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## **Forty-four years on – Reflections on the Scottish Children’s Hearings System**

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## 44 years on – reflections on the Scottish Children’s Hearings System

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### Key features of the Scottish Children’s Hearings System

Unitary civil jurisdiction and welfare philosophy – child welfare and juvenile justice

Separation of fact finding and substantive decision making

Lay tribunal (children’s hearing) – 3 citizen volunteers are the decision makers

Compulsory supervision - protection, control, guidance or treatment

Review and appeal provisions



Children's Hearings (Scotland) Act 2011

Policy aims:

Retain the philosophy of hearings holistic view of the child's needs  
Better support for panel members  
Strengthen the place of the child in the CH  
Increased efficiency and protection  
Embed further UNCRC rights  
Capable of robust legal challenge

Secondary legislation, guidance and practice:

Strengthen the independence of panel members  
Clarity on the separate functions of the children's reporter – 'real and perceived to be real'

(Scottish Parliament, 2010:5)



Participation of all parties in a structured discussion is central – child, relevant persons, panel members, professionals

Effective participation – new framework and regime of state-funded legal aid (2011 Act)

Varies by type of hearing and who is seeking legal aid; means and/or merits or none for some hearings; assessment by solicitor at others Scottish Legal Aid Board

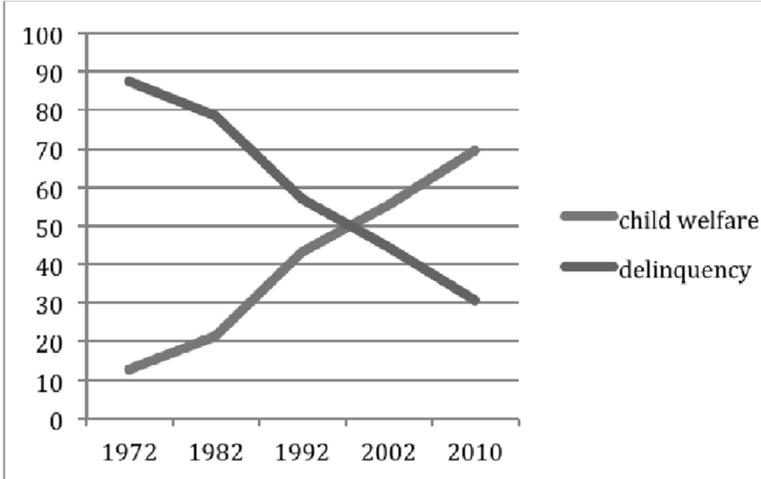
Changing pattern of referrals



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Percentage of delinquency v child welfare referrals in Scotland 1972-2010 (McGhee and Waterhouse 2012, Reprinted with permission from the Child Welfare League of America, 2015 )



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No system of child welfare decision making is perfect all have to address “insoluble problem of determining children’s future welfare in the face of indeterminacy and uncertainty” (King, 1997: 69)

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## **44 years on – reflections on the Scottish children’s hearings system**

**Dublin 13 April 2015**

Thanks you for inviting me to speak to day about the Scottish Children’s Hearings Tribunals System. I speak as someone who practiced as a social worker within the system in its early years and as an academic (with a degree in Scot’s law) who has conducted research on the hearings and continues to analyse the system’s place in Scottish child welfare law.

Firstly, I will briefly summarise the origins and key features of the children’s hearings tribunals system; second I will consider the potential impact of recent legislative reform; reform that partly has been driven as a response to the incorporation of the European Convention of Human Rights into UK domestic law (Human Rights Act 1998); and third, to reflect on the radical shifts and inherent stability that characterise the evolution of the children’s hearings since inception 44 years ago in 1971.

As you will know Scotland has always had a separate legal system to the rest of the UK (sharing only the appellate jurisdiction of the House of Lords, now the Supreme Court of the UK as the final court of civil appeal). Scots law reflects both historical connections to European civil law traditions and the more precedent-based Anglo-Saxon system - with the children’s hearings system fitting squarely within neither tradition.

The Hearings System has its origins in the report of the Kilbrandon Committee (1964) chaired by Lord Kilbrandon, at the time an eminent senior Scottish judge (judges within the highest civil and criminal courts in Scotland take the title Lord or Lady). Political and policy concern about a post-war rise in juvenile offending underpinned the deliberations of the Committee. Kilbrandon recognised that the majority of offences by young people were trivial, rarely contested and reflected a ‘failure in natural upbringing’ (ibid:X) requiring assistance to families without recourse to fines or other punitive measures against parents or child. The outcome was the creation in 1971 of a unique and radical system of non-adversarial lay tribunals as the decision-making forum for children in need of compulsory state intervention. A ‘matching field organisation’ (ibid:70) to provide support and assistance to families initially was to be located within a ‘Social Education’ department. However, the arguably limited focus on social measures and limited flexibility of the then Scottish education system alongside lobbying by social work professionals and so forth sited services squarely within the newly establishing local authority social work departments -now long demised (McGhee et al 1996).

There are three characteristics of this unique non court-based system that articulate the Scottish approach to child welfare decision-making.

First, the Children’s Hearings comprise an underpinning welfare philosophy and a unitary civil jurisdiction - children in need of compulsory measures of supervision are dealt within the same system, whether for reasons of their

behaviour (which includes offending by the child) or their care. The hearings encompass the Scottish child welfare and youth justice systems for children under sixteen years in need of compulsory intervention; there is no separate youth court for children and young people who offend unlike other parts of the UK. Children who are subject to compulsory supervision may be retained in the hearings years until they reach 18 years.

The rationale underpinning the unitary jurisdiction is Kilbrandon's (1964) contention of substantial similarities in children's social circumstances and backgrounds irrespective of the legal ground(s) of referral. The children's hearings therefore continues to sustain a welfare philosophy, often characterised as a focus on 'needs' not 'deeds'; decision making is oriented to the needs of the child and not the magnitude of the offence. Research suggests Kilbrandon's contention remains the case for around two-thirds of children referred (Waterhouse, McGhee and Loucks, 2004).

Second, there is a clear separation of substantive decision-making about the need for compulsory supervision from establishing matters of fact - what Lord President Hope called the 'genius of this reform' (Sloan v B 1991 SLT 530 at 548E (Scots Law Times). Lord Presidents head the judiciary in Scotland and preside over the senior courts, both civil and criminal, the latter as Lord Justice General.

Anyone may refer a child to the hearings system, although police continue to remain the main source of referral (both for care and protection as well as offence referrals, McGhee, 2011). Children's reporters receive all referrals and are effectively the gatekeepers to children's hearings. They are employed by the Scottish Children's Reporter Administration (an executive non-departmental body of the Scottish Government) and tend to have professional backgrounds primarily in law, social work and teaching. They investigate referrals and determine whether a child should be referred to the lay tribunal for a substantive decision.

The basis for referral to the lay tribunal is the presence of at least one of 17 grounds of referral AND the need for compulsory measures of supervision. Grounds of referral address both the care and behaviour of the child (listed at the end of this paper and encompass for example lack of parental care damaging to the child's health and development, offending, truancy, exposure to domestic abuse, forced marriage).

At the lay tribunal (called a child's hearing) a first stage in the formal process is the presentation of the grounds of referral to the child and family. If grounds of referral are contested by the child and/or 'relevant persons' (the definition extends beyond birth parents) or the child and/or parent are unable to understand the grounds or the explanation of the grounds by the panel member at the hearing then the process is suspended. A separate court hearing is held, in chambers, to test the evidence. If the grounds are proved the case returns to the lay tribunal for the substantive decision. All relevant persons and the child have the right (and obligation) to attend the lay tribunal.

Third, the substantive decision-makers are the lay tribunal of 3 citizen volunteers (panel members) who attend each child's hearing. They are drawn from a national panel of volunteers who have undergone a selection and pre-service training process (a public body headed by a National Convenor/Chief Executive, Children's Hearings Scotland, holds responsibilities for appointing, training and supporting panel members). There are around 2,500 panel members who serve in their local authority area, either where they live or work. The intention is community participation in decision-making about the needs of children and young people, directly involving children and their families in discussion of needs and solutions in the child's best interests.

Compulsory supervision (the only disposal available to the hearing, other than discharge) must be necessary for protection, control, guidance or treatment and in the child's best interests (there is a serious harm exception where the child's interests are the primary consideration). There may be conditions attached to the supervision requirement placing the child in out-of-home care including kinship care. Almost three-quarters of looked after children are subject to supervision requirements – around 40% are on supervision in the community and 60% looked after away from home (Scottish Government 2014). Review is annual and provisions exist for child, relevant persons and a local authority to seek an early review; the hearing itself may set an early review date. Appeals are to the Scottish court system (Sheriff, Sheriff principal, Court of Session (highest civil court in Scotland) - there is no appeal to the Supreme Court of the UK.

The Social Work (Scotland) Act 1968 provided the first legislative basis for the hearings system. This was replaced by the Children (Scotland) Act 1995 and incorporated elements of the United Nations Convention on the Rights of the Child (UNCRC, 1991) primarily participation with explicit reference to the child's right to express a view and that regard was to be given to any view in decision-making. At the same time proportionality in the guise of minimum intervention, the 'no' order' principle became the third principal in decision-making alongside the best interests of the child. The Children's Hearings (Scotland) Act 2011 now contains the legal basis for the hearings system and is one arm of a tri-partite reform in Scottish child welfare law in the last 7 years.

The 2011 Act sits alongside the Adoption and Children (Scotland) Act 2007 and the Children and Young People (Scotland) Act 2014. Together these implement an overarching policy framework oriented towards early intervention to address the support needs of children whose wellbeing is compromised (2014 Act), early intervention and diversion from formal systems for children and young people caught up in offending (Scottish Government n.d.) and robust permanence planning for children in public care (either to return to parental care or move to secure long-term substitute care via adoption or permanence orders, 2007 Act). Parental consent to adoption can be dispensed with in Scotland under certain circumstances; both adoption and permanence orders (which secure a child in long-term

substitute care with in some case an authority to adopt) require application to the court.

Having traced the wider policy and legal framework of Scottish child welfare I want to consider aspects of the 2011 Act which I consider brings profound change to the children's hearings and in so doing reflect on the radical shifts and inherent stability that characterise the evolution of the children's hearings since inception 44 years ago.

I don't intend to go into detail on the genesis of the 2011 Act; there have been a series of reviews and consultations from 2004 onwards. The underpinning policy aims have been to retain the philosophy of the hearings and the holistic view of the child's need; to provide better support for panel members, to strengthen the place of the child in the system; to increase efficiency and protection; and to embed UNCRC rights and create a system that is capable of robust legal challenge. Secondary legislation, guidance and practice have focused on strengthening the independence of panel members and ensuring clarity on the separate functions of the children's reporter in decision-making is 'real and perceived to be real' (Scottish Parliament, 2010:5).

A major underlying element was to ensure the system was capable of robust legal challenge having been subject in domestic courts to a series of human rights challenges regarding Art 6 and Art 8 of the ECHR following the coming in to force of the Human Rights Act 1998. The Scottish system had already reached the European Court of Human Rights in 1995 at a time when direct access to professionals' reports to the hearing was not routinely in place for parents (relevant persons) (*McMichael v United Kingdom* (1995) 20 E.H.R.R. 205).

Perhaps one observation to make is that we have seen an increased proceduralisation and specificity in the regulation of the children's hearings with the 2011 Act. This is partly a response to Human Rights cases in the Scottish Courts regarding the hearings but it has made for a complex and in my view a relatively inaccessible Act. The 2011 Act has 206 sections and 6 schedules compares to 1995 Act with 41 sections and 1 schedules; there are 100 procedural rules compared to 33 under 1995 Act.

Participation by all parties lies at the heart of the children's hearings system. The three citizen volunteers represent the community – one of the three chairs on the day; there are express provisions to support participation by the child reflecting Article 12 of the United Nations Convention on the Rights of the Child - they must be given an opportunity to provide their views (children may complete a 'having your say' pro-forma in advance of the hearing) and regard must be given to their views in the hearings decision-making. Age and maturity are relevant and there is a presumption of 12 plus years as of sufficient maturity for a child to have a view but this does not exclude children under 12 years. Status to attend children's hearings has been clarified and all birth parents (including unmarried fathers not living with the child or mother) are regarded as 'relevant persons' and entitled to attend; others may do so

by virtue of certain private law orders relating to parental responsibilities and rights; and others with 'significant involvement in the child's life' may be 'deemed' relevant persons (this can include foster carers in some circumstances). Social workers routinely attend and provide social background reports (which relevant persons and some children routinely receive). Rights to attend, to access all hearings papers and reports, and appeal rights inhere to relevant persons. The children's reporter records proceedings and has a role in ensuring fair process but they do not take part in the substantive decision-making.

The Kilbrandon Report (1964) foresaw discussion of the child's needs arising 'in an atmosphere of full, free and unhurried discussion' (p.50, para 109); what Kenneth Norrie calls a 'structured discussion' (2013:3). Hearings are intended to be non-adversarial given the terms of the grounds of the referral are proved or agreed, the primary focus and decision-making is taken in relation to the child's needs. Discussion is wide ranging and not only focused on the grounds of referral but can take in any matters of relevance to the need for and nature of compulsory measures in the child's best interests 'any information which is relevant to the making of a supervision requirement...will be relevant information to which the children's hearing may have regard' (O v Rae 1993 S.L.T. 570 at 574; M v Authority Reporter, 2011 G.W.D.).

Although the child and relevant persons have always been entitled to bring a representative to the hearing (with the 2011 Act they may additionally bring a legal representative) historically legal representation has not been a feature of children's hearings. There are two reasons: first, means-tested legal advice and assistance has always been available but it did not include representation at the children's hearing, although legal aid (state-funded legal assistance) was and remains in place for related court proceedings - contesting grounds and appeals; and second, a general view that the presence of lawyers might undermine the non-adversarial process of the hearing.

The longevity of the hearings and the lack of legal representation further reflects, in my view, perhaps an underlying assumption of beneficence in the operation of the children's hearings system, the community making decisions about the needs of children in the community; and a historical artefact of the origins of the hearings in juvenile delinquency, the system was predicated on addressing offending by children and young people with the focus on a child's behaviour rather than parental care in itself.

However, lack of parental care is the most common reason for referral to the children's reporter and arguably the hearings system has become primarily a system oriented towards care and protection cases. In recent work (McGhee and Waterhouse 2012) analysing referral patterns from 1972 to 2010 we observed that in early 1990s the balance of referrals shifted from offending to care and protection, in effect the CHS became primarily a child welfare system where parental acts or omissions are the precipitating reason for referral. There are increasing numbers of younger children referred – 14.5% of all children referred in 2013/14 were aged under 2 years (SCRA 2014).

Child welfare cases were seen to be relatively straightforward by panel members (Hallett *et al.* 1998) although ‘tensions’ between panel members and social work teams have arisen especially around issues of contact arrangements for children looked after away from home (CELCIS 2012).

Nevertheless, since the early 2000s the lack of state-funded legal representation at hearings has raised questions about effective participation and the compliance of the hearings system with human rights, in particular article 6 and 8 of the ECHR. The 2011 Act now provides a framework for legal representation and replaces interim measures set in place following two human rights court judgements: *S v Miller* 2001, S.L.T 531, addressing the lack of legal representation at hearings (the court issued guidance on the types of situations legal aid should be made available to children - primarily where secure accommodation was being considered or in complex cases); and *SK v Paterson* [2009] CSIH 76 XA25/09; sub nom *K v Authority Reporter* 2009 S.L.T. 1019 addressing effective participation (in this case for a parent with learning difficulties), which was not cured through general provision to bring a representative to assist discussion.

The new structure of legal representation under the 2011 Act is complex and aims to ensure that children and parents have access to legal advice and more importantly representation at the hearing and not simply in related court proceedings. This varies by type of hearing (for example where secure care – a deprivation of liberty- is being considered, children’s legal aid is automatic) and who (child or parent) is seeking legal aid, there are means and/or merits tests or neither for some hearings; assessment is by solicitors in some cases in others the Scottish Legal Aid Board. There are responsibilities on pre-hearing panels (where panel members decide procedural matters in advance of substantive hearings) and hearings to identify adults and children in specific situations where may need legal representation and refer them to the Scottish Legal Aid Board who will make contact (duty solicitor). All solicitors providing children’s legal assistance must be registered and conform to training and a code of practice. It would take a separate lecture to go into the details but overall there is a greater opportunity for legal involvement in the Scottish children’s hearing system. In a recent report the Scottish Legal Aid Board (2014) indicated that applications for children’s legal aid and assistance by way of representation are expected to increase. Not least, in my view, as it is new revenue source at a time of retrenchment in legal aid and other court reforms.

So, where does this leave the Scottish children’s hearings system as the new Act beds into practice?

First the continuing longevity of the fundamental philosophy and features of the children’s hearings, welfare as paramount, the lay tribunal as decision maker is testament to the continuing political and public commitment to the key tenets of the Scottish children’s hearings system. Political investment in the uniqueness of the system and the marginalisation of competing ideas may also have reinforced the importance of retaining its distinctive discretionary welfare orientation, certainly as a juvenile justice system. More sceptically and

despite my earlier comments about legal involvement, I suspect the Scottish hearings is a relatively inexpensive system to manage compared to court based systems with citizen volunteers as the decision makers regarding the care and protection needs of children.

Second does the hearings live up to the rhetoric of effective participation? What do children and families say? Despite the relative informality a solid range of research presents a diverse set of experiences with some common messages. Elsley et al. (2013) drawing on a range of relatively recent research and consultation on children's views point to positive experiences but continue to identify issues around information and preparation for hearings, the key facilitation role of adults in the process, the importance of accessible language especially in the communication of decisions and hearings process (p.12); although a recent survey of children and families found the majority of young people and adults (79%, n=125 and 86%, n=395 adults) definitely found the decision explained clearly (Hanson 2013). Earlier research highlights some of the challenges for young people in discussing sensitive subject matter, loyalty to family members and hesitance in discussing some concerns in the presence of parents and the perceived social distance between panel members and the families who appear before them (Hallett et al 1998, Griffiths and Kandel 2000, McGhee 2004, Creegan and Henderson 2006). Advocacy for children provisions – part of the 2011 Act, are not yet in force and remain in development.

Since the mid-2000s, referrals to the children's reporter for both for care and protection and offence cases have been falling (numbers of children referred to the children's reporter decreased by more than 60% between 2004 – 2013 (Scottish Government 2014). This may reflect a changing landscape in Scottish child welfare with the emphasis on early intervention and early permanence (Scottish Government 2011). The operation of multi-agency pre-referral screening to mobilise assistance before compulsory measures are required is arguably one reason. This suggests that it is the more complex cases that do come before the lay tribunal. Indeed the Scottish Children's Reporter Administration point to a continuing trend in complex court work and to the importance of positive liaison with the judiciary in managing cases expeditiously (SCRA 2014). Negotiation of these cases alongside a more procedural rights-based system suggests we will see more involvement of lawyers. This may be no bad thing where complex cases are the routine and the forensic approach of lawyers necessary.

I recall writing, almost 17 years ago (McGhee and Waterhouse 1998), that I considered panel members to be part of a system of checks and balances on professional power conducive to promoting conditions for working partnership with parents. Today I am much less sure. There are high levels of agreement between social work recommendations (Hallett et al. 1998, SCRA 2012a) and some evidence of increasing appeals against hearing decisions although changes in data collection impact on the accuracy of comparison (SCRA 2012b, 2013). There has to be recognition that disagreement with the panel's views is not necessarily being adversarial. Yet, as the system has oriented towards more child welfare cases, including a growing proportion of young

children under two years (SCRA 2014); some of whom arrive subject to child protection orders (permits removal to or retention in a place of safety) 21.1% were taken on children aged less than 20 days in 2013 (SCRA 2014) how well is this system of checks and balances working? Parental substance misuse is accepted as a significant reason for these changing patterns of child involvement in state care and protection fora. One area that has come to the fore is the regulation of contact between parents and children in out-of-home care (the hearing's responsibility); and has been identified, as I referred to earlier, as a source of 'tensions' between panel members and social work teams. Perhaps this reflects continuity in holding professionals to account in managing some of the difficult balances in decision making in the best interests of children?

Although this is a child protection conference I will say a brief word on youth justice. Despite criticism from the United Nations Committee on the Rights of the Child (2008), Scotland retains 8 years as the age of criminal responsibility. Although no criminal prosecution is possible for children under age 12 years, it remains possible for children between 8 and 12 years to be referred to a hearing on the offence ground of referral. At the same time the children's hearings have singularly failed since inception to routinely include young people aged sixteen and seventeen years within its fold (McGhee and Waterhouse 2012). Despite policy and practice emphasis on early and effective intervention (Scottish Government n.d.) young people who commit offences can remain exposed to the full rigours of the adult criminal court once they reach 16 years.

To end, we are all aiming to develop the best systems and we can all learn from each other. No system of child welfare decision-making is perfect and all have to address the complex lives of children making decisions in their best interests in the face of what Michael King calls the 'insoluble problem of determining children's future welfare in the face of indeterminacy and uncertainty' (1997: 69).

We do need to heed what Carol Coulter has identified in her reports and what has been found in my own and others research – children in public care overwhelmingly have backgrounds in social and economic deprivation (Bebbington and Miles 1989; Waterhouse *et al.* 2000, Pelton 2015) and we must ensure that we not only provide fair systems for children and their parents; where their voices are heard; but that we also address the inequality in our societies that in themselves are associated with the creation of difficulties that challenge many parents who struggle to adequately care for their children.

Thank you for listening.

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Extract Children's Hearings (Scotland) Act 2011.

(1) In this Act section 67 grounds, in relation to a child, means any of the grounds mentioned in subsection (2).

(2) The grounds are that

- (a) the child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired, due to a lack of parental care,
- (b) a schedule 1 offence has been committed in respect of the child, [my insert - schedule 1 offence is an offence mentioned in Schedule 1 to the

Criminal Procedure (Scotland) Act 1995 - offences against children under 17 years of age to which special provisions apply]

(c) the child has, or is likely to have, a close connection with a person who has committed a schedule 1 offence,

(d) the child is, or is likely to become, a member of the same household as a child in respect of whom a schedule 1 offence has been committed,

(e) the child is being, or is likely to be, exposed to persons whose conduct is (or has been) such that it is likely that

(i) the child will be abused or harmed, or

(ii) the child's health, safety or development will be seriously adversely affected,

(f) the child has, or is likely to have, a close connection with a person who has carried out domestic abuse,

(g) the child has, or is likely to have, a close connection with a person who has committed an offence under Part 1, 4 or 5 of the Sexual Offences (Scotland) Act 2009 (asp 9),

(h) the child is being provided with accommodation by a local authority under section 25 of the 1995 Act and special measures are needed to support the child,

(i) a permanence order is in force in respect of the child and special measures are needed to support the child,

(j) the child has committed an offence,

(k) the child has misused alcohol,

(l) the child has misused a drug (whether or not a controlled drug),

(m) the child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person,

(n) the child is beyond the control of a relevant person,

(o) the child has failed without reasonable excuse to attend regularly at school,

(p) the child

(i) is being, or is likely to be, subjected to physical, emotional or other pressure to enter into a civil partnership, or

(ii) is, or is likely to become, a member of the same household as such a child.

(q) the child-

(i) has been, or is likely to be forced into a marriage (that expression being construed in accordance with section 1 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 (asp 15) or,

(ii) is, or is likely to become, a member of the same household as such a child.

(3) For the purposes of paragraphs (c), (f) and (g) of subsection (2), a child is to be taken to have a close connection with a person if

(a) the child is a member of the same household as the person, or

(b) the child is not a member of the same household as the person but the child has significant contact with the person."