

## CHILDREN ACROSS THE JUSTICE SYSTEMS

### THE 2017 PARMOOR LECTURE TO THE HOWARD LEAGUE FOR PENAL REFORM

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Generations of the Cripps family have served the State as lawyers and politicians. Milo Cripps, the fourth Baron Parmoor, followed, with notable success, rather different paths. And although, apparently, he never spoke in the House of Lords, he made a notable contribution to public life as a staunch supporter of, and in due course a generous benefactor to, the Howard League. We gather together tonight to honour his memory.

More than 225 years after the death of the noted prison reformer, John Howard, the League, whose *raison d'être*, one might have hoped, would long since have vanished, continues its invaluable work as the articulate conscience of a society whose public, official and private consciences seem distressingly atrophied. Never have the words of that great Home Secretary over a century ago seemed more topical:

“The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country.”

Judged by that stern test, what right do we have to call ourselves civilised?

You do me great honour by inviting me to give this prestigious and important lecture, but I have to confess at once that my credentials for being here this evening are threadbare. The best part of 50 years ago, when I was at University, I exhibited a rather dilettante and short-lived interest in criminal law and criminology. The Assize Court was more congenial than the lecture-room and I was amongst the very first to take the recently introduced course in criminology. Those were, perhaps, times for optimism. The Home Office was occupied by one who remains, almost half a century later, still the most distinguished Home Secretary of the last 100 years. And one recalls, almost wistfully, his warning, only a few years later, that if the prison population reached 42,000, "conditions in the system would approach the intolerable."

But my career took me in other directions. I never practised in and have never sat in a criminal court. And it was only the happenstance of court listing that gave me the opportunity in 2002 to deliver a judgment<sup>1</sup> which was, I like to think, of some public utility and which stands high in the annals of the League. I remember that case with sadness. Towards the end of a lengthy judgment which had rehearsed much distressing material I said this:<sup>2</sup>

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<sup>1</sup> *R (on the application of Howard League for Penal Reform) v Secretary of State for the Home Department & Anor* [2002] EWHC 2497 (Admin), [2003] 1 FLR 484.

<sup>2</sup> Paras 173, 175.

“If it really be the case, as the Chief Inspector of Prisons appears to think, that there are YOIs which are simply not matching up to what the Children Act 1989 would otherwise require, if it really be the case that children are still being subjected to the degrading, offensive and totally unacceptable treatment described and excoriated by the Chief Inspector – and [counsel for the Home Secretary], on instructions, was not able to confirm that these practices had been stopped – then it can only be a matter of time, as it seems to me, before an action is brought under the Human Rights Act 1998 by or on behalf of a child detained in a YOI and in circumstances where, to judge from what the Chief Inspector is saying, such an action will very likely succeed.

... I cannot help thinking that ... the Howard League has performed a most useful service in bringing to public attention matters which, on the face of it, ought to shock the conscience of every citizen.”

That was in November 2002. How do matter stand today, almost 15 years later? When launching his annual report in July 2017, the Chief Inspector was quoted as saying that youth custody centres in England and Wales are so unsafe that a “tragedy” is “inevitable” and that “not a single establishment inspected was safe to hold young people.” Comment is unnecessary.

My focus today, however, is rather different. I ask you to think about children – and that for a family lawyer means anyone who has not reached the age of 18 – across the various justice systems in England and Wales in which from time to time they find themselves enmeshed. These systems – and I use the plural deliberately – are, I have to suggest, far too complex, far too little co-ordinated, and serving far too many different and often conflicting objectives, to be effective in furthering the welfare of children and their families.

I was recently concerned (in every sense of the word) with a suicidal teenager, X.<sup>3</sup> I do not propose to discuss the case: it would not be appropriate to do so. I refer to it only because it might be thought to exemplify some of the systemic difficulties we face and because it illustrates some of the problems I wish to address today. For present purposes, all I need to say about X is that she was a gravely disturbed teenager who came from a troubled home and whose mother (her father was dead) had her own difficulties. X was taken into care in accordance with the Children Act 1989 but the various plans approved by the family court did not work. The time came when she needed, for her own safety, to be placed in secure accommodation; no suitable accommodation was available in England, so the placement was in Scotland. Returned to a placement in England, X’s behaviour led to her being sentenced by the Youth Court to a Detention and Training Order and placed in another institution where the intensity and frequency of her self-harming and suicidal actions increased. Eventually, a place was found for her in a clinical setting to which she was transferred by the Secretary of State in accordance with the Mental Health Act 1983.

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<sup>3</sup> The curious can trace X’s story through the five judgments I gave: *In re X (A Child) (Jurisdiction: Secure Accommodation)*, *In re Y (A Child) (Jurisdiction: Secure Accommodation)* [2016] EWHC 2271 (Fam), [2017] Fam 80; *Re X (A Child) (No 2)* [2017] EWHC 1585 (Fam); *Re X (A Child) (No 3)* [2017] EWHC 2036 (Fam); *Re X (A Child) (No 4)* [2017] EWHC 2084 (Fam); and *Re X (A Child) (No 5)* [2017] EWHC 2141 (Fam).

If one thinks about cases like this – and there are far too many of them, even if not all so extreme – it might be thought obvious that we face serious problems to which, at present, we have no effective solutions. What are the problems? And what can we do about them? The first question, I am the first to admit, is much easier to answer than the second.

What are the problems? I believe there are seven. I take them in no particular order.

The first problem, is that cases involving children are spread across the jurisdictions. Cases where a child is to be put into the care of a local authority and disputes in relation to what until recently were called residence and contact are heard in the Family Court or the Family Division of the High Court. Criminal cases where a child is being prosecuted are heard in the Youth Court or the Crown Court. Where a child is seeking asylum, or is subject to immigration control, the case is heard in the First-tier and Upper Tribunals of the Immigration and Asylum Chamber. Where a child is subject to the provisions of the Mental Health Act 1983, the relevant tribunal is the Health, Education and Social Care Chamber.

Although there are some mechanisms in place for the sharing of information between some of these jurisdictions, these mechanisms, even when they work, are confined to the sharing of *information*; there are no mechanisms to facilitate collaborative, joint or even joined-up decision-making. Moreover, because of the way in which the professions are organised and the judiciary deployed, there is too little understanding across the jurisdictions of how the others operate. Let me give an example: although the jurisprudence analysing the tensions between, and explaining the differing functions of, the family and the asylum/immigration jurisdictions is, it might be thought, not merely long established but clear enough, misunderstandings on even the most basic points are still rife.<sup>4</sup>

Or take the interactions between the family courts and the criminal courts. On occasions – and I emphasise I am *not* here referring to X – the perception of a family court is that the sentencing decision of the criminal court is not helpful in furthering the family court’s planning for a disturbed teenager. On occasions one finds that the two jurisdictions simply do not ‘marry-up’ sensibly. I remember a case some years ago where both the family court and the Youth Court had made orders providing for the involvement of the relevant local authority in the child’s life. The child lived in London; the family legislation decreed that the relevant authority was the London Borough of A, the criminal legislation that the relevant authority was the London Borough of B. Did the child benefit from having the services of two local authorities? The answer, as you may have guessed, was No. The involvement of two authorities was simply a recipe for confusion leading to inertia.

The second problem derives from the fundamental constitutional principle explained by Lord Scarman in *A v Liverpool City Council*,<sup>5</sup> that “The High Court cannot exercise its powers, however wide they may be, so as to intervene on the merits in an area of concern entrusted by Parliament to another public authority.” For present purposes, this has a number of important consequences. One is that, absent statutory provision to the contrary, the ambit of

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<sup>4</sup> See *Nimako-Boateng (residence orders - Anton considered) Ghana* [2012] UKUT 216 (IAC) and *The Secretary of State for the Home Department v GD (Ghana)* [2017] EWCA Civ 1126, paras 44-51.

<sup>5</sup> [1982] AC 363.

judicial decision-making is constrained by the extent of the resources made available by other public bodies. So, the family court cannot *direct* that resources be made available or that services be provided; it can merely seek to *persuade*. Another consequence, coming closer to home, is that if, for example, a child is detained under a criminal sentence or in accordance with the Mental Health Act 1983, the decision as to the child's release lies not with the family court but with the Secretary of State in the one case or the treating clinicians or the Health, Education and Social Care Chamber in the other. The family court can make a care order in relation to the child, but the court's functions in relation to her placement and welfare inevitably remain largely in suspense pending her release.<sup>6</sup>

The same principle applies, of course, as between the family court and the local authority. When a care order is made, it is for the local authority to formulate its care plan and for the judge to approve it. What if there is disagreement? The answer, it has been said, is this:<sup>7</sup>

"It is the duty of any court hearing an application for a care order carefully to scrutinise the local authority's care plan and to satisfy itself that the care plan is in the child's interests. If the court is not satisfied that the care plan is in the best interests of the child, it may refuse to make a care order ... It is important, however, to appreciate the limit of the court's powers: the only power of the court is either to approve or refuse to approve the care plan put forward by the local authority. The court cannot dictate to the local authority what the care plan is to say ... Thus the court, if it seeks to alter the local authority's care plan, must achieve its objective by persuasion rather than by compulsion.

That said, the court is not obliged to retreat at the first rebuff. It can invite the local authority to reconsider its care plan and, if need be, more than once ... How far the court can properly go down this road is a matter of some delicacy and difficulty. There are no fixed and immutable rules. It is impossible to define in the abstract or even to identify with any precision in the particular case the point to which the court can properly press matters but beyond which it cannot properly go. The issue is always one for fine judgment, reflecting sensitivity, realism and an appropriate degree of judicial understanding of what can and cannot sensibly be expected of the local authority."

The principle is impeccable, but all too often the consequences are unsatisfactory: a court charged with the duty of furthering the child's welfare is denied the necessary tools to do so.

These difficulties are made more complex by the third problem, the way in which our public finances are organised. A salutary and long-established principle is that public money is to be spent by a public-sector body only for the proper purposes of that body and in accordance with what has been decreed by Parliament. Again, the principle is impeccable but sometimes the consequences are unfortunate. Typically, the families and children who

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<sup>6</sup> See on all this, *Re a Ward of Court* [2017] EWHC 1022 (Fam), [2017] 3 WLR 593, paras 8-16, and *Re X (A Child) (No 5)* [2017] EWHC 2141 (Fam), paras 6-8.

<sup>7</sup> *Re MN (Adult)* [2015] EWCA Civ 411, [2016] Fam 87, paras 34-35.

find themselves before the courts are the victims of multiple difficulties and deprivations: economic, social, educational, employment, housing and health (sometimes both physical and mental). Ideally, we should be treating such families holistically, but too often this is made more difficult, or even impossible, because responsibility is spread across too many agencies and too many budgets. And there is too often the tension between attempting to solve today's problem – the responsibility, let us say, of a local authority – and the longer-term benefits which will flow to other agencies – for example, those involved with criminal justice and health – if the problem is solved.

Even within the ambit of local authority responsibility, there are difficulties created by the ways in which local authorities organise their services and budgets. A unitary authority may have responsibility for children's services, adult services, education and housing. But if the focus of the proceedings in court is on the child, as where the local authority has embarked upon care proceedings, it can often prove frustratingly difficult to engage and motivate the other services, even where, for example, the child's parents are themselves, because of their own difficulties, entitled to the support of the local authority's adult services.<sup>8</sup>

These difficulties are also, of course, exacerbated by the fourth problem, the all too frequent lack of sufficient resources. This problem pre-dates, though it has been made much more acute by, the current age of public sector austerity. The family court is, still, sadly lacking in the resources – for example, adequate and effective special measures, the provision of intermediaries<sup>9</sup> – which are essential if the vulnerable, whether children or adults, are to be enabled to participate properly in the process. These are not merely things mandated, it might be thought, by Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Even more important, are they not mandated by any acceptable concept of what justice and fairness demands?

But there are, of course, many other instances where the lack of resources is seriously hampering the work of the family courts and the criminal courts. Probably the most egregious, because it so directly impacts on the ability of the courts to further the child's welfare, are the serious shortages, regularly all too apparent to too many family judges, of the secure accommodation and the mental health services (whether residential or in the community) needed by ever-increasing numbers of disturbed, sometimes very disturbed, adolescents.<sup>10</sup>

The fifth problem reflects the division of responsibilities across Whitehall between different Departments and Ministers in matters affecting families and children. The Department for Education, the Ministry of Justice, the Department of Health, the Home Office, the Department for Work and Pensions, the Department for Communities and Local

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<sup>8</sup> For an illuminating and saddening example see *Re D (A Child) (No 3)* [2016] EWFC 1, [2017] 4 WLR 55, paras 104, 129.

<sup>9</sup> Again, for an illuminating and saddening example see *Re D (A Child) (No 2)* [2015] EWFC 2, [2015] 1 FLR 1247, paras 15-19, and (the same case) *Re D (A Child) (No 3)* [2016] EWFC 1, [2017] 4 WLR 55, paras 19-20.

<sup>10</sup> *Re X* is, unhappily, only one of too many similar cases. For *subsequent* cases see *Re F (A Minor: Secure Accommodation Resources)* [2017] EWHC 2189 (Fam), *Re M (Lack of Secure Accommodation)* [2017] EWFC B61 and *Re A Child (No Approved Secure Accommodation Available; Deprivation of Liberty)* [2017] EWHC 2458 (Fam).

Government and even The Department for Digital, Culture, Media & Sport (a recent important announcement of extra funding for Family Drug and Alcohol Courts, which I shall refer to in a moment, was made by the Parliamentary Under Secretary of State for Sport and Civil Society) all have roles to play. It is an intriguing commentary on how Whitehall is organised that there is no Department and no Secretary of State whose title includes either the word 'families' or the word 'children', though there is a junior Minister, the Minister of State for Children and Families, in the Department for Education. In some areas, policy and justice are located in different Departments. Thus, at the risk of some over-simplification, criminal policy rests with the Home Office, just as family policy rests with the Department for Education, while both criminal justice and family justice fall within the remit of the Ministry of Justice. Even when this 'system' – if that is a remotely appropriate word – is working with well-oiled efficiency, it is rarely capable of speaking speedily or with a single voice, let alone decisively and effectively.

The sixth problem reflects the tardy, and even now only incomplete, incorporation into our domestic law of the requirements in Articles 3(1) and 12 of the United Nations Convention on the Rights of the Child. Article 3(1) provides that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 12 provides that:

“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 views 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 procedural rules of national law.”

This links in with another problem: our slowness in accepting the equally profound implications of the undoubted fact that a child has, quite distinct from and sometimes in conflict with his or her parents, the important *procedural* rights guaranteed by Article 8 of the European Convention.<sup>11</sup> It is a saddening commentary on our law that it was not until 2011 that the Supreme Court was able to articulate the fundamental principles explained in *ZH (Tanzania) v Secretary of State for the Home Department*<sup>12</sup> which have had, and not before time, such a profound effect on so many areas of the law which impact on children.

In the family courts, the rights and interests of the parent often conflict with those of the child – most obviously, perhaps, where the plan is to remove a child permanently from

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<sup>11</sup> See *CF v Secretary of State for the Home Department* [2004] EWHC 111 (Fam), [2004] 2 FLR 517, paras 158-173.

<sup>12</sup> [2011] UKSC 4, [2011] 2 AC 166.

parents for adoption. Both parent and child have rights to “private” and “family” life which are protected by, are entitled to “respect” in accordance with, Article 8. There is now a detailed, subtle and well-established jurisprudence explaining how these rights are to be balanced. And the application of that jurisprudence is a matter of daily practice in family courts. In other places, for example in the criminal courts and in the Immigration and Asylum Chamber, the issues tend to be rather different: often parent and child share similar interests and find themselves together in conflict with some opposing public interest: in the criminal courts, the public interest in imprisoning offenders even if they have child-care responsibilities; in the Immigration and Asylum Chamber, the public interest in enforcing a fair and proper system of immigration control even if that may lead to the separation of parent and child. Here, I fear, the issues were inadequately appreciated until the decision in *ZH (Tanzania)* and, even now, the jurisprudence is neither as well developed nor as deeply embedded in daily practice as might be thought desirable. The fact that, even now, the United Nations Convention on the Rights of the Child has not been incorporated as such into our domestic law – its statutory application into our law has been piecemeal and partial – says much about our systems. And it is not a matter for pride.

The seventh and final problem is one common to both the criminal and the family courts. Unlike the civil courts, which essentially look only to the past, the criminal court and the family court look both to the past and to the future: to the past to help determine what should happen in the future. That is all to the good, but, too much of the time, the exercise is still limited to determining what is the appropriate *disposal* for the case: what is to happen to the prisoner or to the child in future. In the family court, where the welfare of the child is, by statute, the court’s paramount concern, it is all too easy to focus on the child’s future, without paying adequate attention to what it is that has brought about the court’s involvement in the first place. And, especially with younger children, that has to do almost exclusively with the parent, not the child. For, typically, the problems are those of the parent, not the child. So, far too little time is spent identifying the underlying problem or, more typically, problems and then to setting out to find a *solution* for the problem(s). In a sentence: family courts, and where children are involved criminal courts also, ought to be but usually are not *problem-solving courts*.

What this brief canter through an immensely complicated landscape has, I hope, brought out is the pressing and imperative need to *do something* across all these disorganised systems; systems which, to repeat, are far too complex, far too little co-ordinated, and serving far too many different and often conflicting objectives, to be effective in furthering the welfare of children and their families.

Something, indeed much, must be done; but what?

The history of law reform over the last few centuries shows that significant changes, especially those to do with institutional reform, often take not years but *decades* to achieve. Lest you think me unduly pessimistic, can I remind you of just how long it took to introduce the unified, single, Family Court, recommended in 1974 by the late Sir Morris Finer, acknowledged by almost everyone of any sense as being an obvious necessity, yet not established until 2014, precisely *forty* years later. And I fear that significant institutional

changes to overcome, for example, the first of the problems I have identified – the spread of cases involving children across so many jurisdictions – would even in normal times be almost impossible of achievement, however desirable in themselves, given the fragmentation of power and responsibility in Whitehall. So much must, I fear, be left to the initiatives of the judiciary and the third sector.

That much can be achieved largely without the initiative or intervention of Whitehall is demonstrated, I think, by the great success of FDAC, the Family Drug and Alcohol Courts, the first, and triumphantly successful, example, and judicially driven, of problem-solving in the family court. Fundamentally, the approach adopted in FDAC is a combination of judicial monitoring and a multi-disciplinary therapeutic intervention tailored to meet the needs and problems of the parents in care cases where the underlying issue is parental substance abuse. Very careful independent academic research has proved that FDAC works and that FDAC saves money. More children are reunified with parents if the case has gone through FDAC than through the normal family court, and there is significantly less subsequent breakdown. FDAC increases the sum of human happiness and decreases the sum of human misery. And it saves the local authorities who participate significant sums of money: £2.30 for every £1 spent.

Another, more recent, project which is already proving a great success is PAUSE, where the objective is to break the pattern we see so frequently in the family courts of mothers who find themselves the subject of repeated applications for the permanent removal of each of their successive children. (The dismal record is believed to be held by a woman who has lost *nineteen* children to the care system.) Again, as with FDAC, the approach is founded on identifying and then tackling the often numerous underlying problems and difficulties which have confronted the woman – in short, helping her to ‘turn her life around’. There are other projects adopting similar approaches.

I believe that this points the way forward to what in my view is so urgently required: a fundamental re-balancing of the family court towards what ought to be its true role as a problem-solving court, engaging the therapeutic and other support systems that so many children and parents need.

But the concept of the problem-solving court surely has to extend far further than that, not least, it might be thought into the processes of the criminal courts as they impinge on families, whether the child or the parent.

This is particularly important in cases where the court, whether the family court or a criminal court, is struggling to deal with a disturbed teenager. In these uniquely complex cases, the children have themselves become part of the problem, so a problem-solving court must grapple with the underlying problems and difficulties not just of the parent but also of the child, in short, with the underlying problems and difficulties of the whole family. So what we need is a problem-solving court for the whole family. Can a criminal court, can the Youth Court, satisfactorily fulfil that role? Is it not, in truth, a role better suited to a re-vamped family court with an enhanced jurisdiction?



However, a court which is to be an effective problem-solving court has to have available to it the necessary tools, including, critically, access to therapeutic and other support systems for the families involved. In the case of FDAC those tools are, generally speaking, to hand, because each FDAC reflects a local alliance between each of the relevant agencies, who have voluntarily come together to share their resources in what they recognise has to be a common endeavour. But what is feasible in the context of FDAC may be impossible to achieve in other contexts. So we need to find ways of working round the problems caused by the rule in *A v Liverpool City Council*. This will probably require primary legislation and will certainly require ingenuity, but it ought not to be impossible; for there are already statutory provisions which, for example, empower a family court to direct what services a local authority is to provide. Thus, section 38(6) of the Children Act 1989 enables the court to direct an assessment at the expense of the local authority of a child who is subject to care proceedings. Although this particular power is narrow in scope – in substance it applies only to an *assessment* and not to *therapy*, and only to the *child* and not to the *parent* – it shows that there can, if Parliament chooses, be exceptions to the *Liverpool* principle. The need for the practical implications of the *Liverpool* principle to be revisited as a matter of appropriate urgency is surely obvious if cases such as X are to become things of the past and if the courts are to be properly equipped for their vital problem-solving role. More effective tools are required than the present blunted weapons of persuasion and shaming.

In an ideal world we would be giving very serious consideration to sweeping jurisdictional changes, bringing order to disorder by incorporating many if not all of these jurisdictions within the expanded jurisdiction of a family court. Why, for example, could the Youth Court not be amalgamated in an expanded family court where the process would no longer be criminal and the emphasis could be on problem-solving in the true sense and, as I have suggested, for the entire family, rather than on punishment, or so-called rehabilitation, for the child in the custodial estate so excoriated by the Chief Inspector?

We cannot, of course, wait as the decades pass while the argument gains traction. But could not more be done in the interim by the judges, and in the criminal context by the Crown Prosecution Service? For example:

- Improving understanding across the jurisdictions of how the others work.
- Introducing mechanisms to facilitate collaborative, joined-up or even joint decision-making.
- In particular, ensuring by appropriate judicial ‘ticketing’ and ‘cross-deployment’ that judges with expertise and experience in the family court can also sit in the Youth Court, the Immigration and Asylum Chamber and the Health, Education and Social Care Chamber.
- In cases where there are parallel proceedings in different courts involving the same child, listing the cases simultaneously before suitably ‘cross-ticketed’ judges. There is nothing particularly novel or difficult in this: I have myself on a number of occasions sat simultaneously in the Family Division and the Administrative Court to hear a pair of cases relating to the same family.

Those are matters for judicial initiative. But is it too much to suggest, with all appropriate diffidence, that the Crown Prosecution Service might wish to reconsider existing prosecuting policy in relation to children? I do not, of course, go so far as to suggest that age alone should immunise children from the appropriate application of the criminal law where there has been really serious offending. However, in less serious cases it is legitimate to ask what advantage there is, either to the child, or to the child's family, or, indeed, to society at large, in invoking a criminal process in preference to a family court process, especially where the family court is already engaged in careful analysis of and planning for the child's future.

Many of the problems which I have identified require solutions which necessarily have to reflect no doubt tough political decisions borne of a political will to act. In relation to that, I have said as much as is appropriate for a serving judge. But I can properly end with this plea: that more be done to embed Articles 3 and 12 of the United Nations Convention on the Rights of the Child and Article 8 of the European Convention in our law and, even more so, in practice across all the jurisdictions which impact on children and their problems.