

The Crime and Disorder Act 1998: Child and Community ‘Safety’

Christine Piper

*Law Department, Brunel University

The provisions of the Crime and Disorder Act 1998 (‘the Act’) relating to children and young people came as no surprise to those with academic and professional interests in youth justice and crime prevention, such provisions being based on measures previously outlined in the White Paper, *No More Excuses - A New Approach to Tackling Youth Crime in England and Wales*,¹ and in the Audit Commission’s Report, *Misspent Youth, Young People and Crime*.² However, the scope and significance of those provisions may have escaped more general notice, partly because the title does not suggest a focus on children and young people and also because debate, in Parliament and the media, in the weeks immediately before the Act received the Royal Assent on 31 July 1998, was dominated by controversy around an amendment, which was not enacted, to lower the age of consent for homosexual sex from 18 to 16 years.³

The Act as a whole provides new court orders relating to the prevention and punishment of crime and disorder, amends the criminal law and revises aspects of the youth and adult criminal justice systems. However, the Act’s title does not give any indication that so many of

1 Cm 3809 (London: Stationery Office, 1997). This White Paper was itself based on consultation documents issued by the Government when in Opposition and during its first six months in power. See, for example, *Safer communities, safer Britain, Labour’s proposals for tough action on crime* (London: Labour Party, 1995); J. Straw and A. Michael *Tackling Youth Crime: Reforming Youth Justice, A consultation paper on an agenda for change*, (London: Labour Party, May 1996) and *Community Safety Order, A Consultation Document* (London: Sentencing and Offences Unit, Home Office, September 1997).

2 London: Audit Commission, 1996.

3 This proposed reform was part of a new clause 1 which had been passed in the House of Commons by a majority of 207 on 22 June 1998 but was rejected in the House of Lords on 22 July by a majority of 168 and dropped by the Government in order to ensure the passage of the Act: see R. Swade ‘The Crime and Disorder Bill, The Age of Consent Debate’ (1998) 148 *Childright* 6.



the Act's provisions are aimed at minors. Family lawyers, for example, may only now be noting that the Act has provisions which, when implemented,⁴ will make new orders available to the Family Proceedings Court. Indeed, one might argue that if the Act had been entitled the 'Children and Young Persons' Act' that would not have been so very misleading, given the focus of such a large proportion of the Act⁵ on those under 18 years of age.⁶ The many provisions of the Act relating to children and young people have the potential, as had the Children Act 1989, for changing professional philosophies for working with children and families and for influencing how we 'see' children.

Targeting children and young people

Of obvious importance is the abolition, in section 34, of the rebuttable presumption that a child over 10 years of age is *doli incapax* - a presumption previously applying to 10-13 year olds.⁷ Provisions in the Act relating to, for example, racially aggravated offences (in sections 28-33) are, therefore, potentially relevant to children over 10.⁸ Furthermore, the Act creates a new order

4 Pilots for child safety orders began in selected areas on 30 September 1998 and will run for 18 months with the aim of national implementation 2000-2001.

5 As V. Baird points out, 'there are youth-related measures in all five parts of the Act' ('Crime and Disorder Act 1998: introduction and new preventative orders in youth justice' (1998) *Legal Action* October 15, 15).

6 The Act uses the previous statutory definitions of 'child' as under 14 and 'young person' as 14 and under 18 (s 117).

7 See, for a discussion, S. Bandali 'Abolition of the Presumption of Doli Incapax and the Criminalisation of Children' (1998) 37(2) *Howard Journal* 114.

8 Those sections of the Act which relate to new sex offender orders (ss 2-3 for England and Wales and s 20 for Scotland) and extended sentences for licence purposes for sex and violence offences (ss 58-60 and 86-88) might also apply to young people - given the extension of culpability in relation to sexual offences; see, for example, the Sex Offender Act 1997 s 4.



- the anti-social behaviour order - which is available to the courts in relation to anyone aged 10 or over in England and Wales and aged 16 or over in Scotland.⁹ Drug treatment and testing orders will be available in both jurisdictions for those aged 16 or over.¹⁰

There are also provisions relating specifically and exclusively to children and young people. Sections 11-15, dealing with child safety orders and child curfew schemes and notices, relate only to the under 10 year olds; section 16, allowing the removal of truants to designated premises, relates to children and young persons of compulsory school age; parenting orders are triggered when a child or young person is the subject of one of a range of orders or is convicted of an offence.¹¹ In addition there are provisions relating to the setting up of statutorily based systems to 'process' children and young people who offend: sections 65-66 set up a new system of reprimands and final warnings to replace police cautions, sections 37-42 provide a statutory framework for a youth justice system with services, plans and inter-agency teams, and a national Youth Justice Board is set up by section 41 and schedule 2.¹² Existing provisions for remands and committal of children and young people are amended by sections 97 and 98, the court's ability to take account of the accused's silence at trial is extended down to 10-13 year olds¹³ and,

9 By ss 1 and 19, respectively. None of the provisions in the Act relate to Northern Ireland except certain of the provisions abolishing the death penalty for treason and piracy (s 36).

10 ss 61-4 and 89-95; schedules 4 and 6.

11 Sections 8-10 deal with parenting orders: section 8(1) lists the relevant orders as a child safety order, an anti-social behaviour order (created by s 1 of the Act) and a sex offender order (created by s 2 of the Act). In addition a parenting order can be triggered by the child failing to comply with a school attendance order under ss 443-444 of the Education Act 1996 (s 8(1)(d) of the Act) and by a criminal conviction (s 8(1)(c) of the Act).

12 The Act also provides time limits within the prosecution process for the under 18 year olds (s 44) and amends the powers of youth courts (ss 47-8).

13 Section 34 of the Act amends s 35 of the Criminal Justice and Public Order Act 1994 by removing the words 'who has attained the age of fourteen years' from s 35(1) and by deleting all of s 35(6).



for those found guilty of offending, the courts will have additional or re-named sentencing options: a reparation order,¹⁴ an action plan order¹⁵ and a detention and training order,¹⁶ together with new sanctions (under sections 72 and 77) for breach of supervision requirements.

On the other hand, very few sections of the Act relate explicitly and exclusively to ‘grown-ups’. The abolition, by section 51 and schedule 3, of committal proceedings for indictable only offences relates to ‘an adult’; section 99, which inserts a new section into the Criminal Justice Act 1991 and thereby amends powers to release short term prisoners on licence, relates to those ‘aged 18 or over’ though the new section 34A(5)(a) gives the Home Secretary the power to repeal the words ‘aged 18 or over’. Those sections of the Act which are not explicitly aimed at children and young people are nearly all¹⁷ concerned with sexual and violent offenders,¹⁸ offenders dependent on drugs¹⁹ and offenders motivated by race.²⁰

In relation to adults, and those younger citizens who are brought within the scope of that

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- 14 Sections 67-8. Alternatively, under s 71, the court can impose a reparation requirement in a supervision order.
- 15 Sections 69-70 and schedule 5.
- 16 Sections 73-9. For a discussion of these new orders in the context of the current use of the Children and Young Persons’ Act 1933 s 53(2) and (3), see C. Ball ‘*R v B (Young Offenders: Sentencing Powers): Paying due regard to the welfare of the child in criminal proceedings*’ (1999) 10(4) *Child and Family Law Quarterly* 417-424.
- 17 The exceptions to this generalisation include amendments to police powers of seizure (ss 24, 26-27), powers to remove masks (s 25), bail conditions and restrictions (ss 54-56), the abolition of the death penalty for treason and piracy (s 36), sentencing guidance (ss 80-1) and the ‘toughening up’ of penalties for failure of compliance by football spectators with reporting restrictions under s 16(5) of the Football Spectators’ Act 1989 (s 84).
- 18 See ss 2-4 and 20-22 (sex offender orders) and ss 58-60 and 86-88 (sentences extended for licence purposes for sexual and violent offenders).
- 19 See ss 61-64 and 82-95 and schedules 4 and 6 (drug treatment and testing orders).
- 20 See ss 28-33 (racially aggravated offences) and ss 82 and 96 (sentencing increases for



term, the Act is, therefore, concerned with what have become, in legislation over the last two decades, ‘the usual suspects’: those offenders who are perceived as the most ‘dangerous’ to society at this point in time²¹ because they are sexually or physically violent, use or traffic in drugs or threaten the stability of a multi-racial society.²² In this context, an Act entitled ‘Crime and Disorder’ which concentrates to the extent this Act does on children and young persons is clearly endorsing those political and social ideas which emphasise the ‘danger’ of young people’s behaviour - the perceived threat from children ‘out of control’ and the potential threat to society if children are not guided into responsible and law-abiding adulthood.

Images of children

Such fears are, of course, not new:²³ they have justified state intervention in factories and families since the early 19th century with a focus on one or both of those two categories of children labelled by the Victorians as the ‘depraved’ and the ‘deprived’.²⁴ They have, however,

racial aggravation).

- 21 See J. Pratt ‘Governing the Dangerous: An Historical Overview of Dangerous Offender Legislation’ (1996) 5 *Social and Legal Studies* 21-36 for an analysis of changing conceptions of ‘dangerousness’.
- 22 See, for example, the Criminal Justice Act 1993 and the Crime (Sentences) Act 1997 for provisions relating to violent, sex and drug offenders and the Criminal Justice Act 1991 for the provision in ss 1 and 2 whereby those convicted of particular sexual and violent offences can be sentenced to ‘longer than normal’ terms of imprisonment.
- 23 See, for example, G. Pearson *Hooligan: A History of Respectable Fears* (London: Macmillan, 1983); H. Hendrick *Child Welfare, England 1872-1989* (London: Routledge, 1994) especially ch 1; J. Eekelaar, R. Dingwall and T. Murray ‘Victims or Threats? Children in Care Proceedings’ (1982) *Journal of Social Welfare and Family Law* 68-82.
- 24 See, for example, A. Morris and H. Giller *Understanding Juvenile Justice* (London: Croom Helm, 1987) ch 1; C. Piper ‘Moral campaigns for children’s welfare in the nineteenth century’ in M. King (ed) *Moral Agendas for Children’s Welfare* (London: Routledge, 1999) ch 3.



currently been amplified by a particular ‘politicisation’ of law and order²⁵ whereby, according to von Hirsch and Ashworth, ‘popular resentment’ about crime has been exploited by both right and centre left political parties and governments in successfully ‘garnering political support’.²⁶ ‘What is different about “law and order” in the 1980s and 1990s is the stridency of the appeals to fear’.²⁷ An example of such an appeal can be found in Jack Straw’s Labour Party report of April 1996 entitled *Tackling disorder, insecurity and crime*, which begins;

There is a rising tide of disorder which is blighting our streets, parks, town and city centres and neighbourhoods. Disorder has been all too often ignored. ... yet it has profound effects on individuals who feel frightened and unsafe: it can help to tip whole areas into decline, economic dislocation and crime; it can undermine the commercial viability of town and city centres.

25 The politicisation of criminal justice policy as such is not novel: it has, for example, occurred from time to time in relation to juvenile justice from at least the 1960s onwards: see J. Pitts *The Politics of Juvenile Crime* (London: Sage, 1988).

26 A. von Hirsch and A. Ashworth ‘Law and Order’ in A. von Hirsch and A. Ashworth (eds) *Principled Sentencing* (2nd Ed.) (Oxford: Hart Publishing, 1998) 410, 413-414.

27 *ibid* 411.



The fears engendered have increasingly focussed on the young in the 1990s, despite unclear statistics about juvenile offending trends²⁸ and despite the fact that the death of James Bulger in 1993 - which intensified concern and led to calls for tougher penalties for young offenders - was unrepresentative of youth crime.²⁹ But, as Diduck argues, 'Moral concern [for children] can easily turn to moral condemnation, particularly in a political context in which the rhetoric of morality trips off the tongues of both the new right and the new labour communitarianism'.³⁰ According to Littlechild one can pinpoint when this occurred: 'It is possible to put a date on the genesis of the new punitive policies in the youth justice system: at the time when the police and the media were on the hunt for the rat boy, bail bandits and ram raiders; and when the Conservative Party was low in the opinion polls'.³¹ For the same political reason, there began in

28 See B. Littlechild 'Young offenders, punitive policy and the rights of children' (1997) 17(4) *Critical Social Policy* 73-92, 78-9; M. Hill and K. Tisdall *Children and Society* (London: Longman, 1997) 178-180.

29 Venables and Thompson (the two boys convicted in this case) were sentenced under the Children and Young Persons' Act 1993 s 53(1) which provides for the equivalent of a life sentence. The sentencing powers available were, therefore, adequate though whether it is adequate to deal with children in the Crown Court is another issue.

30 A. Diduck 'Justice and childhood: reflections on refashioned boundaries' in M. King (1999) n 24 above, ch 8.

31 n 28 above, 77.



1996 'what seemed to be like a Dutch auction of who could seem to be most tough in relation to young people'.³²

The responsible child

32 *ibid* 80.



What has emerged - sometimes in contradiction, as we shall see, to the smaller print of policy documents - is a particular image of the young offender which concentrates on the personal responsibility of the child or young person for his or her offending. *Tackling Youth Crime*, having outlined the proposed reforms which are now in the Crime and Disorder Act 1998, made the new approach clear: 'Changes of this kind ... would represent a move away from preoccupation with legal processes to one of confronting young offenders with their behaviour'.³³ Straw, as Home Secretary, re-iterated this theme in *No More Excuses*:

An excuse culture has developed within the youth justice system. It excuses itself for its inefficiency, and too often excuses the young offenders before it, implying that they cannot help their behaviour because of their social circumstances. Rarely are they confronted with their behaviour and helped to take more personal responsibility for their actions.³⁴

According to this White Paper, 'Children above the age of criminal responsibility are generally mature enough to account for their actions and the law should recognise this'.³⁵ They are, therefore, deemed mature enough to respond to measures focussing on 'nipping offending in the bud'.³⁶

33 Straw and Michael, n 1 above, 12.

34 White Paper, n 1 above, Preface by Home Secretary.

35 *ibid* Introduction

36 *ibid* Preface: 'We are determined to cut waste in the present Youth Justice System as identified by the Audit Commission last year. Instead we will refocus resources and the talents of professionals on nipping offending in the bud, to prevent crime from becoming a way of life for so many young people'.



Many young people offend once or twice, often under the influence of their peers. The challenge is to nip that behaviour in the bud and to prevent further criminality ... a range of community sentences must be provided in every area to prevent the first time offender from developing into a repeat offender'.³⁷

This 'no-excuse' culture and the constitution of children and young people as sufficiently responsible and mature to be held to account has also allowed restorative justice to re-emerge as a legitimate option in relation to offending by minors. Mediation and reparation projects established and researched within the juvenile and criminal justice systems in the 1980s had revealed more difficulties than advantages. By 1992 Davis had concluded, 'It is rare for a set of ideas to catch on as quickly as did the enthusiasm for victim-offender mediation and reparation in the UK in the mid 1980s ... It is now fair to say that, within government circles, mediation and reparation schemes constitute something of a "dead" subject'.³⁸ The political need since 1992 to be seen to be tackling youth crime, against a backdrop of criticisms of the current youth justice system, has given reparation a new lease of life. It is presented as a new, more positive means of responding to offending by the young and, through its elements of blaming the offender whilst

37 *Safer communities, safer Britain*, n 1 above, 6-7.

38 G. Davis *Making Amends: Mediation and Reparation in Criminal Justice* (London: Routledge, 1992). For schemes operating in the 1980s see, for example, H. Blagg 'Reparation and Justice for Juveniles' (1985) 25 *British Journal of Criminology* 269-279; M. Wright and B. Galaway (eds) *Mediation and Criminal Justice* (London: Sage, 1989).



promoting reintegration into the community, appears to cross the punishment/protection divide.

Research undertaken within the social sciences is called in aid of these images and possibilities. *No More Excuses* asserts in its Preface: 'For too long we have assumed that young offenders will grow out of their offending if left to themselves. The research evidence shows this does not happen' and paragraph 1.10 of that document³⁹ accurately summarises recent Home Office research which shows that young men are now taking much longer to desist from offending and that those traditional indicators of 'settling down', such as marriage, no longer correlate with such desistance (though they are still operative in regard to young women).⁴⁰ However, that research also shows that 'offending amongst young people is widespread and ... most offenders commit no more than one or two offences,' with 3% of such offenders counting for about a quarter of all offences,⁴¹ a finding distorted in the White Paper: 'For many young offenders it is true that their first caution - or court appearance - is enough to divert them from crime. But this assumption is wide of the mark when it comes to the hard core of persistent offenders who cause so much crime'.⁴² 'Most' has changed to 'many' and the focus of the message is on the 'hard core': measures and language suitable for a minority set the tone for the

39 n 1 above.

40 J. Graham and B. Bowling *Young People and Crime* HORS 145 (London: Home Office, 1995).

41 *ibid* 83 and 84.



majority.

42 *No More Excuses*, n 1 above, para 1.9.



The dominant image of the young offender is, therefore, not of a child but of a (male) youth: sections 8-16 of the Act, dealing with parenting, child safety and curfew orders, all available for the under 10 year olds and two exclusively so, are entitled ‘Youth crime and disorder’. As the Bulger case revealed, we find it difficult to conceptualise as ‘normal’ those children who offend - they become ‘evil monsters’ at one end of the spectrum and youth at the other⁴³ and, if von Hirsch and Ashworth are right in their analysis of symbolic criminal justice politics,⁴⁴ politicians have led, rather than followed, public opinion in these constructions. But that analysis also warns that there are ‘subspecies’ of such politics:

One such subspecies seems to be a certain mixture of nostalgia and notions of ‘instilling discipline’, represented by measures such as curfews for young teenagers. The children involved are not necessarily characterised as vermin ... the idea, rather, seems to be the instillation of a certain ‘benevolent discipline’.⁴⁵

That rather different image of a naughty child was evident in *Tackling Youth Crime*. Having summarised the now familiar message about the need for young offenders ‘to be held to account’ the following statement is made: ‘All this is common sense. It is how people deal with unacceptable behaviour by children in a family setting or at school or on the sports field’.⁴⁶

Such homely comments have clear appeal: that they gloss over the known difficulties of

43 See, for example, M. King *A Better World for Children* (London: Routledge, 1997), chapter entitled ‘The James Bulger trial: good or bad for guilty or innocent children?’.

44 n 26 above, 419.

45 *ibid.*

46 1996, above n 1, 9.

substitute child care and control by state agencies is, therefore, a source of some concern.

The vulnerable child

These current dominant images of the minor who offends or engages in 'deviant' behaviour - though by no means novel - are in contrast to other images which have underpinned legislative provisions in the past. For example there has at times been an image of the child whose offending is viewed as an indicator of need - whether that need is in relation to social and economic conditions or personal behaviour difficulties. In the 1970s and 1980s policies of diversion from prosecution and from custodial sentences, developed under the influence of financial constraints and social science research and theory, were based on ideas about the deleterious effect of labelling⁴⁷ children as criminals and the propensity for offending to be a stage in the development of children. Such ideas are evident in the White Papers preceding the Social Work (Scotland) Act 1968 and the Children and Young Persons' Act 1969⁴⁸ and also in the provisions in the Children Act 1989 to impose duties on Local Authorities, in the context of children 'in need', to encourage children not to offend and to divert them from criminal proceedings.⁴⁹

47 See E. Lemert *Human Deviance, Social Problems and Social Control* (New York: Prentice Hall, 1967).

48 Home Office *The Child, The Family and the Offender* Cm 3601 (London: HMSO, 1965); Home Office *Children in Trouble* Cm 274 (London: HMSO, 1968).

49 Section 17 and schedule 2 para 7.



The dominant image of the young offender is also in contrast to images of children underpinning recent legislation relating to the family. For example, the Family Law Act 1996 relies on an image of a vulnerable child harmed by parental conflict and violence and who needs protection from divorcing or abusive parents by state encouragement of mediation and remedies to remove abusers from the family home. Likewise, in the family justice system, so strong is the image of the dependent, vulnerable child that court welfare officers are often reluctant to 'burden' children with the opportunity to express their wishes and judges are reluctant to give leave to minors to make independent applications.⁵⁰ Even when the child's liberty is at stake in an application for her to be placed in secure accommodation under section 25 of the Children Act 1989 the child has no right to be in court because it is deemed harmful for her.⁵¹

Child and community protection

And yet there are passages in policy documents that would found a different image of the child or young person who offends and would influence less punitive practice in relation to them. One such passage can be found in the Introduction to the recent Consultation Document *Supporting Families*:⁵² 'First the interests of the child must be paramount. The Government's interest in family policy is primarily an interest in ensuring that the next generation gets the best possible start in life'. Whilst this may be constituting childhood simply as preparation for adulthood it does concentrate on the child's welfare. However, this is point 7, whereas point 1 gives a different message: 'Families are at the heart of society. ... Our future depends on their success in

50 See chapters by J. Roche and C. Piper in S. Day Sclater and C. Piper (eds) *Undercurrents of Divorce* (Aldershot: Ashgate, 1999), ch 3 and ch 4, respectively.

51 *Re W (minor)(secure accommodation order: attendance at court)* [1994] 2 FLR 1092.

52 London: Home Office, 1998, 4.

bringing up children. That is why we are committed to strengthening family life'. The ambiguity as to whether the aim is to promote the child's welfare *per se* or to protect adults is also evident in the Government's apparent acceptance⁵³ of the research which finds statistical correlations between the onset or persistence of offending and various factors concerned with family life, learning difficulties, unemployment and drug or alcohol use⁵⁴ and its enacted 'solutions' which focus on final warnings and a range of court imposed orders.

The Labour Government has, therefore, given mixed messages about the relationship between child and community 'safety'. In Opposition the position appeared clear: 'Ultimately the welfare needs of the individual young offender cannot outweigh the needs of the community to be protected from the adverse consequences of his or her offending behaviour'.⁵⁵ In the White Paper this conflict is resolved differently: 'Preventing offending promotes the welfare of the individual young offender and protects the public Preventing offending by young people is a key aim: it is in the best interests of the young person and the public'.⁵⁶ So, using this version of best interests which trumps all other child welfare needs, the section on child safety and curfew orders can be headed 'Protecting children under 10'.⁵⁷

Nevertheless, in Standing Committee, the responsible Minister (Mr O'Brien) stated; '

53 See, for example, *No More Excuses*, n1 above, ch 1.

54 See, for example, and D. Utting, J Bright and C. Henricson *Crime and the Family*, Occasional Paper 16, (London: Family Policy Studies Centre, 1993) and M. Rutter, H. Giller and A. Hagell *Antisocial Behaviour by Young People; The Main Messages from a Major Review of the Research* (Knutsford: Social Information Systems Ltd, 1998) for reviews of such research.

55 Straw and Michael, n 1 above, 9.

56 n 1 above, paras 2.2. and 2.3.

57 *ibid*, before para 5.2.



this Bill is concerned with protecting both the child and the community’ and ‘The [child safety] order’s purpose will be to facilitate a balance’.⁵⁸ Child protection has generally avoided such notions of balance though there are important exceptions. One of these⁵⁹ is the Children Act 1989 provision mentioned above which empowers the court to make a secure accommodation order.⁶⁰ The criteria for that order include, in section 25(1)(b), ‘likely to injure himself or other persons’ which creates a potential conflict between the interests of the community and the child

58 HC Standing Committee B 7 May 1998 (<http://www.parliament.the-stationery-office.199798/cmstand/b/st980507/pm/80507s08.htm> and [/80507s07.htm](http://www.parliament.the-stationery-office.199798/cmstand/b/st980507/pm/80507s07.htm), respectively).

59 Another example is part IV of the Family Law Act 1996 which deals with protection of children, spouses and cohabitants from domestic violence: the court, in deciding whether to exercise its discretion to make an occupation order, may have to balance the harm such an order would inflict on the respondent (or his child) against the harm the applicant (or her child) might suffer if an order were not made. See, for example, ss 33(7)(b) and 36(8)(b).

60 s 25, operating in relation to a child ‘looked after’ by the Local Authority, that is, in care under s 31 or accommodated under s 20 of the Children Act 1989. The scope was extended by the Children (Secure Accommodation) Regulations 1991 Regulation 7 to children accommodated by health authorities and trusts and in non-Local Authority residential care and mental nursing homes.



and has led to the exclusion of the principle that the welfare of the child should be paramount.⁶¹

Whether the courts will be able to give sufficient weight to the child's welfare in the balancing exercise created by child safety orders is similarly problematic, a point made at length by the Opposition in Standing Committee. The Minister's reply was not wholly reassuring:

61 *Re M (Secure Accommodation Order)* [1995] 1 FLR 418. See C. Smith and P. Gardner for the difficulties caused by these conflicting aims: 'Secure Accommodation under the Children Act 1989: legislative confusion and social ambivalence' (1996) 18(2) *Journal of Social Welfare and Family Law* 173-187.



The Hon member for Hertsmere is correct in saying that the paramount consideration is for the care of the child. The orders will also allow consideration of the impact of the child's behaviour, which could be damaging to its victims and to the wider community. Such behaviour could be damaging to the child, if there was no intervention to stop it. ... As the trigger for a care order under the clause would be the child's original behaviour followed by the breach of an order made under the Bill, the court would have to have regard to that, as well as to the care of the child. ... The child's welfare would be neglected by our not stopping such behaviour.⁶²

These attempts to conflate child and community safety raise a related issue, that of the separation or otherwise of the young 'criminal' from the young 'victim'. The trend, since the failure to implement much of the Children and Young Persons Act 1969,⁶³ has increasingly been to 'process' the child who offends through law and procedures quite separate from those relevant to the child in need of services or protection. This has occurred partly as a result of the punitive attitudes already discussed but also as a result of longer standing concerns to minimise state intervention in the lives of both groups of children and to set up appropriate procedures for them. Examples of this increasing separation are the repeal by the Children Act 1989 of the criminal offending condition for a care order⁶⁴ and the division of the old juvenile court into separate Family Proceedings and Youth Courts by section 70 of the Criminal Justice Act 1991. The

62 Standing Committee B, Mr Alun Michael, May 12 1998 (<http://www.parliament.the-stationery-office.199798/cmstand/b/st980512/am/st80512s01.htm>).

63 See, for example, R. Harris and D. Webb *Welfare, Power and Juvenile Justice* (London: Tavistock Publications, 1987).

64 Section 90 and schedule 15 of the Children Act 1989 repealed section 7(7) of the Children and Young Persons Act 1969.



deprived and depraved are now normally responded to differently, there remaining very few pieces of legislation or sites⁶⁵ which bridge the distinction between them. Child safety orders seem set to muddy the distinction.

That is not necessarily something to be criticised. Valid arguments for conflating the categories and not labelling the child who offends as ‘an offender’ *per se* have been put forward by politicians, juvenile justice practitioners and charitable bodies from time to time over at least 200 years and have, occasionally, formed the dominant view. However, those pursuing such an approach must develop practices which fully acknowledge the dangers such a blurring of distinctions can produce for the child and her family and formulate best practice accordingly. There are grounds for concern that this might not occur in relation to child safety orders.

Fudging distinctions: the child safety order

On the application of a local authority, the family proceedings court will be able to make a child safety order in relation to children under 10 years of age if one or more of the conditions specified in section 12(3) are fulfilled:

- (a) that the child has committed an act which, if he had been aged 10 or over, would have constituted an offence;
- (b) that a child safety order is necessary for the purpose of preventing the commission by

65 As mentioned above, the Children Act 1989 schedule 2 deals with the prevention of offending in the context of need, and admission to secure units can be by welfare (s 25 of the Children Act 1989) and criminal processes.



the child of such an act as is mentioned in paragraph (a) above;

(c) that the child has contravened a ban imposed by a curfew notice;⁶⁶ and

(d) that the child has acted in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself.

66 Section 11(3)(c) will not be available for the courts until child curfew schemes have been authorised and become operational.



These are ‘fairly wide grounds’⁶⁷ and cover conceptually different scenarios. Conditions (a) and (b) reveal the political imperative to ‘deal with’ an ever younger category of (potentially) offending children. Children over 10 will be liable to reprimands, warnings and criminal proceedings in respect of their offending, the under 10s may instead be the subject of a child safety order if offending (without the *mens rea* element) is proved (without the child having any right to separate representation) to the satisfaction of the court (on the balance of probabilities).

Conditions (c) and (d) appear to be targeted at the child who, in public spaces, is a nuisance or who is deemed to be in such places at unsuitable hours for a child. The fourth condition is identical in its wording to part of section 1 of the Act. That section provides for anti-social behaviour orders for anyone over 10 years of age and includes a definition of acting in an ‘antisocial manner’: ‘that is to say, in a manner that caused or was likely to cause harassment, alarm or distress’.⁶⁸ In effect, this means that a child safety order, imposed on this condition, amounts to an anti-social order for the under 10s.

67 Mr Clappison, Standing Committee B 7 May 1998 (<http://www.parliament.the-stationery-office.199798/cmstand/b/st980507/pm/80507s08.htm>). The Committee proposed to substitute the following for the first three grounds: ‘that there are reasonable grounds for believing that the child’s behaviour indicates a serious risk of the child offending after he has attained the age of 10 and that making such an order is in the interests of preventing the child so offending’ (amendment 347). That amendment was not pressed to a division.

68 s 1(1)(a) and replicated in s 11(3)(d).



The order is for a maximum period of 3 months⁶⁹ and places the child under the supervision of a ‘responsible officer’ who can be a member of a local authority youth offending team (established under section 39) or a social worker in the social services department of a local authority⁷⁰ and ‘requires the child to comply with such requirements as are so specified’.⁷¹ Those requirements, set out in section 11(5), are any⁷² ‘which the court considers desirable in the interests of - (a) securing that the child receives appropriate care, protection and support and is subject to proper control; or (b) preventing any repetition of the kind of behaviour which led to the child safety order being made’.

The Act, in contrast to the Family Law Act 1996 in section 11(4), does not impose its own welfare test or checklist, and so the welfare of the child will be paramount in proceedings to apply for these orders.⁷³ The application must be made by a local authority and the child will probably be supervised by a social work trained officer. It may, therefore, be seen as alarmist to view such orders as heralding an Orwellian state. However, this focus on offending to trigger a civil order - without the child-friendly provisions built into the child protection process or the procedural safeguards built into the criminal process - is worrying. For example, applications for child safety orders will not be ‘specified proceedings’ so a guardian *ad litem* will not be appointed for the child, nor is the child entitled to separate legal representation (because she is

69 Unless the circumstances are ‘exceptional’ in which case the maximum is 12 months.

70 ss 11(1)(a) and 11(8).

71 Section 11(1)(b).

72 Except that s 12(3) specifies that requirements which conflict with the parent’s religious beliefs and the child’s schooling should be avoided.

73 As applications for child safety orders are family proceedings, the welfare test in the Children Act 1989 s 1 operates rather than the test in the Children Act 1933 s 44 (‘have regard to the welfare of the child or young person’) which operates in criminal proceedings.



not a party, nor are they criminal proceedings). Similarly, whilst the child safety order is essentially a supervision order (with requirements) it does not have the same safeguards built into its use. A supervision order is available within the family justice system via section 31 of the Children Act 1989 where the 'significant harm' threshold operates,⁷⁴ and within the youth justice system under section 7(7)(b) of the Child and Young Persons Act 1969. The problem, as *Childright* has commented, is that 'the extra care, protection and support' which a child safety order might give to a child may only be useful 'so long as they are not branded as criminals and excluded from society'.⁷⁵ Child safety orders could label and criminalise children to their detriment and bring more children into youth justice and care systems when less draconian responses might be more appropriate. There is no requirement to consider (as in section 1(5) of the Children Act 1989) whether, even if the conditions have been satisfied, it is better for the child not to make an order and so it is not clear how the magistrates' discretion in section 11(1) ('may make an order') will be exercised.

74 Though it is fair to say that a s 31 order gives the Local Authority parental responsibility for the child (s 33(3)).

75 The Children's Legal Centre (1998) 143 *Childright* 8-9, 9.



Perhaps more serious, however, are the implications for the child (and for the coherence of family law) who fails to comply with any requirements included in a child safety order. The order can be varied or, alternatively, it can be discharged and a care order made in its stead under section 31(1)(a) of the Children Act 1989. Section 90(1) of the Children Act 1989 abolished the power to make care orders on an offence condition because, as Masson notes, ‘The offence condition ... did not fit in with the notion that a care or supervision order should only be made on proof of substantial harm’,⁷⁶ and yet the Crime and Disorder Act 1998 explicitly states that the significant harm test to be found in the section 31(2) of the Children Act does not have to be applied.⁷⁷ Before the introduction of the Children Act 1989 there were at least 12 routes into care⁷⁸ and section 12 of the Crime and Disorder Act 1998 does not technically alter the intention of the Children Act 1989 to establish only one route into care but, by specifically excluding the necessary operation of the threshold test, in effect it does create a different route into care.⁷⁹

The potential of the provision for child safety orders is that an instance of actual ‘offending’ or the risk of such, the failure to ‘stay in’ between the hours of 9 pm and 6 am as specified by the terms of a curfew notice⁸⁰ and instances of anti-social behaviour could all lead

76 J. Masson *Current Law Statutes Annotated* Children Act 1989, 41-159.

77 Section 12(7).

78 P. Bromley and N. Lowe *Bromley’s Family Law*, 7th ed (London: Butterworths, 1992) 440 *et seq.*

79 Significantly, seven years before the partial repeal of s 7(7) of the Children and Young Person’s Act 1989 (see above) a new sub-section has been inserted into that section to enjoin on the courts its use only in relation to serious offending and only if the child was also ‘in need of care or control which he is unlikely to receive unless the court makes a care order’ (s 7(7A) inserted by the Criminal Justice Act 1982 s 23).

80 s 14(2); s 15(4) amends s 47 of the Children Act 1989 so that the Local Authority also has a duty to investigate the child’s welfare if informed that a curfew notice has been contravened.



to the imposition of conditions on a child and its family which, if not complied with, allow a court to by-pass that very test that was felt necessary in 1989 to reduce the incidence of the most severe form of state intervention in the family. Furthermore, behaviour which falls short of offending (anti-social behaviour by anyone over or under 10, together with 'offending' or the risk of such by those under 10 deemed incapable of offending) can, therefore, potentially lead, depending on the child's age and the original order, to the removal of a child from his or her family either to be 'looked after' by the Local Authority or by HM Prison Service.

The partnership context

This ambiguity as to whether the primary aim is the promotion of the child's welfare or crime prevention is of significance in relation to an important theme in the Act - that of inter-agency partnership. Under section 39 Local Authorities must set up youth offending teams, and probation committees and police and health authorities must cooperate in such provision and in the making of youth justice plans for the area. In practice many such teams already exist, having developed *ad hoc* over the last decade or so and inter-agency partnerships are routine in child protection work.⁸¹ What undermines government assurances that community protection can be properly pursued without a reduced emphasis on child protection and support is that it has been seen as necessary to set up a new and separate partnership. Schedule 2 of Children Act 1989, together with the Children Act 1989 (Amendment) (Children's Services Planning) Order 1996, requires the local authority to produce and publish children's services plans and such plans

81 For government encouragement of partnership in probation practice see, for example, *Partnership in Dealing with Offenders in the Community* (London: Home Office, 1990) and *Supervision and Punishment in the Community* Cm 966 (London: HMSO, 1990). For such encouragement in relation to child protection see, for example, F. Kaganas, M. King and C. Piper (eds) *Legislating for Harmony, Partnership under the Children Act 1989* (London: Jessica Kingsley Publication, 1995).



should include provision for services to prevent offending behaviour by children and young people. Yet a consultation paper issued in early 1998 by the Department of Health, entitled *Working Together to Safeguard Children: New Government Proposals for Inter-Agency Co-operation*,⁸² did not mention youth offending. One could, therefore, argue that new ‘dedicated’ partnerships are necessary because crime preventative measures have not been given adequate priority and resources in children’s services plans⁸³ but that could have been remedied. How children at risk of offending or who do offend are protected will depend at least partly on the nature of the partnership between the partnerships.

How the new orders and processes provided by the Crime and Disorder Act 1998 are ‘contextualised’, resourced and marketed will, therefore, be crucial. If preventative measures are developed, presented and resourced as opportunities and services sufficiently widely available not to stigmatise and alienate then they are greatly to be welcomed. Similarly, if child safety, anti-social behaviour and parenting orders include requirements that provide child and family support rather than negative control they too can open up new avenues for helping children and their families. Otherwise these measures will simply provide different technical ways to draw children and families into youth justice and child protection systems which often do not improve their lives.

82 London; Children’s Services Branch, Department of Health, February 1998.

83 See Social Services Inspectorate/Department of Health *Responding to Youth Crime: Findings from inspections of youth justice services in five local authority social services departments* (London: HMSO, 1994); B. Hearn and R. Sinclair *Children’s Services Plans, Analysing need: reallocating resources*, (London: Department of Health, 1998).



One suspects that, as with the introduction of community service orders by section 14 of the Powers of Criminal Courts Act 1970, the lack of penological and conceptual clarity is not an accident. The Act can be all things to all people. It appears to legitimate much wider possibilities for victim-offender and community-offender reparation and encourages the sort of inter-disciplinary working that could allow the child to be seen as more than simply an offender. Yet these provisions sit alongside what is in effect a tariff-based, rather than child-centred, system of reprimands and warnings and alongside civil orders whose requirements for 'detention' in the home could be increasing the dangers to a child. How youth justice professionals and magistrates approach and use these orders and services will be a major determinant of outcome, given the inherent ambivalence in government policy.

The proclaimed commitment of the Labour Party and Government to a two-pronged strategy in relation to young offenders is well known: 'Both research and common sense indicate that there are links between social conditions and crime ... As well as tackling these underlying causes of offending, immediate action can be taken at a local level to reduce crime'.⁸⁴ It would be a pity if the immediate action in the provisions of the Crime and Disorder Act 1989 set the tone for professional and magisterial responses to children who offend. Terms such as risk, harm and safety are now ubiquitous concepts deployed in different policy areas but with different meanings and outcomes in each. There is a danger that the Act will contribute to the dominance of particular meanings whereby children's rights and welfare are subsumed in community safety. If that occurs, then it is doubtful whether the child, in experiencing the potentially restrictive and controlling nature of these new orders, will appreciate that he or she is being 'saved' from a life of depravity.

84 *Safer communities, safer Britain*, n 1 above 8.

