CAFCASS has announced a drive to increase its complement of professions, and is likely to train Children and Family reporters who were formerly Court Welfare Officers as Guardians.

**e) Insufficient local authority social workers**

The Government have stated that recruitment is now high priority.<sup>35</sup>

**f) The time-scale for pre-sentence reports and s37 reports are not synchronised-the measure will cause delay.**

Synchronisation is irrelevant. If Children Act proceedings follow on from the s 37 report, they will commence in the Family proceedings Court. The Criminal Proceedings need not be held up to await the report.

**g) Going soft on Crime**

We do not propose that there be any fetter whatsoever on the power of the criminal courts to impose the appropriate sentence for the crime. Our aim is simply to provide *a link* between the criminal court and the family court which is readily available, where, in the judgement of the court, the public interest would be best served by diverting the case to a jurisdiction where the welfare of the child is the paramount interest. Even where a suitable case has been diverted, our proposal would not deprive the criminal court of the power to punish the offender.

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<sup>34</sup> S47 Children Act 1989 provides that where a local authority is informed of a child living or found in its area who is the subject of an emergency protection order; in police protection ;in contravention of a ban imposed by a curfew notice under Ch.1 Crime & Disorder Act 1998 or may be suffering or likely to suffer significant harm , they must make enquiries to see what action may be necessary to safeguard of promote the child's welfare.

<sup>35</sup> *Every Child Matters-summary par.20*

**h) Youth Offending Teams and Social Services would duplicate work under this scheme; or hinder each other's work.**

Provided each was informed of the other's remit, sensible planning should obviate this risk. We would expect good communication to development between these distinct groups of professionals as already widely exists.

**i) Judges and Magistrates would require yet more training.**

A small additional component may be required to existing training programmes. Our proposal is after all only a modest addition to the wide range of powers already existing. It would be familiar to many Magistrates and Judges whose current jurisdiction spans both criminal and family matters.

**Karen Green  
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