



The Kilbrandon Lectures

Reflections on Care and Justice
for Children in Scotland

20th Anniversary



The Kilbrandon Lectures

Reflections on Care and Justice
for Children in Scotland

20th Anniversary

© Crown copyright 2012

You may re-use this information (excluding logos and images) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or e-mail: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This document is also available from our website at www.scotland.gov.uk.

ISBN: 978-1-78045-850-2

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

Produced for the Scottish Government by APS Group Scotland
DPPAS13045 (07/12)

Published by the Scottish Government, July 2012

Contents

Page

- 4.** Dedication
- 5.** Acknowledgements
- 5.** Editors
- 7.** Executive Summary
- 13.** The Kilbrandon Lecturers
- 16.** Introduction *Malcolm Hill and Raymond Taylor*

DEDICATION

This publication is dedicated to the memory of Professor Stewart Asquith, who initiated the Kilbrandon Lecture Series and was for many years closely involved in planning each lecture.

Professor Asquith had a long-standing interest in and commitment to the principles underpinning children's hearings. For his PhD at the University of Edinburgh¹, supervised by Professor MacCormick who later delivered the 5th Kilbrandon Lecture, he compared the functioning of early hearings with their juvenile court counterparts in England (later replaced by youth courts)¹. Much of his subsequent work concerned juvenile justice

(youth justice) and children's rights. Shortly after the first Kilbrandon Lecture, he became the holder of the newly created St Kentigern Chair for the Study of the Child and Society at the University of Glasgow in 1992.

Professor Asquith remained actively involved with the Lectures, even during a long final illness. He died on 13th April 2009. According to Stewart's widow, Elspeth Turner, he was 'openly proud' of the Kilbrandon series and 'delighted that it attracted not only well known speakers with things to say, but also provided a platform to challenge the status quo and suggest new ways of seeing and doing things'.

¹This was published by the Edinburgh University Press in 1983 under the title *Children and Justice: Decision-making in Children's Hearings and Juvenile Courts*.

Acknowledgements

The editors of this collection would like to thank Mr Joe Hamilton, Locality Reporter Manager, of the Scottish Children's Reporter Administration (SCRA) for the helpful comments he provided during the preparation of this publication. We would also like to acknowledge our appreciation of the work of Fiona Donnelly and Claire Laidlaw of the Development and Alumni office of the University of Glasgow for their assistance in organising the Lectures.

Editors

Professor Malcolm Hill is Emeritus Professor of Social Work at the University of Strathclyde

Raymond Taylor is Visiting Senior Research Fellow at the University of Strathclyde

The Kilbrandon Lectures

1. *The 20th Anniversary of the Children's Hearings System* – Sandford J. Fox 1991
2. *The Advent of the Children (Scotland) Act in 1995* – Fred Stone 1995
3. *Justice for Scotland's Children* – Donald Dewar 1997
4. *The Lost Boyhood of Judas* – Anthony Clare 1999
5. *A Special Conception of Juvenile Justice: Kilbrandon's legacy* – Neil MacCormick 2001
6. *Justice for Europe's Children* – Maud de Boer-Buquicchio 2003
7. *Modern Childhood: The image of the child in our society* – Trond Waage 2005
8. *Children in Conflict with the Law: An International Perspective* – Bjorn Cronstedt 2007
9. *Children's Hearings and the Love that Binds: Reflections on Community, Discipline and Exile* – Kathleen Marshall 2009
10. *Healthier Lives: Better Futures* – Sir Harry Burns 2011

Executive Summary

The Kilbrandon Lectures

This publication brings together the first 10 Kilbrandon Lectures. An extensive introduction integrates key themes from the Lectures. The Lecture Series was set up to commemorate the Kilbrandon Report of 1964, which led to the establishment of the innovative and still unusual Scottish Children's Hearings System. Some Lectures concentrated on the principles and practice of the Hearings System, whereas others explored related issues, including children's rights and family relationships. Later, Lectures also explored developments in other countries.

The Kilbrandon Report

The Kilbrandon Report considered how best the judicial system and associated services should respond to young offenders and children in need of care and protection. Among its main principles were:

- all children in difficulty should be dealt with in similar ways since their needs are similar, as are the origins of their problems;
- the main needs common to children requiring compulsory intervention are for education in its widest sense and support to those bringing them up;
- decisions about the facts in the case should be separated from decisions about what is best for the child;

- panels ‘vested with coercive powers’ should decide the outcome – not courts.

The Children’s Hearings System

The main Kilbrandon recommendations were incorporated in legislation and took full effect in 1971. Children’s panels were set up to be broadly representative of the local community, though, in practice, more panel members have been women, while older adults and professionals have been disproportionately included. Individual cases are dealt with by three panel members, one acting as Chair. A few formalities must be followed, but otherwise open discussion occurs, with family members, social workers and others present given opportunities to contribute as they wish. The children’s reporter service acts as gatekeeper and supporter of the children’s

hearings. The decisions of hearings are reviewed at regular intervals.

The central features of the hearings have been sustained intact for more than 40 years, but significant changes have occurred in response to research, changed circumstances and decisions of the European Court of Human Rights. Amendments include stricter guidance and training on hearings rules, the introduction and extended role of safeguarders, the creation of a national reporter service independent of local government and restrictions on reporters giving advice to hearings. Certain Lecturers have urged hearings to be more imaginative in using the flexible powers available to them.

Others have commended the light legal touch of hearings, where children represent their own views and have good access to

lay support. However, legal representation has become somewhat more common and the Children's Hearings (Scotland) Act 2011 made provision for a dedicated hearings advocacy service. This Act also created a single national body to take over from 32 local authorities the functions of recruiting, training and maintaining panels to serve on hearings.

The principles of the Children's Hearings System: 'welfare' and 'justice' models

For many years it was customary when describing the Children's Hearings System to contrast:

1. the Hearings System's predominantly '*welfare*' approach focused on determining what is best for the child, where the same process deals with wrongs done to the child and by the child;

2. 'justice' models in England, the USA and elsewhere that manage youth crime separately from care and protection. They place more emphasis on alleged offences and proportionate sentences.

Welfare-based approaches have been criticised both for excessively long 'sentences' and for inadequate procedural safeguards. Several Kilbrandon Lecturers, though, have defended the priority given to children's best interests by the Hearings System and its commitment to tackling the causes of underlying problems, in a spirit of social justice.

Support Services

The Kilbrandon Report urged the creation of a unified matching field organisation for hearings in each local authority. Kilbrandon envisaged a Department of Social *Education*, but in practice

responsibilities towards hearings have been assumed by social work services. Lecturers have regretted the perennial insufficiency of appropriate resources to carry out all of the hearings decisions as intended, though also noted that an inadequate range of services occurs in all systems. The Lecture Series has highlighted the importance of close collaboration between social work services and others, including education and mental health, in order to fulfil hearings' wishes.

Children's Rights

The hearings strongly embody three types of children's rights – to protection, participation and provision. Lecturers have emphasised the interconnectedness of these different rights. They have also admired the long-standing centrality in hearings of listening to children, though it has been noted that elsewhere in

society children's views are often ignored. In 2003 Scotland followed other European countries in creating a Children and Young Person's Commissioner post to promote children's rights. The Scottish Commissioner co-operates with other members of the European Network of Ombudspersons for Children.

Children's Activities, Material Circumstances and Relationships

Contemporary childhood is changing fast. Children spend much of their time separate from adults in specialised educational and play institutions. Commercialisation and new media have a major impact on their lives. Poverty makes it hard to give children a good upbringing. Young children's brains are affected by negative circumstances and the resulting changes in turn influence later social relationships and behaviour.

The Kilbrandon Report saw the family as crucially involved with the problems affecting children and hence at the heart of potential solutions. Like Kilbrandon, the Lectures have stressed the vital importance for future social and health outcomes of loving, responsive relationships that encourage self-discipline and a sense of responsibility. Speakers have highlighted how crucial it is for children to form positive mutual attachments, with fathers as well as mothers, and with others as well as parents. Family members, peers and professionals can help foster children's resilience. If formal intervention is required, the earlier it takes place, the more likely it is to succeed. The extent to which the state should intervene on certain issues remains controversial, as it does in relation to corporal punishment and to smoking within the family.

International Dimensions

The Kilbrandon Lectures have always sought to include comparative perspectives from outside Scotland. Speakers from elsewhere in Europe and the USA have praised the central tenets of the Hearings System, whilst occasionally giving gentle pointers to possible improvements.

It has been noted that the Scottish Children's Hearings System is affected by a number of obligations owing to international as well as national law. The UN Convention on the Rights of the Child gives children substantive rights, whereas Council of Europe Treaties strengthen their procedural rights. In some parts of the world, children continue to be ill-treated by government bodies, despite such internationally recognised agreements. Agencies like UNICEF

and NGOs are helping to build more humane youth justice systems and family support. The Council of Europe has also put in place measures to help resolve cross-border issues affecting children, such as inter-country adoption, custody disputes between parents living in different member states and the abduction, trafficking and sexual abuse of children.

The European Convention of Human Rights (ECHR) (incorporated into UK legislation) shares Kilbrandon's concern to place children and their parents at the heart of decision-making and has led to some positive changes in the Children's Hearings System. However, there are dangers that certain interpretations of its Articles could undermine hearings by obliging them to become more like courts.

Conclusion

The Kilbrandon Lecture Series, initiated by Professor Stewart Asquith and supported by the Universities of Glasgow and Strathclyde and the Scottish Government, has become a welcome means of re-examining in an accessible manner the ways in which children in Scotland are viewed and treated. The Lectures have discussed the principles and evolving nature of the Children's Hearings System. They have also charted changes in children's lives more generally and offered critical insights into how adults and children together can shape the future.

The Kilbrandon Lecturers

1. Sandford J. Fox, 1991 – obtained a law degree at Harvard and was appointed Professor of Law at Boston College in 1959, a position he held for more than 40 years. He was an adviser in drafting the UN Convention on the Rights of the Child and active in the fields of child abuse and juvenile delinquency. He was awarded a research grant by the US Department of Justice to study the Children’s Hearings System in Scotland, which resulted in the seminal work on the hearings co-written with Fred Martin and Kathleen Murray. He died in 2000.

2. Fred Stone, 1995 – senior consultant and Professor of child and adolescent psychiatry, played an innovative role in the development of child mental health services in Glasgow.

He was a member of the Kilbrandon Committee and was involved in children’s hearings from the start, serving as Chair of the Children’s Panel Advisory Committee (CPAC) in Strathclyde for several years. He retained an interest in the Hearings System throughout his life and co-authored with Andrew Lockyer a key text on the topic (Lockyer and Stone 1998). He died in 2009.

3. Donald Dewar, 1997 – studied law in Glasgow. Member of Parliament for Aberdeen South in the late 1960s, then Reporter to the Children’s Panel in Lanark, he served as MP for Glasgow Garscadden for over 20 years. Following various roles in the shadow cabinet, he became Secretary of State for Scotland in 1997.

After the re-establishment of the Scottish Parliament in Holyrood, he was elected as an MSP and became Scotland's first First Minister. He died in 2000.

4. Anthony Clare, 1999 – studied medicine in Dublin and trained in psychiatry at the Maudsley Hospital London. He held senior posts in psychological medicine in London before returning to his home country to become Medical Director at St Patrick's Hospital, Dublin. He also had a distinguished career as a radio broadcaster, including his famous series 'In the Psychiatrist's Chair'. He died in 2007.

5. Neil MacCormick 2001 – studied philosophy and jurisprudence at the Universities of Glasgow and Oxford. Following academic appointments in Dundee and Balliol, he

held a chair in public law at the University of Edinburgh for over 30 years. He was a member of the European Parliament from 1999 to 2004, appointed Queen's Counsel 'honoris causa' in 1999 and knighted in 2001. He died in 2009.

6. Maud de Boer-Buquicchio – was brought up in the Netherlands and studied law at the University of Leiden. For some years she worked in the Secretariat of the European Commission on Human Rights, becoming Head of Division in 1990. After a period as Deputy Registrar at the European Court of Human Rights, she was elected as Deputy Secretary General, Council of Europe.

7. Trond Waage, 2005 – worked for the Norwegian Government, was Director of Research at Child Watch International and led

the TV Department at the University of Oslo. He was Norwegian Children's Ombudsman for eight years and initiated the European Network of Ombudspersons for Children (ENOC). Subsequently, he became Special Adviser on children's rights at the UNICEF Research Centre in Florence.

8. Bjorn Cronstedt, 2007 – an ordained priest of the Church of Sweden and graduate of University of Uppsala. He worked for Save the Children Sweden in Latin America and founded an international organisation aiming to eradicate child prostitution and pornography. Later he worked with the Vietnamese Government to support families at risk of commercial and sexual exploitation.

9. Kathleen Marshall, 2009 – a lawyer by training, she worked in local government, then set up and ran the Scottish Child Law Centre in Glasgow. She chaired the Edinburgh Inquiry into the Abuse and Protection of Children in Care. Kathleen became the first Scottish Commissioner for Children, serving from 2004 to 2009.

10. Sir Harry Burns, 2011 – graduated in medicine at the University of Glasgow and worked in the field of general surgery. He then shifted direction into public health and became Director of Public Health for the Greater Glasgow Health Board. He was appointed Chief Medical Officer for Scotland in 2005 and held positions at the University of Glasgow. He was knighted in 2011.

Introduction *Malcolm Hill and Raymond Taylor*

The Kilbrandon Lectures

This publication brings together the first 10 Kilbrandon Lectures, all held at the University of Glasgow, which were delivered from 1991 to 2011. The Lectures cover a wide range of issues related to children. At the core has been interest in judicial and professional responses to children in difficulty, but this has been connected to ideas about children and to changes in childhood, the family and wider society.

The Lecture Series was set up in memory of Lord Kilbrandon, whose Report led to the establishment of the innovative Scottish Children's Hearings System. The first Lecture took place to mark the 20th anniversary

of their implementation. Hence, the topics are all related in some way to the hearings. Some have dealt directly with the Hearings System in Scotland, while others have been about broader aspects of childhood and several have covered children, policies and service far beyond Scotland. Each one has been connected to one or more of the critical concepts addressed by the Kilbrandon Report, such as children's welfare, youth justice, children's rights, and social justice.

The Lecture Series has been a joint venture between the Scottish Government (formerly the Scottish Office, then the Scottish Executive), and the Universities of Glasgow and Strathclyde. By custom, Lectures have

been introduced and chaired by the Principal or Vice Principal of the University of Glasgow. Commonly a Scottish Minister or Deputy has been present with relevant senior civil servants.

Lord Kilbrandon

The first Lecture in the Series was set up to celebrate the 20th Anniversary of the Children's Hearings System in Scotland, whose radically new approach to the treatment of children in difficulties was the result of the report of a Committee chaired by Lord Kilbrandon from 1960 to 1964.

Born Charles James Dalrymple Shaw, he studied at Oxford and Edinburgh Universities. He became an advocate in 1932 and Queen's Counsel in 1949. He was a Sheriff during the 1950s before he became a Senator of the College of Justice and Lord of Session, with

the judicial title of Lord Kilbrandon. In addition to chairing the Committee with whose fruits this publication is concerned, he served on the Commission on the Constitution from 1972, which foreshadowed Scottish devolution.

Speaking at the time when the UK Government had just introduced the Bill that would lead to Scotland having a devolved Parliament, Kilbrandon Lecturer **Donald Dewar** recalled that Lord Kilbrandon had played a significant role 'in the development of our thinking as Chairman of the Royal Commission on the Constitution' (p.4). Another Kilbrandon lecturer, **Neil MacCormick** stated that Lord Kilbrandon was 'certainly a fine judge, but was a great human being' (p.3). **MacCormick** became friends with the older man who was 'kind and avuncular, but by no means condescending' (p.3).

Lord Kilbrandon's widow attended the first few Lectures. His son, the Right Honourable Michael Shaw, has attended frequently, as have other family members on occasion. In 1997, **Dewar** expressed his pleasure that Lady Kilbrandon was present. He went on to say 'It must be a matter of considerable pride to Lady Kilbrandon and the family that some 33 years after the Committee reported, the principles enshrined in that Report have gained such respect from the country as a whole, from the System and indeed internationally' (p.4).

All Lectures were open to the public and presentations were expressed in an accessible manner, yet based on deep knowledge and experience of the subject matter. We hope this combination is reflected in the publication too.

In the rest of this introductory chapter, we shall outline key themes from the Lectures and, where appropriate, place these in a wider context and provide brief updates of the law, policies, practices and understandings. The themes include the Kilbrandon Report and the establishment of the Hearings System, operation of the hearings, childhood and consideration of the international dimension.

For the sake of clarity and brevity, when making reference to Kilbrandon Lectures' chapters in this publication we shall simply use the presenters' surnames in bold, while other works will be indicated using the surnames of the authors plus the year of publication, e.g. Asquith 1983.

The Kilbrandon Report

In 1961, a Committee was set up under the chairmanship of Lord Kilbrandon to consider measures necessary to deal with 'juvenile delinquency'² and children in need of care and protection. The Committee produced its report in 1964. One member of the Kilbrandon Committee was the eminent Scottish child psychiatrist, **Fred Stone**, who delivered the second Lecture.

The Report described the basic considerations that underpinned its recommendations. These are summarised by Lockyer and Stone (1998) as follows:

- To reduce or prevent juvenile delinquency by focusing on the needs of the young people

- Minimising the distinction between young offenders and those in need of care and protection
- Identifying the key need common to all children concerned as being for special measures of education and training
- Stressing the importance of involving and supporting parents
- Acknowledging that in over 90% of cases, the facts were not disputed, so a procedure for 'proving' guilt or innocence was often not necessary
- Recognition that a separate arrangement might be needed for particularly grave offences

Fox stated that Kilbrandon integrated law and 'the social context of delinquency' (p.3).

²This was the term current at the time for what later came to be referred to as offending by young people or youth crime.

Lord Kilbrandon and half of the Kilbrandon lecturers (**Fox, Dewar, MacCormick, de Boer-Buquicchio, Marshall**) held academic legal qualifications, so it is not surprising that the role of law has permeated a number of the presentations. In their own ways, though, each was interested in the world beyond legislation and court systems. They examined the interconnections between statutes, legal rules and processes on the one hand and society and social conditions on the other. As **Fox** stated, it was important to follow Lord Kilbrandon by avoidance of 'becoming bogged down in narrow legalisms' (p.1).

Crucial to the recommendations of the Report were its analysis of the underlying 'causes' of problems experienced or produced by

children³. It suggested that both poor care of children and misbehaviour by them resulted from similar circumstances. According to **Marshall**, Kilbrandon recognised the huge overlap between children who are neglected/abused and young people who offend. **Stone** suggested that 'possibly the most significant statement in the entire Kilbrandon Report' (p.3) was:

'the true distinguishing factor common to all children concerned is their need for special measures of education and training, the normal upbringing process having, for whatever reason', fallen short'.

The report gave particular attention to children who commit offences and it was the unusual approach to youth crime that

³ Here and elsewhere, use of the word 'children' normally includes 'young people'.

has been the main theme of many subsequent commentaries (e.g. **Fox**, Asquith 1998). In his Lecture, committee-member **Stone** was however at pains to refute the notion that ‘considerations of child abuse and neglect were but an afterthought’. **Stone** stressed that the Committee put care and protection cases first in the list of categories they envisaged hearings would handle.

Fox observed that the Report sought to balance the importance of children being held accountable for misdeeds with the principle that any arrangements made should provide for the child’s welfare. He asserted that the Report combined adherence to Scottish legal traditions with bold innovation.

The main recommendations made by the Report in light of these considerations were:

- To establish throughout Scotland a system of children’s hearings, with decisions taken by three lay volunteer persons, each children’s hearing to include representation from both sexes.
- To create a new kind of official, ‘the reporter’, to whom the police, other professionals or indeed a member of the public would refer any significant concerns that might merit compulsory measures. The reporter would decide whether a case merited referral to a hearing.
- If the grounds for referral were disputed, the case could not be disposed of by a children’s hearing until and unless the facts were upheld by a Sheriff.
- Decisions by a hearing would be enforceable and open to an appeal to a Sheriff and beyond that to the Court of Session. Latterly,

this would be extended to include the Sheriff Principal under the Children (Scotland) Act 1995.

- Hearings would routinely review cases (courts normally do not do this).
- The provision of social background reports and implementation of hearing decisions would be the responsibility of a new Social Education Department of the local authority.

Stone highlighted two main practical *organisational* changes recommended in the Report on the basis of its analysis of key principles and evidence about the causation of child and family problems. The first was to replace juvenile courts with a radically different system of 'juvenile panels'. These panels were to comprise three lay people,

'who either by knowledge or experience were considered to be specially qualified to consider children's problems' (Kilbrandon Report para 74). The panel was to make decisions according to children's needs, but would be 'vested with coercive powers' including that of removing children from home, so its decisions should be subject to appeal to a Sheriff (para 75).

The second was to create a 'matching field organisation' by means of a local authority Social Education Department. This reflected the view of the Committee that the primary purpose of juvenile justice systems was 'educative', to enable children to learn right ways of behaviour and live more fulfilling lives. Subsequently, the Council of Europe urged that juvenile justice systems should

'avoid repressive approaches and focus on education and reintegration' (**de Boer-Buquicchio** p.29).

According to **Stone**, basing field services in education had the advantage of universality, i.e. this was a service for all children not only those with problems. Also, schools were places where children were a 'captive population' (p.8) who could be easily accessed.

A major innovation proposed by the Report and enacted in the hearings was the separation of establishing the facts (*proof*) from the action arising (*disposal*) (**Stone, Dewar**). If the facts are denied, then that is dealt with in a different location by the Sheriff rather than the hearing. In other jurisdictions these two processes are normally handled in the same setting and are usually called determination of guilt or

innocence and sentencing. This conventional terminology has been avoided in the Scottish Children's Hearings System in keeping with the welfare emphasis of hearings.

The Report envisaged hearings working closely with parents (**Marshall**). The presumption was that nearly all parents had good instincts, perhaps 'latent or overlaid by extraneous factors' (Kilbrandon Report, para 18). **Marshall** expressed misgivings about this formulation. She pointed out that in some cases 'parenting skills are abysmally lacking' (p.27).

The Committee proposed the abolition of Remand Homes, some of which had led to what **Stone** called 'incarceration of children and young people in a Dickensian environment' (p.2). This recommendation was fulfilled,

although each year small numbers of children are 'locked up' in secure care.

The Establishment of the Children's Hearings System

The main Kilbrandon recommendations about judicial processes dealing with children⁴ were included almost unchanged in the Social Work (Scotland) Act 1968, which took full effect in 1971. Central was the removal of all cases from courts except the most grave offences involving children who offend in favour of children's hearings, where three 'lay' panel members made the decisions.

Kilbrandon had argued that making decisions about a child's welfare did not require legal expertise, so suggested that persons appointed to panels should be those with relevant

knowledge or expertise. It was through a later Government White Paper and subsequent guidance that the idea became entrenched that panel members should be representatives of the local community (Lockyer 1992; Reid and Gillan, 2007). In practice this has 'proven to be difficult' and **Marshall** urged that renewed efforts be made to improve links between hearings and their local communities (p.33). Children's Panel Advisory Committees were set up to advise the Secretary of State about the recruitment and appointment of panel members.

The Chair of the hearing was (and is) responsible for the conduct of the hearing and for following certain procedures, but otherwise the communication was intended to be informal, with all participants given

⁴In public law cases only – separation and divorce were not covered.

an opportunity to contribute as they wished. Hearings typically involve open discussion steered by the chair, rather than formal presentations and questioning typical of courts. The intention is 'to identify the character of the problem and the best way to deal with it' (**MacCormick**, 2001).

A new children's reporter service was established as part of each local authority to act as gatekeeper and supporter of the Hearings System. Although reporters in the early years of hearings were employed by local authorities, some degree of independence from local government was afforded by the fact that reporters could be dismissed or suspended by the Secretary of State (Lockyer and Stone 1998). Also the reporter service was separate from the *Social Work* Departments of local

authorities that were set up rather than the *Social Education* Departments that Kilbrandon had called for (see below).

Unlike panel members, reporters were full-time professionals, commonly but not exclusively with a legal background. Their role was to act as organisers and co-ordinators in relation to cases referred (**Dewar**). Among the functions carried out, reporters were to investigate the grounds for referral, decide whether voluntary or compulsory measures were likely to be needed and, if necessary, refer a child to a hearing. Where a child or parent denied the grounds, it was the reporter's role to lead the evidence before a Sheriff (Jackson 2003). Reporters also took on the task of arranging hearings and offering guidance about legal requirements to panel members. Reporters would also conduct

any Appeals before the Sheriff against decisions made by the children's hearing.

According to Lockyer and Stone (1998), reporters took a 'leading role in determining the character and practice in hearings' (p.41). The multi-faceted role was crucial to the satisfactory working of the System, but eventually was to leave reporters open to problems involving a perceived conflict of interest. Lockyer and Stone noted 'the close relationship between reporters and panel members was largely considered a strength, though it came to be seen in some quarters as an undesirable lack of independence' (p.41). Eventually, this would create problems in relation to the European Court of Human Rights, as is discussed later.

The grounds for referral to children's hearings were set out in the Social Work (Scotland) Act

1968 and modified in the Children (Scotland) Act 1995. They can be seen as falling into three groups (**MacCormick**):

- Welfare – e.g. the child lacks adequate parental care or is in moral danger
- Behaviour – e.g. truancy, drug or alcohol abuse
- Offending

The hearing only makes a decision about what should happen if *either* the grounds are accepted by the child and parents *or* when denied they have been proven before a Sheriff (**MacCormick**).

The Principles of the Children's Hearings System: 'Welfare' and 'Justice' Models

For many years it was customary when describing the Hearings System to contrast 'welfare' and 'justice' models towards children, particularly in relation to juvenile (youth) crime (Asquith 1983; Lockyer and Stone, 1998; Hill et al. 2007; Whyte 2012).

Typically, *justice models* focus on alleged wrongdoing, the truth of which must be established through fair procedures. These include individuals being made aware of claims against them, able to challenge allegations and entitled to legal representation to contest statements and, when appropriate, argue for mitigation in any sentence made. By contrast, *welfare models* focus on the needs of the child and seek to determine what is best to be done

through more informal discussion. They also give considerable autonomy to children, which **de Boer-Buquicchio** argued is essential in judicial proceedings that affect them. Since the aim in relation to offending is the same as in relation to care and protection, it is common for both types of case to be handled in the same setting (Hill et al. 2007).

In practice, most systems seek to achieve some kind of balance between welfare and justice considerations. Welfare models do take account of deeds (MacCormick), while so-called justice models take into consideration the child's interests. Several lecturers affirmed the vital importance of designing youth justice systems differently from adult arrangements (**Fox, MacCormick, Cronstedt**), which remains true of justice-based systems, though the

procedures are more similar than with welfare approaches.

In recent years, the USA and England & Wales have been based on largely justice considerations (Bottoms and Kemp 2007; Duquette 2007), while Scotland has adhered more to the welfare model, as have several continental European countries at least up to age 15 (Buist and Whyte 2004; Korpinen and Poso 2007; Hollander and Tarnfalk, 2007). In different ways, many American states and England and Wales had welfare-oriented systems in the 1960s. However, they moved strongly in the direction of more justice-oriented approach, which in England and Wales entailed the separation of youth courts from family courts dealing with care and protection. One of the main factors in this

change was concern that treating children differently from adults and not observing the same procedural rights as an adult court meant that children could be subject to deprivations of liberty that were very disproportional to the matter that brought them to the attention of the authorities (Duquette 2007; Mooney and Lockyer 2012).

Children's hearings embody the key features of a welfare-based approach. This includes eschewing a number of traditional terms like crime, sentence and order in favour of offending, disposal and requirement. **Marshall** summarised the reasons given in the Kilbrandon Report for turning away from a 'justice' or punishment-oriented model, which had hitherto characterised Scotland:

- A high standard of proof is required in 'justice' systems
- The focus on the offender makes it hard to extend treatment to significant others, like parents
- Obtaining longer-term treatment is difficult, as this could seem disproportionate to the crime
- The 'once and for all' nature of a sentence lacks the capacity to review progress of 'treatment'

Sometimes 'justice' approaches have been depicted as inherently more punitive with an emphasis on punishment (**de Boer-Buquicchio**), though that is not necessarily the case.

Welfare-based approaches have been criticised for excessive 'sentences' (Duquette 1994), but conversely have also been seen as insufficiently oriented to punishment and retribution

(**MacCormick**). Critics from a 'justice' perspective have also argued that in the past, welfare-based systems abused individual rights (**Fox, Duquette** 2007). One defence of hearings has been to assert that procedural safeguards are in place, especially at the proof stage.

A more substantive argument in favour of 'welfare' approaches, which also addresses the punishment issue, has been that hearings and welfare systems more generally are based on a different concept of 'justice' from that applied to systems dealing with crime.

MacCormick addressed this issue in his Lecture. He asserted that society in general must achieve a balance between efficiency and fairness, the market place and social distribution, human rights and access to resources. He argued that the upbringing of children should encourage honesty and

liberty by approving of and rewarding good behaviour and punishing bad behaviour. However, this only makes 'real sense to any participant' in a context of 'reasonable distributive fairness' (p.20).

Likewise, Archard (2007) indicated that the concepts of juvenile or criminal justice are linked to those of social justice, since the evidence points to a close link between criminality and the distribution of resources and opportunities in society. Similarly, child abuse and neglect is affected by material, status and gender inequalities.

MacCormick averred that abiding by laws is fostered by a sense of mutual responsibility within society. He pointed to the justification

for state sanctions arising from the fact that most people adhere to laws most of the time in a spirit of reciprocity and respect for others, but their voluntary compliance would be unfair if non-compliers could ignore their social obligations without consequence.

Turning to children, **MacCormick** suggested (in accordance with Kilbrandon) that both their misbehaviour and sufferings from abuse and neglect reflected a failure in their environment. It is not right to treat them like adults since they have not 'deliberately dropped out of the frame of non-contractual reciprocity'. Rather they 'have not yet been effectively inducted into the game' (p.23), in other words they are 'immature moral agents'⁵. Hence, state action should be directed

⁵This depiction of children as immature and lacking (full) moral understanding has been fundamental to children's legislation for many years, but has been challenged in recent years by writers who emphasise children's competence and agency (see e.g. James and Prout 1998; Zwozdiak-Myers, P. (2007).

at tackling deficiencies in the family or quasi-familial setting in which a child is found.

MacCormick echoed Kilbrandon in arguing that children's hearings – indeed any state system for dealing with troubled children – should primarily have an educative role. In order to reduce offending by children it is necessary to recognise and tackle socio-economic conditions.

MacCormick cited Asquith and Docherty (1999) that this approach is consistent not only with the UN Convention, but with the criminological literature.

The Operation of the Hearings

Several Kilbrandon Lecturers and others have noted the widespread acceptance of the Hearings System by those involved, most politicians and the public (**Fox, Dewar**).

Dewar commented that the involvement of ordinary members of the public enabled them to engage with and understand social problems, which benefited society as a whole. He recalled debates on whether panel members were too middle class, but believed that on the whole 'a representative base' had been achieved. The evidence is that panel members have always included a good range of occupational backgrounds and age, though women, people aged 45-65 and professionals have been over-represented. Importantly, even if greater involvement of people from less advantaged backgrounds is probably desirable, panel members are sufficiently diverse to demonstrate and increase public acceptability of the system (Murray 1976; Lockyer 1992; Reid and Gillan 2007).

Dewar praised the voluntary nature of panel membership and the commitment of individual panel members. However, he also voiced concern from his perspective as a former reporter that panel members could be inconsistent, misguided or trample ‘all over the family’ (p.5). He went on to say that this was rare and that the great majority of panel members displayed sensitivity and good sense.

Early research by Martin, Murray and Fox (1981) indicated that hearings had been largely successful in creating an informal atmosphere, but this was often at the cost of non-compliance with the procedural requirements. Also there were wide variations in the ways hearings were conducted. **Fox** stated that following the evaluation these ‘breaches of legally mandated procedures’

were largely put right by training and monitoring during the 1980s. Improvements in this respect have been confirmed by later evidence (Murray 1998; Hill et al. 2003; Reid and Gillan 2007).

The Social Work (Scotland) Act 1968 did not explicitly give children the right to attend their own hearing, but this was implied (Kearney 2000). **Dewar** recalled that at the time of the Report fears were put forward that ‘the child would be intimidated by social workers, by panels and by the circumstances’ (p.3). While this does occur in some instances, many children are able to handle the situation with confidence, understand what is going on and feel supported throughout the process. Some are aggrieved, but most appear to regard their hearings as fair (Hill et al. 2002; Waterhouse 2007; SCRA 2010).

Fox called for further systematic research, partly because of the growth in child abuse cases since the early evaluation. Not long after, in the mid-1990s the Scottish Executive did fund two major studies, which again affirmed widespread support for the System from all the key stakeholders, though also noted aspects that could be improved (Waterhouse et al. 1998; Hallett et al. 1998).

At the heart of Kilbrandon's thinking was that issues of crime by young people and their care and protection are inextricably connected. This was borne out by the study carried out in the 1990s by Waterhouse et al. (2002), which revealed that the majority of young people referred on offence grounds had been earlier involved in referrals about inadequate parental care, neglect or abuse and that disadvantage

was a factor in both. Research by Gault published in the SCRA report Study on Youth Offending in Glasgow (2003) supports the conclusions reached by Waterhouse.

Stone voiced his belief that not enough attention had been given to the hearing process itself and its potential for improving situations. He also wished that hearings had been more adventurous in their decisions, reminding his audience that the Kilbrandon Report had envisaged 'a variety of unorthodox conditions' (p.11) if these seemed beneficial. Similarly, **Dewar** argued that panel members had considerable power and suggested that these could be used very flexibly. Responding to the trend already apparent in the 1990s towards 'restorative justice' (see e.g. Whyte 2009), which has strengthened in subsequent years, he noted

that 'it is perfectly possible for supervision requirements to take initiatives which will accommodate forms of reparation and victim contact'.

This remains very rare, however. (**Stone**, 1995) echoed Cowperthwaite (1988) in remarking that the hearings had also made much less use of voluntary or informal measures than the Report expected. **Marshall** went further in suggesting that 'the Children's Hearings System as we know it, is a pale reflection of the Kilbrandon vision' (p.10). She felt strongly that too often hearings decisions were not implemented by the local authority.

The inbuilt reviews of hearings have been widely seen as advantageous and in contrast to most court systems. However it was long the case that often the panel members present

were not the same, although provision could be made to ensure that at least one person from the original hearing was there. **Stone** indicated that seeing the same case again enables panel members to gain feedback about the consequences of their earlier decisions.

Evolution of the Children's Hearings System

Since the inception of the Children's Hearings System, the core features have remained intact over more than four decades. There have, though, been a number of significant organisational transformations and certain detailed changes, in response to both external factors and internal review and evaluation.

The Children Act 1975, which applied across the UK and mainly reflected concerns south

of the border, introduced Safeguarders to the Hearings System. These were professionals appointed on a case basis when there was a conflict of interest between parents and children. Their initial usage was limited (Lockyer, 1994a; Kearney 2000).

Substantial changes to the reporter service were made by the Local Government etc. (Scotland) Act 1994. This abolished the 12 Regional and numerous District Councils, replacing them with 32 unitary councils. Hence the number of organisations responsible for supporting hearings almost tripled. Significantly the opportunity was taken in this Act to remove children's reporters from local authorities altogether and create a new national service independent from local government - the Scottish Children's Reporter Administration with

its headquarters in Stirling (Kuenssberg and Miller 1998).

Arguments for and against a local or national service were finely balanced and a recent report had recommended that on balance reporters should stay with local authorities (Finlayson 1992). It was thought by the Government though, that it would be hard to achieve uniformed high standards of practice in small units responsible to 32 authorities. **Dewar** observed that this was intended to provide for more consistent practices and procedures, though he also stressed the importance of hearings and reporters remaining in touch with local communities.

The Children (Scotland) Act 1995 led to substantial changes in terminology and practice in the broader children's field, but to a great

extent the main features of hearings were retained. Certain new principles applied to hearings, for instance that of minimum necessary or minimum intervention principle (Norrie 2005). This required that no order should be made unless it was better for the child to do so (Skinner and McCoy 2000). It supported efforts to divert children from compulsory measures, already inherent in the role of the reporter, but in some cases local authority policies were in tension with hearings in cases where the latter thought children needed to be in care (Kearney 1992; Lockyer 1994b).

Stone noted that the 1995 Act significantly marked a shift towards more frequent involvement of Sheriffs, particularly in relation to determining not only the facts in relation

to emergency child protection, but also the disposal. This development to some extent addressed the issue raised by **Fox** about the previous absence of legal representation in such cases. Nevertheless, **Stone** expressed concern about this move, and Lockyer (1994b) indicated that it breached the Kilbrandon principle that decisions about where a child should be cared for is essentially not a legal one.

Lockyer and Stone (1998) argued that the wording of the Children Act 1995 weakened the previous unqualified duty of hearings to listen to children. The 1995 Act did include a duty to take children's views into consideration, but this should depend on the age and maturity of the child. The 1995 Act extended the role of Safeguarders (**Dewar**).

They could now be appointed to a case whenever the hearing thought it was in the child's interest, though usually it involved a conflict of some kind among the viewpoints of child, parents or social worker (Lockyer 1992; Hill et al. 2003).

One of the main challenges to the core principles of the hearings has come from strong views among political and popular opinion that the welfare approach to offending by young people lacks sufficient deterrence, concern for the victims or even punishment.

In England and Wales the shift towards a welfare basis for juvenile courts that occurred in the 1960s was replaced by a return to a more traditional format from the 1970s onwards (Bottoms and Kemp 2006). In Scotland, the welfare approach has been retained but

with some modifications at the margins. Under the Conservative UK Government an exemption was introduced via the Children (Scotland) Act 1995 to the principle that the governing factor in decisions should be the best interests of the child. Sections 16 and 17 allow for hearings and courts to depart from the principle of paramountcy of the child's welfare 'for the purpose of protecting the public from serious harm'. Lockyer and Stone (1998) regretted this change.

The New Labour Government at Westminster from 1997 and the Coalition Scottish Executive from 1999 introduced a raft of measures aimed to improve responses to youth crime and other forms of anti-social behaviour (**Dewar**). It became common during the early years of the new millennium to talk of meeting needs

and addressing deeds. Whyte (2007) has emphasised that it is in a child's long-term interests to modify their deeds.

Dewar emphasised the necessity of seeking to prevent re-offending, but also reiterated the basic Kilbrandon principle that 'the offence and the social needs are bound up together'. McAra (2006, 2009), however, has criticised what she saw as 'the competing and contradictory logics' (p.383) introduced into children's hearings by the more punitive and managerial approach of the 1990s and early 2000s. McAra and McVie (2007; 2010) have drawn on evidence from the Edinburgh Study of Youth Transitions and Crime to claim that the hearings have shifted too far away from the 'founding commitment to decriminalization and destigmatization' (2010, p.211).

In the early days of the hearings, the great majority of referrals were on offence grounds, as they had been under the previous court system. However, gradually but steadily the proportion of care and protection referrals grew (Lockyer and Stone 1998), until eventually they outnumbered offence referrals. **Dewar** noted that between 1977 and 1995 the number of offence referrals increased a little, but the number of care and protection referrals almost doubled.

This change has a number of implications. For instance it means more younger children are involved in hearings cases. Usually very young children do not take part in hearings, though **Stone** suggested that it was valuable for even pre-verbal children to be present, partly because their behaviour would provide

helpful information. It is also more likely in care and protection cases that at least one parent has a conflict of interest with that of the child or will not be supportive of the child at the hearing. Among other things, this alters the interpersonal dynamics of the hearing process and also can raise different issues about who represents the child's interests (Lockyer and Mooney 2012).

Another priority of the first decade of the millennium was to tackle perceived delays in hearings, as in other court processes. Similarly, **de Boer-Buquicchio** stated that Council of Europe member states were addressing the time taken to deal with cases. As she said 'Justice delayed is justice denied' (p.32). The Scottish Executive during the early 2000s placed much emphasis on tight time-scales for hearings

procedures, with target periods set out for each stage (e.g. from referral to reporter decision; from decision to hearing). Such measures did result in significant reductions in the time taken by reporters to manage referrals and arrange hearings. Moreover, when combined with additional resources the timescale targets were popular with most reporters, panel members and social workers. However, the evidence about the impact on offending was inconclusive (Hill et al. 2007).

Since 1971, hearings have dealt only with young people up to the age of 16, except that young people already on supervision on their 16th birthday may remain involved. One exception to this rule is where a criminal court remits the case of a child over 16 and not on supervision to the reporter for the disposal of

the case by the Children Hearing (S49(6) & (7) of The Criminal Procedure (Scotland) Act 1995).

As Whyte (2007) noted regretfully, 'Scotland is now the only UK country and one of few in Western Europe where young people aged 16 and 17 are routinely dealt with in adult criminal proceedings' (p.161). A number of people have proposed that the hearings should cover everyone up to the age of 18. Lockyer (1994) observed that the 16-year age limit was inconsistent with that of the UN Convention on the Rights of the child. **Stone** believed more needed to be done to avoid young adults involved with hearings 'drifting into homelessness and sleeping rough' (p.10).

Legal Representation

It has been a longstanding tenet of the hearings, accepted by many legally trained personnel, that legal representation of children at the disposal stage is generally inimical to the informal style and consensual model of decision-making inherent to the system (Lockyer 1994b). It is argued that the notion of legal representation is most relevant to proof, though admittedly it can also apply to the notion of mitigation of 'sentencing' (Lockyer and Mooney 2012). In many respects children are often well able to speak for themselves and hearings facilitate this. Moreover, a range of other individuals are routinely present to help represent their interests and views, notably parents, carers and social workers.

In more difficult situations, Safeguarders can be appointed (Hill et al. 2003). **Fox** noted, however, that children (and parents) might be reluctant to appeal against hearings decisions unless they have access to legal aid and advice. Lockyer (1994b) countered that it was sufficient that children and parents be aware of their rights to obtain legal help if they wished to appeal and not necessary for lawyers to be present at a hearing.

Criticisms about the absence of access to legal representation were particularly concerned about child protection cases, where hearings had acquired the power to make place of safety orders, so children could be taken to or placed in a safe location when they appeared to be at imminent and serious risk of harm.

Fox cited Article 37(d) of the UN Convention on the Rights of the Child⁶ to suggest that children subject to place of safety orders did not have ready access to legal help. Subsequently these orders were replaced by Emergency Child Protection Orders under the Children (Scotland) Act 1995 which are dealt with by Sheriff Courts (Kearney 2000).

Duquette (1994; 2007) has been supportive of the non-adversarial and co-operative approach of children's hearings, but nevertheless felt that it would be valuable for children to have a legally qualified advocate who could where necessary challenge local authorities and also act 'if the hearing is not conducted according to the rules' (p.134).

⁶For the sake of brevity, this will henceforward in this chapter be referred to simply as the UN Convention.

Duquette claimed it would be helpful to have an independent child advocacy service that would be continuously involved with all children who appear before hearings. The advocate would 'give voice to the child' (p.136) and for older children take on the child's viewpoint. He acknowledged the difficulties that can arise for younger children where an advocate may seek to substitute his/her view of the child's interests, an issue further explored by Mooney and Lockyer (2012). While strong views have been expressed in Scotland that widespread use of legal representation would undermine the consensual approach of hearings (Lockyer 1994), Duquette has argued that child advocates could be selected and trained such that they operated in a non-adversarial manner.

⁷ For further details see later section

Recent Changes to the Hearings System

Significant changes to hearings and the associated support services were made by the Children's Hearings (Scotland) Act 2011. The new 2011 Act will improve outcomes for children, produce greater national consistency, ensure that the system is compliant with the European Convention on Human Rights⁷ and simplify arrangements for warrants and orders (Scottish Government 2011). Certain measures in the Bill that preceded the Act were controversial and the Minister Adam Ingram commented that opinion differed too widely on some issues to accommodate all views.

Section 25 of the Act reinforces the 'welfare' principle embodied in earlier legislation. In reaching any decision relating to a child 'the children's hearing, pre-hearing or court is

to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration' (S.25). Not only should hearings prioritise the child's interests, but they should also take a long-term perspective on the child's welfare – throughout childhood.

The main change introduced by the 2011 Act was to create a new Non-Departmental Public Body with the name Children's Hearings Scotland, headed by a National Convener. This new organisation will take on the role of Children's Panel Advisory Committees and take over from local authorities the functions of recruiting, training and maintaining panels to serve on hearings. Thus a single national panel will replace 32 separate children's

panels. Similarly a single national panel of Safeguarders⁸ was created to handle appointment and removal of Safeguarders, training and payment. Critics of these changes argue that this will result in excessive centralisation, whilst the rationale in favour is that the new body will increase impartiality and independence. In the past local authorities have had certain managerial and support roles in relation to the Hearings System while also being an interested party in most cases.

The National Convener has a duty to set up Area Support Teams. The National Convener's functions such as, for instance, organising panel member rotas and local training may be delegated to ASTs.

⁸ Safeguarders may be appointed by hearings or Sheriffs to assist with the proceedings where it appears to be in the child's interest to do so.

The Act contains a number of other important measures, e.g. concerning the sharing of information about the implementation of hearings decisions. Children's participatory rights have been extended. The Act will provide for the establishment of an advocacy service specifically for children in the Hearings System, with a remit to provide support before, during and after a hearing, along the lines suggested by Duquette (2007). Supervision requirements will be replaced by compulsory supervision orders and it is planned to introduce secondary measures to allow these to be used flexibly, as recommended by **Stone, Dewar** and **Marshall** among others. The grounds for referral to hearings in the main have been incorporated from previous legislation, but there have been

some amendments and additions, such as the reference to exposure to domestic abuse in Section 67(f) and special measures for children accommodated by a local authority or subject to a permanence order⁹ (S.67(h) and (i)).

Following the Act, the Principal Reporter and SCRA will continue their functions largely as before, with an explicit guarantee of independence (S 22, CH(S) Act 2011).

Social Education and Social Work

Although the Kilbrandon proposals for children's hearings were implemented largely as recommended in the report, the proposal to create a Department of Social *Education* as a matching field organisation was not. Instead local authority Departments of Social *Work* were established separate from Education

⁹Permanence Orders were introduced by the Adoption and Children (Scotland) Act 2007 to 'provide legal security and stability for children who are to be looked after long-term and who cannot return home' (Clapton and Hoggan 2012, p.21).

Departments, following the Social Work (Scotland) 1968. This reflected the emerging status of social work as an integrated profession and a commitment to establishing generic services dealing with the whole life span, witnessed in the creation of Social Services Departments in England and Wales at about the same time. As **Stone** recalled, Lord Kilbrandon 'accepted graciously' the change. As Kilbrandon intended, the new services were family oriented (Martin 1982).

Stone's own preference was for a comprehensive child mental health service. As a psychiatrist, he tended to refer to responses to child problems more in terms of treatment than the phrase 'education and training' used in the Kilbrandon Report. He asserted that complex and severe childhood problems required

skilled multi-professional input. Drawing on the prevailing evidence at the time of his Lecture, he said 'the more effective methods of treatment tend to be goal-directed, focused on the family as a whole and relatively short-term' (p.6).

According to Gilmour and Giltinan (1998) the new departments brought about a difference in emphasis from both the education espoused by Kilbrandon and medical treatment advocated by **Stone** in favour of support and service provision. Gilmour and Giltinan stated this entails securing the appropriate resources for children rather than affecting cures - a stance that is similar to that propounded by **Burns** from a health perspective.

In practice, social work services have always worked closely with education services in

relation to troubled children. Initiatives such as community schools and inter-disciplinary assessment meetings have helped co-operation (Stead et al. 2004). It has been argued that teachers' values and the availability of pastoral supports in schools have resulted in some of Kilbrandon's hopes being fulfilled (Forest 1998). Interestingly, from the 1990s onwards, children's services (later children and family services) increasingly became specialist parts of Social Work Departments and some authorities established joint departments combining education and children's social work services. In recent years, it has become common for educative programmes to be provided in Scotland as elsewhere, often by voluntary organisations, though more often focused

on young people than parents (McGhee et al. 2003; Korpinen and Poso 2007; Whyte 2009).

Over the years, though, recurrent concerns have been expressed that the departments have lacked the capacity to meet the competing demands placed on them (Martin 1982; Lockyer and Stone 1998). It has been suggested (at times vocally by panel members themselves) that the resources available are inadequate in the sense that the support, programmes and accommodation needed to carry out disposals effectively are insufficient in quantity, quality or both. In this context, the term 'resources' has mostly referred to local authority field social workers, residential or foster care, and specialist programmes, although shortages in education provision and child mental health services have also

been a recurrent issue. Reflecting American as well as British experience, Fox observed that it is a perennial and universal struggle to combat 'chronic under funding' with its 'serious consequences' (p.5). **Stone** stressed the importance of good facilities and support to panel members, but highlighted that the most important resource was the people themselves.

Partly as a result, there have been recurrent tensions between hearings and social workers, perhaps inevitably so. Panel members have often been frustrated when social work departments have in their eyes failed to carry out requirements as expected. At times, this has been 'excused' as resulting from excessive work demands and organisational factors (Lockyer and Stone 1998).

Fox identified that all jurisdictions face the issue of the distribution of power between courts (and similar judicial bodies like children's hearings) and the bodies responsible for carrying out orders. **Fox** described conflicts in the 1960s in Massachusetts between judges and youth services. In the Scottish context the equivalents are hearings and local authorities. The legislation in Scotland gives panel members wide discretion to stipulate conditions to supervision requirements, but in practice it has been rare to do so except with respect to place of residence or in regulation of contact between the child and relevant persons or others. This means that what happens to a child under supervision has been largely a matter for the local authority to determine.

However, discussions at hearings may include preferences and expectations expressed by the panel, sometimes strongly. On occasion, this has resulted in panel members' dismay during review hearings to find that their expectations have not been fulfilled, whether because of resource shortages or a difference of opinion by the local authority. A related issue has been the perceived lack of specialist expertise among social workers (**Stone**).

Dewar acknowledged that social workers had come under criticism, particularly in relation to child protection cases, but paid tribute to their commitment in the face of difficult judgements and tasks. A review of social work carried out by the Scottish Executive affirmed the value of social work services (Scottish Executive 2006). Social workers have been broadly very supportive of hearings, especially when

compared with court-based systems, but some have felt that at times panel members are unable to accept or understand arguments based on children's needs, particularly when swayed by parents (Gilmour and Giltinan 1998).

Fox recognised that there were resource limitations affecting the ability of field agencies to carry out the wishes of hearings, but he said this was a universal phenomenon that could not be avoided. **Marshall** took a more robust stance on this issue. She stated that it was necessary for society to make sacrifices in other respects in order to make sure that adequate resources were available to help Scotland's most vulnerable children and their futures. She called for public debate on priorities for cutting to make way for spending on children's services.

Marshall also noted that delays and failures to implement hearings decisions had been longstanding, despite the wording of Kilbrandon that panels should be able to ‘*command* services needed for a child’s social education’ (Recommendation 6).

Marshall welcomed a new power given to hearings in 2004 to require a local authority to comply with the terms of a supervision requirement. She argued that panel members should be more prepared to challenge local authorities, not in order to blame them but to try and ensure a better response and to expose gaps in provision. The Children’s Hearings (Scotland) Act 2011 requires the National Convener, when requested by a hearing, to apply for an order to oblige a local authority to comply with a hearings decision.

Inter-agency Co-operation

Throughout the history of hearings, social work services within local government have been the primary agency carrying out assessments, providing reports to hearings and taking legal responsibility for children placed on supervision. Education departments have provided school reports and also had a significant part to play in plans for children. Other statutory and voluntary services have always played a part in support to children and families dealt with by hearings, but the necessity for different agencies working with children to collaborate closely received impetus from a series of Scottish Executive and Government policy documents, culminating in *Getting it Right for Every Child* (Stradling and Alexander 2012).

Dewar supported ‘the need to look at the whole child’ (p.9), while recognising the pressures and competing priorities faced by those concerned. He emphasised the role of reporters in coordinating assessment and actions.

Despite efforts at national and local level to improve co-ordination, errors and problems have persisted, as noted in child abuse enquiries such as those of Caleb Ness, echoing issues south of the border (Laming 2004; Munro 2011). Similarly, **Cronstedt** said that in Sweden there was ‘an absence of coordination and cooperation between professionals, a tendency to avoid difficult issues such as domestic violence, physical and sexual abuse’ (p.28). Duplication of effort and failures in communication between different professionals have been prevalent in Sweden

as in the UK. One means of overcoming fears about and barriers to co-operation may come from improved interprofessional training at qualifying and post-qualifying levels (Kuenssberg et al. 2012).

Children’s Rights

It has long been recognised that children have rights in addition to those shared with adults that pertain to any human being, although equally the basis and nature of such rights has been a matter of disagreement (Archard 2004; Lockyer 2012). Nearly all governments of the world have subscribed to the rights set out in the UN Convention on the Rights of the Child. This sets out as the over-riding principle that in all judicial and administrative decisions affecting them, the child’s best interests should be the main consideration. Of course, this begs the question of who can or should

decide what is in a child's best interests and on what basis they should do so.

Despite widespread official commitment to children's rights, ignorance and ambiguity about them persists. **Cronstedt** commented that even Sweden, the first signatory of the UN Convention, has not introduced a duty for schools or professional training to promote an awareness of children's rights.

The key rights have sometimes been grouped into three Ps (**Waage**):

Protection – e.g. in relation to war, violence, neglect, exploitation

Provision – e.g. to education and health services

Participation – to have their views taken into account in matters affecting them

Arguably there are other important rights, notably the right not to face discrimination on the basis of ethnicity, gender, legal status and so on (**de Boer-Buquicchio**).

It has long been recognised that there is a tension between children's welfare and participatory rights (Archard 2007). Children's views *may* not correspond with what is in their best interests, partly because they may lack the understanding and foresight to judge what is best. Few deny that what children want may not be in their interest, and indeed, the same could be said of adults. For this reason, hearings and other decision-making bodies are expected to see a child's interests as a *paramount* consideration. They must also take into account a child's views, but need not follow these if that

is contrary to the child's welfare (as judged by panel members).

Even then, Archard (2007) suggests that hearings should in principle accord greater weight to a child's views when the child is more mature, since it is the child's (presumed) lack of competence that justifies paternalism. Archard also indicates that an overemphasis on children's participatory rights and hence their competent agency could undermine the case for dealing with them on a welfare basis, since they must then be seen as responsible for their actions, just like an adult. Conversely, Tisdall (1997) warned that the 'age and maturity' qualifications that take account of children's rights can result in their right to be heard being 'engulfed by paternalistic views of their best interests' (p.89).

However, some suggest, as did **Waage**, that these two kinds of right are best seen as interdependent: provision and protection are best achieved when children are involved in the process. Marshall (1997) and Archard (2004) argued that children's perspectives normally form an important means of reaching a conclusion about what is best for them.

Acceptance of participation rights has probably been slower and more partial than with respect to protection, welfare and provision rights. The need for hearings to take seriously the views of children was stressed in the Kilbrandon Report, made a duty by the Social Work (Scotland) Act 1968 and reinforced in subsequent legislation. **De Boer-Buquicchio** supports the empowerment of children whereby they are not the object

of family proceedings but able to exercise ‘a number of subjective rights’ (p.11).

Waage suggested that giving children a voice has become commonplace in a range of public settings. ‘The problem is we don’t have ears to listen to them’ (p.22). He also suggested that adults and adult power are threatened by moves towards greater participation by children. Further, he stated that schools concentrate too much on prescribed subjects and not enough on developing individual children’s potential.

On a wider front, **Waage** argued that the voting age should be lowered, that nursery education should include democratic processes and that schools ‘fail to promote participation as a learning opportunity’ (p.25). **Cronstedt** also suggested that lowering the voting age would

lead to positive changes for children. As others have done (James and Prout 1998; Mayall 2002) he challenged traditional thinking about child development, especially that derived from Piaget, which has been very influential in professional education.

MacCormick by contrast stressed children’s welfare and protection rights. He argued that the main rationale for judicial systems to deal with children separately and differently from adults lies in the fact that children have not yet acquired adult moral discernment.

Fox similarly warned of the dangers of treating children as if they are fully comprehending, since this could undermine their welfare rights that entitled them not to be punished in the same way as adults. Archard (2007) suggested that an excessive emphasis on

children's participatory rights owing to their presumed competence could remove the case for children to be dealt with separately and differently from adults.

Cronstedt discussed an important right that tends to be taken for granted in Europe – namely the right to a name and hence nationality and identity. He cited the example of Paraguay where in 2002 one-fifth of children had not had their births registered. This resulted in exclusion from health care and education. NGOs have helped fast track registration of children in Paraguay and elsewhere.

The Role of Children's Commissioners

In many countries it has become standard in just the last few decades for governments to establish Commissioner services to support

the rights of children. The 7th Kilbrandon Lecturer (**Waage**) was a former Ombudsman in Norway, while the 9th was the first Scottish Commissioner (**Marshall**).

The first post of Ombudsman (or Commissioner) for Children was established in Norway, with a view to promoting and protecting children's rights. Since then many countries particularly in Europe have established similar positions, as recommended by the UN Convention and Council of Europe (**de Boer-Buquicchio**).

The European Network of Ombudspersons for Children, initiated by **Waage**, now has more than 20 members. The first Children's Commissioner in the UK was appointed in Wales in 2001, with Northern Ireland then Scotland following in 2003.

The remits and powers of Commissioners vary, even within the UK (Marshall and Williams 2012). For instance, the Commissioners in Wales and Northern Ireland may undertake individual casework, whereas those in Scotland and England do not have the authority to do so. The Northern Ireland Commissioner is the only one with the power to initiate legal proceedings. After wide consultation with young people, the first Scottish Commissioner identified three main priorities for children – safety, activity and happiness.

The European Commissioner on Human Rights has a wider role with respect to both children and adults. This Commissioner has general duty to develop awareness of human rights and promote effective observance of relevant Council of Europe instruments. Attention has

been given to such matters as the impact of domestic violence on children and the treatment of refugee children (**de Boer-Buquicchio**).

The nature of childhood

Ideas about children's rights are closely connected to differing views of children. For instance, welfare rights reflect a perception of children as immature and vulnerable, whereas participatory rights put greater emphasis on children's competence (Archard 2004).

In many academic areas (sociology, history, geography, social policy) the last few decades have witnessed a critical examination of adult conceptions of childhood (Holloway and Valentine 2000; Mayall 2002). Emphasis has been put on the highly variable expectations

for children, which help shape many different kinds of childhood.

At the same time, children's agency in creating their own worlds has been explored. It is recognised that the behaviour of both adults and children is crucially shaped by prevailing ideas about what is appropriate at the particular time in a given society. Thus, the Hearings System embodies notions about children widely accepted in Scotland, but more contentious elsewhere – in particular that circumstances as much as intent affect their behaviour and that they are usually capable of reform through education and family support. Yet, **Marshall** argued that there remain cross-currents demonising children and restricting what they can do and where they can go. **Cronstedt** illustrated how the harsh treatment

of children in many parts of the world reflects a negative view by powerful adults of children, especially those who are in conflict with the law.

Waage discussed how the treatment of children in Europe has changed markedly over the centuries in line with changed views of the nature of children. He noted in particular the exclusion of children from work and the development of free access to education but also the lack of respect, which some children feel in school. More recently, he highlighted the IT revolution and the power of fashion.

Waage summarised many key characteristics of contemporary childhood, describing children today as:

- the 'not yet' generation – not able to do things adults can
- the negotiation generation – able to persuade adults to take account of their views
- institution generation – spending much of their time in nurseries or school and organised play settings
- individualised generation – putting stress on personal responsibility
- commercial generation – keen to buy things, especially to keep in with youth fashion
- media generation – spending much of their time in front of TVs and computers

Waage described risks to children from the spread of new communication media. By illustration, he pointed to the dangers of adults contacting children by 3G phones to commit offences against them and the humiliating

consequences of certain photos posted on-line. For **Waage** the appropriate response is not to ban usage of new technology. Instead a range of measures is needed. They include teaching children to take responsibility for their own actions and for others; parental vigilance; regulation of supply and consumer ethics.

Children's Welfare and Needs

One of the key children's rights recognised by both the UN Convention and the Children (Scotland) Act 1995 is that children's welfare or best interests should be the main consideration in decisions affecting them (the degree of influence of this welfare principle varies somewhat depending on the kind of decision being made). In order to determine what is best for a child, it is necessary to understand children's needs, while recognising that

the notion of need can be an elusive and subjective one (Hill and Tisdall 1997).

Stone summarised academic understandings of children's main emotional needs as being for love and discipline. These also formed two of the themes explored by **Marshall**. She quoted from young people's understandings about the kind of love they want from adults – family, professionals and others. Such love entails understanding, standing by, listening and offering respectful challenge.

Marshall explained that love is not blind: it recognises negatives but sees beyond them and works through them. This is a crucial feature of intimate relationships recognised by attachment theories, discussed further below.

Stone further observed that most children coming before hearings were materially

and socially 'disadvantaged'. Their families typically experienced poverty, poor accommodation, social isolation, stressful relationships, separations and substance misuse. Likewise **Clare** argued passionately that crime emerges from poverty, lack of early positive attachment, abuse and absence of meaning, so it was unhelpful to portray even child murders as monsters and innately evil. He criticised 'simple-minded' responses to violent crimes and murders by children and young people.

Clare argued against building more prisons and in favour of the 'need to understand and prevent such behaviour', as Kilbrandon had urged. This assessment fits with the work of senior police in Strathclyde and elsewhere who have emphasised that violence reduction

requires early multi-agency efforts and that violent offending is best addressed by a blend of firmness and offering opportunities for more pro-social activities (VRU 2010; Carnochan et al. 2012). **Marshall** however pointed to evidence that many young people lack trust in the police and other professionals.

During the new Labour years it became standard in policy and practice to use the term 'social exclusion' to refer to a range of material and social processes which meant certain individuals were left out of many of the opportunities and activities experienced by the majority of the fellow citizens (Hamilton 2011). **Marshall** preferred to use the more 'gutsy' word exile. She noted how this word applied most literally to refugees, whose numbers in Scotland have increased in recent years. However, others

kinds of children experience enforced or self-imposed exile from their community. Children's hearings can send children away from their own community. Also children may be isolated (internal exiles) on account of stigma, mobility issues, caring commitments and so on. Anti-social behaviour and dispersal orders can banish groups of children from certain areas, as can mechanisms designed to protect residents.

Marshall stated that children require not only love, but controls, also pointing out that the UN Convention mandates appropriate discipline. This does not equate with punishment: 'discipline should never harm' (p.22). Rather, gentle guidance, education and providing a good role model are among the best ways to promote virtue.

An exciting scientific development in recent years has been the investigation of the human brain. It has long been known that biological drives have an effect on behaviour including violence, but 'as one factor among many' (**Clare** p.24). The Lectures by **Clare** and **Burns** highlighted the reverse process – how the brain responds to environmental stresses in ways that mean some people become more predisposed to negative engagements with other people. **Burns** gave evidence of the connections between brain activity and social circumstances or activities, illustrated by significantly greater incidence of plaque inflammation among poor people and high cortisol levels in children who have spent a long time in orphanages.

Dewar noted evidence from English research about the factors in youth crime, including low income, poor housing, impulsivity, poor discipline, parental conflict and low school attainment. He regretted the continuing high incidence of poverty and health problems in Scotland, and especially in Glasgow.

Burns provided charts showing how Scotland's health is poorer than that of a number of comparable countries, though in certain respects like smoking the record is better than most. He demonstrated how poor health is closely linked to income deprivation. Hence, **Burns** believed that health is a characteristic which emerges when individuals live in a fair and civilised society, a conclusion very consistent with the Kilbrandon philosophy. Like Kilbrandon, **Burns** also declared faith

in the altruistic nature of most people and communities, citing Adam Smith's view that a concern for others is as much a human quality as selfishness.

Stone pointed to the desirability of promoting resilience to help overcome unfavourable circumstances (see Luthar 2006). He indicated critical factors including supportive relationships in the family, with peers and at school. On the other hand, citing psychological research, he cautioned that many children do not simply 'grow out of' early difficulties (p.5). Unless there are concerted efforts to produce changes in the child's circumstances, problems will often persist and even magnify. Similarly **Burns** cited the work of Antonovsky and his concept of salutogenesis, which refers to 'factors that support human health rather

than those which cause disease' (p.15). One key ingredient in salutogenesis and resilience is a sense of coherence - namely confidence that the world is 'structured, predictable and explicable'. This may be linked to policy and practice approaches that are based on health assets not deficits, just as resilience frameworks stress building on and up strengths and resources (Hill 2012).

Burns notes that health assets comprise anything that sustains well-being and acts as a buffer against life's stresses. He suggested that there are four main types of health assets:

1. economic assets - mainly influenced by the private sector and central government
2. environmental assets - mainly influenced by local government and the community

3. social networks – mainly influenced by the community
4. personal sense of control – mainly influenced by the community

While stressing the importance of economic and environmental conditions, **Burns** also stated that lives could be transformed through the intervention of individual professionals and informal supporters, especially when this is based on non-judgemental trust building. Success lies in the quality of the interactions between the individual and his supporters.

It is hard to measure whether children's lives have improved or not over the 40 years since hearings began. **Stone** observed that children's lives had changed considerably in the years since the Kilbrandon Report. On the plus side, they were on average bigger and healthier,

while many were active in 'sport, music, in voluntary services, quite apart from their computer sophistication'. Yet, there had also been an increase in drug abuse, suicide and what we would now call self-harm. **Clare** cited a report from the Mental Health Foundation indicating that children had become more subject to family instability and parental stress. They were also less able to cope 'with the ups and downs of life' (p.31).

Dewar and **Cronstedt** emphasised the importance of early intervention, i.e. trying to identify children with difficulties at an early age and provide appropriate measures to prevent problems escalating (Asquith et al. 1998; Korpinen and Poso 2007). **Dewar** cited English research showing that early offending was a significant predictor of habitual crime later in life. He advocated a range of

early preventive measures, including good quality nursery provision. Likewise, **Cronstedt** advocated special support for children having difficulties in school and appropriate programmes to help families.

Children and the Family

The Kilbrandon Report saw the family as being crucially involved with the problems affecting children and hence at the heart of potential solutions. This is why the hearing was designed to foster open communication among family members, who had traditionally been passive or made only minimal contributions to the decisions within court systems.

Family relationships were central to the talk by **Clare**. His Lecture was intriguingly entitled – *‘In the lost boyhood of Judas, Christ was betrayed’*. The implication was that the actions

of adults are rooted in their experiences as children. As he pointed out, upbringing does not determine what happens later, but it does have a very powerful effect. **Clare** observed that it seemed like common sense to state that parenting is important, but he was conscious that in the behavioural sciences and elsewhere it had become common to suggest that ‘children growing up are much more significantly shaped and moulded by the influence of their peers, their teachers and the cultural atmosphere’ (p.5).

Clare wished to reassert the importance of parents and in particular redress neglect of the role of fathers. He challenged the tendency in the social science and psychological literature to write ‘parent’ but mean ‘mother’. Much research had been carried out on mother-child

relationships, some of which led to 'mother-blaming', as in interpretations of the causes of various mental health problems. In contrast, research on fathers had been very limited.

He briefly reviewed the views of two key theorists about parents. He indicated that Freud gave a central role to mothers and expressed ambivalence about fathers partly on account of the character of his own parents. Bowlby's work gave rise to attachment theory, which has become central to understanding about children (Howe, 2011; Minnis and Bryce 2012) and has featured strongly in children's panel member and social work training.

One of Bowlby's earliest concepts was that of maternal deprivation, which he believed responsible for a range of childhood difficulties. Over time he modified this

position, but according to **Clare** 'the crucial role of the mother remained' and fathers figured 'in a supportive role' (p.9). Again, the ideas reflected Bowlby's own life, since he was a workaholic who became impatient if his children intruded while he was busy.

Burns highlighted an important concept in attachment theory - the 'internal working model', developed by Bowlby's successor, Ainsworth. The interactions between an infant and the primary caregiver create in the infant a model of what close relationships should be like. The child who is cared for warmly and responsively comes to expect and give trust, whereas the child who has been neglected or abused develops a model of mistrust and antagonism.

Burns linked this to recent understandings of the working of the brain, in that violent or unpredictable parenting produces stress, which adversely affects the functioning of the brain, including development of cognitive skills. Not surprisingly then, according to Burns, adverse childhood events such as parental abuse, alcoholism and mental ill health, are statistically associated with later behaviour (e.g. teenage pregnancy, violence and alcoholism in adulthood, even heart disease).

Clare claimed that many men felt ineffectual and they were often portrayed as lacking responsibility, but increasingly there were expected to be accessible, loving, disciplinarian and so on. Greek myths and the Bible offered precious few examples of 'good' fathers. Research had shown that father-absence

was linked to a range of difficulties, such as failure at school, substance misuse and suicide. According to the Growing Up in Scotland study (2009), about one in five younger children in Scotland do not live with their father, though two-thirds of these have contact with him.

Clare said that recent research showed that when fathers spend a lot of time interacting with their children this tends to foster self-confidence, empathy and flexibility in children. Active fathering also correlated with intelligence and academic achievement. It may be that other factors influence these statistical associations, but **Clare** referred to an American survey that controlled for many of such factors.

Clare made a further claim, which he recognised to be controversial - namely that marriage is critical for men. He noted that unattached

males committed most offending and violent behaviour. Studies have indicated that the absence of nurturant fathering can lead to 'over-compensatory masculine behaviours' (p.19). **Clare** concluded that there should be a re-ordering of employment so that both men and women could fulfil their roles as parents and workers satisfactorily. Alongside this, the domestic sphere (bringing up children) must be valued and not seen as inferior to activity in the public sphere.

De Boer-Buquicchio indicated that both the European Convention (Article 8) and the UN Convention make the child's interests paramount in situations of family conflict or separation, 'making it possible to safeguard children's relationships and contacts with parents with whom they do not live' (p.13).

Thus, the guidance to the Children (Scotland) Act 1995 emphasises the presumption in favour of contact with parents for looked after children unless it is contrary to their interests.

Thinking and practice about post-divorce arrangements have also shifted towards maintaining relationships with both parents, except when this is contrary to the child's welfare. It has become normal practice across Europe to take account of separated children's views in reaching decisions about them (**de Boer-Buquicchio**). As Marshall (1997) has argued, assessing a child's views is not only a reflection of their participatory rights, but also an essential part of determining how to promote their welfare rights.

De Boer-Buquicchio stated that it was the aim of the Council of Europe to abolish corporal

punishment within the family, as it had been (largely) in schools and penal systems for children. Within this context she criticised the provision in the Criminal Justice (Scotland) Act 2003, which banned certain violent actions by parents and, by implication, upheld the right of parents to carry out 'justifiable assault' as reasonable chastisement. By that year, 10 member states of the Council of Europe had prohibited all forms of corporal punishment.

Waage also noted that governments were reluctant to intervene in the family sphere. He illustrated this by saying that in many countries it was no longer allowed to smoke in public, but it was all right to smoke heavily in a car with one's own children present.

Waage expressed concern about a trend towards what he called being a 'hyper-parent'.

This entails expecting children to perform excellently from an early age, especially in organised courses and clubs, and following the latest expert advice in the media. He feared this brings a loss of childhood. Also there were dangers of parents organising their children's lives, but spending little time listening and 'in a trusting dialogue'. **Waage** also said that children do not want or need their parents to be like a pal, but to be involved as a flexible and responsible guide.

Cronstedt described research carried out in Sweden indicating that disturbing behaviour by children in Kindergarten or school tended to be dealt with by moving them to a different group or setting. 'The intervention was always to find a new environment, thereby avoiding having to address difficulties in the family and

community' (p.27). This process also made the child feel socially excluded and reduced their self-esteem. Sometimes the problems were due to violence and abuse in the family, with the child pressurised to keep secrets.

Marshall stated that by Scottish law and according to the UN Convention, parents should normally be seen as having primary responsibility for their children, but there are occasions when it is vital for the state or wider community to intervene for the sake of the child. When children are removed from their birth families, by far the most common arrangement is for them to be placed with other families, usually in foster care but sometimes with adopters.

Usage of non-family forms of care has decreased considerably over the last 30 years

(Clapton and Hoggan 2012). **Dewar** voiced a common view about residential care – he was sceptical about it, but accepted 'there are cases where it is necessary'. Government reports have sought to promote a more positive perception of residential childcare and there is considerable evidence that it *can* be beneficial for some children (Skinner 1992; NRCCI 2009).

Dewar pointed to the importance of finding alternatives to secure accommodation and referred to fostering and residential services then being developed for young people who would otherwise be in secure care. These have had mixed results and a major evaluation concluded that it is more fruitful, at least in the short term, to consider services as complementing secure care (Walker et al. 2006).

International Dimensions

The Kilbrandon Lectures have always sought to include comparative perspectives from outside Scotland. Five of the ten speakers have been Scots, while three have come from continental Europe, one from Ireland and one from the USA.

The very first Lecture was presented by an American, Professor Sanford **Fox**, albeit one who knew the Children's Hearings System well, as he had been involved in the first academic evaluation of the early operation of the System. He provided an outside view on the Scottish Children's Hearings System. Professor Anthony **Clare** had worked as a psychiatrist and broadcaster for many years in England, but had returned to his home country of Ireland by the time he delivered his talk. His topic (fatherhood) was not specific to any country.

In an earlier publication, **Fox** (1982) contrasted the American situation with that in Scotland, where Kilbrandon thought that decisions about welfare were 'too intimately tied to the inflexibility of legal rules of criminal procedure'. In the United States, **Fox** argued there was an opposite problem where 'American juvenile courts discretion had achieved a near complete dominance over law'. He exemplified this with reference to children not understanding the reasons why they appeared before a court and lack of attention to the truth of charges. The seminal Gault case led to a move away from the previous 'welfare' approach. The case included elements of the problems noted by **Fox**, as well as resulting in lengthy deprivation of liberty for a minor incident (Duquette 2007, Mooney and Lockyer 2012). **Fox** was in favour of some kind of panel system, which had the

open communication of the Scottish Children's Hearings System with adequate procedural safeguards.

Like other external commentators, **Fox** regretted that the Children's Hearings System's principles and operations were not better known as he thought that, for example, American states and countries recently emerging from communist regimes in Eastern Europe could have improved their systems as a result.

Conversely he argued that Scotland should draw on experience elsewhere, including in US, which might indicate how to avoid or deal with problems and dilemmas. Guernsey has introduced a youth justice system closely based on Scotland's Children's Hearings System and they have appointed a former

Children's Reporter to the role of Children's Convenor. A number of other countries do have non-legal panels making decisions about youth crime, though often these panels are mostly comprised of officials and professionals, as in Scandinavia and Vietnam (**Cronstedt**).

Three Lectures in succession during the first decade of the 21st century represented a shift in focus by speakers towards direct consideration of international dimensions of childhood and children's rights. They were presented by a Norwegian, a Dutch woman and a Swede, each of whom worked for international organisations (Council of Europe, UNICEF and Save the Children).

International treaties

The Scottish Children's Hearings System is affected by a number of obligations owing to international as well as national law. The most influential have been the UN Convention on the Rights of the Child, and Council of Europe Treaties. According to **de Boer-Buquicchio**, the UN Convention gives children substantive rights, which are supplemented by the strengthening of procedural rights stipulated in the Council of Europe Treaties. **Dewar** observed that both had significant effects on the Children (Scotland) Act 1995. As Asquith (1994) observed, the UN Convention assumes that children will be dealt with in a court setting so that its provisions and some of the comments made by its monitoring committees do not fit the Scottish hearings.

Fox referred to the influence of the UN Convention. He felt that UK representatives at crucial meetings lacked awareness of the Scottish Children's Hearings System, particularly with regards to the impact of provisions about legal representation.

Cronstedt noted that although nearly all nation states have ratified the UN Convention 'many pay only lip service' to its implementation. Usually the legal framework was satisfactory: the problem lies in administration and application of the legislation. He said that the widespread detention of children in prisons and psychiatric hospitals was not justified. UNICEF has advocated that the basis for treating children in conflict with the law should be rehabilitative. Children should be diverted from formal processing whenever possible and

provided with alternatives to custody. UNICEF also supports restorative justice approaches, as recommended by **Dewar** and **Cronstedt**. Owing to weak or corrupt governments in a number of countries, it falls to NGOs to provide legal advice and other support.

The Council of Europe is older than and distinct from the European Union. It was established in 1949 'to protect and build democracy, human rights and the rule of law' (**de Boer-Buquicchio** p.3). Some of the Council's Conventions set out norms that member states are expected to incorporate in domestic law and provide international monitoring mechanisms. Of particular significance has been the European Convention on Human Rights (ECHR) (incorporated into UK legislation through the Human Rights Act 1998) (Marshall

2007). This guarantees rights to life, liberty and family life, as well as the right not to be tortured or face inhuman or degrading punishment (**de Boer-Buquicchio**). These rights apply to adults and minors alike, as does the European Social Charter, which includes a number of measures to protect children, establish parentage and regulate adoption. Marshall (2007) has pointed out that the strong emphasis on family in the ECHR corresponds with Kilbrandon's concern to place children and their parents at the heart of hearings.

The Council of Europe has also put in place measures to help resolve cross-border issues affecting children, such as inter-country adoption, custody disputes between parents living in different member

states and abduction. It has fought to reduce trafficking and sexual abuse of children (**de Boer-Buquicchio**). On the other hand, **Marshall** expressed fears that the increasing emphasis on the ECHR in the UK could undermine the Hearings System if it became obliged to 'introduce many more of the characteristics of a court in order to satisfy human rights requirements'.

The European Court of Human Rights helps uphold 'the rights and freedoms which children are entitled in the European legal space' under the ECHR (**de Boer-Buquicchio**, p.14). Judgements of the Court are binding. In the past, the Court tended to conflate children's interests with parents' rights, leading critics to describe the ECHR as a 'parents-treaty', but in recent years the Court has paid more attention

to children's interests even when they do not coincide with parents' and to take more account of children's views (**de Boer-Buquicchio**). Increasingly, too, the Court has been prepared to hold states responsible for failure to ensure action was taken to prevent cases of serious harm. Its case decisions have had important consequences, including in Scotland.

MacCormick noted that, for all its many merits, the Hearings System had failed to meet basic human rights in certain respects. The European Court of Human Rights considered in the *McMichael* case the question of whether parents were entitled to know the contents of reports about themselves provided to panel members. Reports are normally provided to hearings by social workers and schools, sometimes by others notably psychiatrists. Before the

McMichael case, the practice was for the Chair to summarise key points. Sometimes important details were withheld on account of their sensitivity – in this instance concerning a parent’s psychiatric problems. It was also feared that it would be hard to keep reports confidential when families had copies (Lockyer and Stone 1998). The European Court ruled that this was an unfair procedure. Parents were entitled to know what was said about them and be in a position to challenge this if they wished. In addition, the judgement in the *McMichael* case recognised certain rights of fathers in relation to children ‘born out of wedlock’. As a result of this case, Government Rules governing children’s hearings were amended to give parents or other ‘relevant person(s)’ access to reports, but ‘left it dangling as regards the children who were

the focus of the proceedings’ (Marshall 2007, p.273).

After discussion about this omission, the Scottish Children’s Reporter Administration (SCRA) introduced a scheme, whereby the presumption was that all children over the age of 12 received full papers subject to closely controlled exceptions. Children under 12 may also receive papers by exception. The Reporter here exercises discretion upon advice by the report writer and takes into account the maturity of the child and any harm potentially caused to them by disclosure of the information. On the other hand, the child’s right to privacy have not been fully clarified.

Another ruling of the European Court had a significant effect on access to legal representation. Under Article 6.1 of the ECHR, which concerns the procedures for a fair trial,

it was judged in the case under consideration that lack of access to legal representation had adversely affected the ability of the child to influence the outcome of the hearing. Again new Government Rules made provision for legal representation at hearings in circumscribed circumstances (Jackson 2003). On the other hand, the Court did decide that children's hearings did not need to abide by the more stringent requirements of Article 6.3, since children are not charged with an offence at a hearing (if necessary this is a matter for Sheriffs) and are not subject to penal sanction (Marshall 2007).

Concern about the independence of reporters was voiced before the Human Rights Act, but this brought into focus the fact that reporters were (at different stages) involved in deciding whether to proceed with case, seeking to prove

grounds and advising the hearing. **Norrie** (2000) has noted that the reporter's role as adviser was not included in law, but was envisaged by Kilbrandon and did develop in practice. As a result of potential implications in compliance with some elements of the European Convention, the SCRA reviewed the role of the Reporter and introduced changes in September 2009. This led to refinements in some elements of the way Reporters carry out their roles in relation to children's hearings. These minimised contact between Reporters and panel members before children's hearings and led to the Reporter offering a view on law and procedure rather than advising the hearing.

The European Committee of Social Rights, which is concerned with the provisions of the Social Charter, has considered several cases involving

children. Examples of the issues include corporal punishment and education of children with disabilities (**de Boer-Buquicchio**). The Commission of Human Rights has criticised the UK in general for excessive use of detention for young people and insufficient use of diversion from formal measures. It also promotes 'child-friendly' procedures, like that present in hearings (Whyte 2012).

Children Beyond Europe and North America

Cronstedt reminded his audience that in many parts of the world children lack the legal and procedural safeguards to be found in Europe and North America. He described a prison in Asuncion (Paraguay) in 2000 where children were held indefinitely without court proceedings. The conditions were extremely overcrowded, food was minimal and they were kept in cramped cells 22 hours a day. Cronstedt said that such deprivation of children's liberty in squalid conditions was not uncommon. Furthermore, any wrongdoings committed were a strategy for survival – 'their basic crime is poverty and hunger'

(p.11). Although the South American context is very different, the link between material circumstances and youth crime echoes the views of **Kilbrandon** and **Burns**.

Cronstedt said that ‘most children in contact with the law have committed petty crimes’ (p.12). Indeed some are charged for ‘status offences’, which would not be considered criminal if committed by adults. He described how street children were often rounded up and then detained along with adult prisoners.

Waage and **Cronstedt** pointed to children’s vulnerability to sexual exploitation (not confined to poorer countries of course). Cronstedt detailed the extent to which many

children in the world carry out arduous work for long hours. Some are forced to beg and steal. Trafficking of children occurs widely in developing countries.

NGOs and governments have established mechanisms and projects to combat these multiple problems, sometimes jointly. For instance, the Assistance for Street Children Project in Vietnam developed models to help the children return to their families and avoid threats (Cronstedt). However, many of the professionals seeking to help children have little or no prior training, so assistance was obtained from Scotland to develop their system of social work education (Taylor et al. 2009).

Conclusion

The Committee which Lord Kilbrandon established in 1960 led to the formation of Scotland's unique approach to care and justice for young people – the Children's Hearings System.

The Kilbrandon Lecture Series, inaugurated by Professor Stewart Asquith first Director of the Centre of the Child and Society, at the University of Glasgow, has become a well established, and influential public lecture. It receives strong support from the Scottish Government, the public, professionals and academics from across Scotland, many of whom who are actively engaged in the lives of children and young people and their families; panel members, social workers, health care workers, teachers, members of the legal

profession and students. It is hoped that this publication will introduce the insights and wisdom of those who have delivered the Kilbrandon Lecturers over the last 20 years to a wider audience.

References

Archard, D. (2004) *Children's Rights and Childhood*, London: Routledge.

Archard, D. (2007) 'Children's rights and juvenile justice' in Hill, M., Lockyer, A. and Stone, F. (eds.) *Youth Justice and Child Protection*, London: Jessica Kingsley.

Asquith, S. (1983) *Children and Justice: Decision-making in Children's Hearings and Juvenile Courts* Edinburgh University Press: Edinburgh.

Asquith, S. (1998) 'The Scottish Children's Hearings in an International Context', in A. Lockyer and F. Stone, (eds) *The Scottish Children's Hearings*: Edinburgh: T & T Clarke.

Asquith, S. and Docherty, M. (1999) 'preventing Offending by Children and Young People in Scotland' in P. Duff (ed.) *Criminal Justice in Scotland*, Aldershot: Ashgate.

Asquith, S. and Hill, M. (eds) (1994) *Justice for Children*, Dordrecht: Martinus Nijhoff.

Bottoms, A. and Kemp, V. (2007) 'The relationships between youth justice and child welfare in England and Wales', in Hill, M., Lockyer, A. and Stone, F. (eds.) *Youth Justice and Child Protection*, London: Jessica Kingsley.

Buist, M. and Whyte, B. (2004) *International Evidence to Scotland's Children's Hearing Review*, Edinburgh: Criminal Justice Social Work Development Centre for Scotland.

Carnochan, J., Hill, M. and Taylor, R. (2012) 'The police, the community and multi-agency work for children and young people', in M. Hill., G. Head, A. Lockyer, B. Reid and R. Taylor (eds.) *Children's Services: Working Together*, Harlow: Pearson.

Clapton, G. and Hoggan, P. (2012) *Adoption and Fostering in Scotland*, Edinburgh: Dunedin Press.

Cowperthwaite, D. J. (1988) *The Emergence of the Scottish Children's Hearings System*, Southampton: Institute of Criminal Justice.

Duquette, D. (1994) 'Scottish children's hearings and the representation of the child', in Asquith, S. and Hill, M. (eds.) *Justice for Children*, Dordrecht: Martinus Nijhoff.

Duquette, D. (2007) 'Children's Justice: A View from America' in Scottish children's hearings and the representation of the child', in Hill, M., Lockyer, A. and Stone, F. (eds.) *Youth Justice and Child Protection*, London: Jessica Kingsley.

Finlayson, A. (1992) *Reporters to the Children's Panels*, Edinburgh: HMSO.

Forest, D. (1998) 'Reconstructing social education', Lockyer, A. and Stone, F. (eds) *Juvenile Justice in Scotland*, Edinburgh: T & T Clark.

Fox, S. J. (1982) Juvenile Justice Reform: Some American Scottish comparisons', in Martin, F. and Murray, K. (eds) *The Scottish Juvenile Justice System*, Edinburgh: Scottish Academic Press.

Gault, I (2003) Study on Youth Offending in Glasgow: Scottish Reporter's Administration Stirling.

Gilmour, I. and Giltinan, D. (1998) 'The changing focus of social work, in Lockyer, A.

and Stone, F. (eds) *Juvenile Justice in Scotland*, Edinburgh: T & T Clark.

Growing Up in Scotland (2009) Research Findings No. 1 <http://www.scotland.gov.uk/Publications/2009/03/11112830/0>.

Hallett, C., Murray, C., Jamieson, J. and Veitch, B. 1998 *Deciding in Children's Interests*, Edinburgh: The Scottish Office Central Research Unit.

Hamilton, D. (2010) 'Child Poverty in the UK: Issues and answers' in Taylor, R., Hill, M. and McNeill, F. (eds.) *Early Professional Development for Social Workers*, Birmingham: venture Press.

Hill, M. (2012) Accentuating the positive: resilience and desistance approaches to children's needs and behaviour', in M. Hill., G. Head, A. Lockyer, B. Reid and R. Taylor (eds.)

Children's Services: Working Together, Harlow: Pearson.

Hill, M., Lockyer, A., Morton, P. Batchelor, S. and Scott, S. (2002) 'Safeguarding Children in Scotland: the perspectives of children, parents and safeguarders', *Representing Children* 15(3): 169-183.

Hill, M., Lockyer, A., Morton, P. Batchelor, S. and Scott, S. (2003) 'Safeguarding children's interests in welfare proceedings: the Scottish experience' *Journal of Social Welfare and Family Law* 25(1): 1-25.

Hill, M. and Tisdall, E. K. M. (1997) *Children and Society*, Harlow: Longman.

Hill, M. Walker, M., Moodie, K., Brendan Wallace, B., Bannister, J., Khan, F., Mclvor, G. and Kendrick, A. (2007) 'More haste, less speed? An evaluation of fast track policies to tackle

persistent youth offending in Scotland', *Youth Justice*, 7(2): 121-138.

Hill, M., Lockyer, A. and Stone, F (2007) 'Introduction', in Hill, M., Lockyer, A. and Stone, F. (eds.) *Youth Justice and Child Protection*, London: Jessica Kingsley.

Hollander, A. and Tarnfalk, M. (2007) 'Juvenile Justice and the Justice system in Sweden', in Hill, M., Lockyer, A. and Stone, F. (eds.) *Youth Justice and Child Protection*, London: Jessica Kingsley.

Holloway, S. and Valentine, S. (eds.) (2000) *Children's Geographies*, London: Routledge.

Howe, D. (2011) *Attachment Across the Life Course*, Basingstoke: Palgrave MacMillan.

Jackson, P. (2003) 'Rights and representation in the Scottish Children's Hearings System',

in J. McGhee, M. Mellon and B. Whyte (eds) *Meeting Needs, Addressing Deeds*, Glasgow: NCH Action for Children Scotland.

James, A. and Prout, A. (1998) *Constructing and Reconstructing Childhood*, London: Falmer Press.

Kearney, B. (1992) *Report of the Inquiry into Child Care Policies in Fife*, Edinburgh: HMSO.

Kearney, B. (2000) *Children's Hearings and the Sheriff Court*, Edinburgh: Butterworths.

Kilbrandon Report (1964) *Children and Young Persons Scotland*, Edinburgh: HMSO.

Korpinen, J. and Poso, T. (2007) 'Approaching youth crime through welfare and punishment: The Finnish perspective', in Hill, M., Lockyer, A. and Stone, F. (eds.) *Youth Justice and Child Protection*, London: Jessica Kingsley.

Kuenssberg, S. and Miller, A. D. (1998) 'Towards a National Reporter Service' in Lockyer, A. and Stone, F. (eds) *Juvenile Justice in Scotland*, Edinburgh: T & T Clark.

Kuenssberg, S., Reid, B. and Taylor, R. 'Issues in interprofessional education', in M. Hill., G. Head, A. Lockyer, B. Reid and R. Taylor (eds.) *Children's Services: Working Together*, Harlow: Pearson.

Laming, Lord (2003) *The Victoria Climbié Inquiry*, London: Stationery Office.

Lockyer, A. (1992) *Citizenship Service and Children's Panel Membership*, Edinburgh: Social Work Services Group.

Lockyer, A. (1994a) 'Interests and advocacy: Identifying the role of safeguarders in the Scottish children's hearing system', *Children & Society* 8, 1: 55-68.

Lockyer, A. (1994b) 'The Scottish Children's Hearings System: Internal Developments and the UN Convention', in S. Asquith and M. Hill (eds) *Justice for Children*, Dordrecht: Martinus Nijhoff.

Lockyer, A. (2012) 'Taking children's citizenship seriously', in M. Hill., G. Head, A. Lockyer, B. Reid and R. Taylor (eds.) *Children's Services: Working Together*, Harlow: Pearson.

Lockyer, A. and Stone, F. (eds) (1998) *Juvenile Justice in Scotland*, Edinburgh: T & T Clark.

Luthar, S. S. (2003) *Resilience and Vulnerability*, Cambridge: Cambridge University Press.

Marshall, K. (1997) *Children's Rights in the Balance*, Edinburgh: The Stationery Office.

Marshall, K. (2007) 'Human rights and children's rights in the Scottish Children's Hearing System', in Hill, M., Lockyer, A. and Stone, F. (eds.) *Youth Justice and Child Protection*, London: Jessica Kingsley.

Marshall, K. and Williams, J. (2012) 'Children's commissioners: representing children's interests and views', in M. Hill., G. Head, A. Lockyer, B. Reid and R. Taylor (eds.) *Children's Services: Working Together*, Harlow: Pearson.

Martin, F. (1982) 'The Social Work Department' in Martin, F. and Murray, K. (eds) *The Scottish Juvenile Justice System*, Edinburgh: Scottish Academic Press.

Martin, F., Fox, S. and Murray, K. (eds) (1981) *Children out of Court*, Edinburgh: Scottish Academic Press.

Martin, F. and Murray, K. (eds) (1982) *The Scottish Juvenile Justice System*, Edinburgh: Scottish Academic Press.

Mayall, B. (2002) *Towards a Sociology of Childhood*, Buckingham: Open University Press.

McAra, L. (2006) 'Welfare in crisis? Key developments in Scottish Youth Justice', in J. Muncie and B. Goldson (eds) *Comparative Youth Justice*, London: Sage.

McAra, L. (2009) 'Scottish Youth Justice', *Deviance et Societe*, 33, 3, 383-398.

McAra, L. and McVie, S. (2007) 'Youth Justice? The impact of system contact on patterns of desistance from offending', *European Journal of Criminology*, 4, 315-345.

McAra, L. and McVie, S. (2010) 'Youth crime and justice', *Criminology and Criminal Justice*, 10, 211-230.

McGhee, J. (2004) 'Young people's views of the Scottish children's hearings system', in J. McGhee, M. Mellon and B. Whyte (eds) *Meeting needs, addressing deeds - working with young people who offend*, Glasgow: NCH Scotland.

McGhee, J., Mellon, M. and Whyte, B. (eds) (2004) *Meeting needs, addressing deeds - working with young people who offend*, Glasgow: NCH Scotland.

McGhee, J., Waterhouse, L. and Whyte, B. (1996) 'Children's Hearings and Children in Trouble', in S. Asquith (ed) *Children and Young People in conflict with the Law*, London: Jessica Kingsley.

Minnis, H. and Bryce, G. (2012) Attachment and loss in childhood and beyond', in M. Hill., G. Head, A. Lockyer, B. Reid and R. Taylor (eds.) *Children's Services: Working Together*, Harlow: Pearson.

Mooney, A. and Lockyer, A. (2012) 'Children's Representation', in M. Hill., G. Head, A. Lockyer, B. Reid and R. Taylor (eds.) *Children's Services: Working Together*, Harlow: Pearson.

Munro, E. (2011) *The Munro Review of Child Protection*, London: Department of Education.

Murray, K. (1982) 'The Children's Panel' in Martin, F. and Murray, K. (eds) *The Scottish Juvenile Justice System*, Edinburgh: Scottish Academic Press.

Murray, K. (1998) 'The Contribution of Research', in A. Lockyer and F. Stone, (eds) *Juvenile Justice in Scotland: Twenty-Five Years of the Welfare Approach*, Edinburgh: T&T Clark Ltd.

Norrie, K. (2000) Human rights challenges to the Children's Hearings System', *Journal of the Law Society of Scotland*, 45 (4).

Norrie, Kenneth (2005) *Children's hearings in Scotland*. W. Green, Edinburgh.

NRCCI (2009) *Report of the National Residential Child Care Inquiry*, Edinburgh: Scottish Government.

Reid, B. and Gillan, I. (2007) 'The place of lay participation in decision-making', in Hill, M., Lockyer, A. and Stone, F. (eds.) *Youth Justice and Child Protection*, London: Jessica Kingsley.

SCRA (2010) *The View and Experiences of children and families involved in the Children's Hearings System in Scotland*, Stirling: SCRA.

Scottish Executive (2006) *Changing Lives: Report of the 21st Century Social Work Review*. Edinburgh Scottish Government.

Scottish Government (2011) *Children's Hearings Act*, Edinburgh: Scottish Government.

Skinner, A. (1992) *Another Kind of Home*, Edinburgh: Scottish Office.

Skinner, A. and McCoy, K. (2000) 'The legal and policy context for children's services in Scotland and Northern Ireland', in D. Iwaniec and M. Hill (eds.) *Child Welfare Policy and Practice*, London: Jessica Kingsley.

Stead, J., Lloyd, G. and Kendrick, A. (2004) 'Participation or practice innovation: tensions in interagency working to address disciplinary exclusion in school', *Children & Society*, 18, 42-52.

Stradling, B. and Alexander, B. (2012) 'Getting it right for children: Promoting effective change', in M. Hill., G. Head, A. Lockyer, B. Reid and R. Taylor (eds.) *Children's Services: Working Together*, Harlow: Pearson.

Taylor, R., Stevens, I. and Nguyen T.T.L. (2009) 'Introducing Vocational Qualifications in Care to the Socialist Republic of Vietnam' *Social Work Education*, 28,1, 29-41.

Tisdall, E. K. M. (1997) *The Children (Scotland) Act 1995*, Edinburgh: Children in Scotland.

Tisdall, K., Baker, R., Marshall, K. and Clelland, A. (2002) *Voice of the Child Under the Children (Scotland) Act 1995: Giving due regard to children's views in all matters that affect them*, Edinburgh: Scottish Executive.

VRU (Violence Reduction Unit) (2010) *The Violence Must Stop*, Glasgow: Strathclyde Police VRU.

Walker, M. et al (2006) *Secure Accommodation in Scotland*, Edinburgh: Scottish Executive.

Waterhouse, L. (2007) 'The Scottish Children's Hearings System: Thinking about effectiveness', in Hill, M., Lockyer, A. and Stone, F. (eds.) *Youth Justice and Child Protection*, London: Jessica Kingsley.

Waterhouse, L., McGhee, J. and Whyte, B. (2002) 'Children's hearings and children in trouble', in J. Muncie, G. Hughes and E. McLaughlin (eds) *Youth Justice: Critical Readings*, London: Sage.

Whyte, B. (2004) 'Understanding youth crime', in J. McGhee, M. Mellon and B. Whyte (eds) *Meeting needs, addressing deeds - working with young people who offend*, Glasgow: NCH Scotland.

Whyte, B. (2007) 'Change, evidence, challenges: Youth justice developments in Scotland', in Hill, M., Lockyer, A. and Stone, F. (eds.) *Youth Justice and Child Protection*, London: Jessica Kingsley.

Whyte, B. (2009) *Youth Justice in Practice*, Bristol: Policy Press.

Whyte, B. (2012) 'Youth justice, policy and practice', in M. Hill., G. Head, A. Lockyer, B. Reid and R. Taylor (eds.) *Children's Services: Working Together*, Harlow: Pearson.

Zwozdiak-Myers, P. (2007) *Childhood and Youth Studies*, Exeter: Learning Matters.



The Scottish
Government

© Crown copyright 2012

ISBN: 978-1-78045-850-2

This document is also available on the Scottish Government website:
www.scotland.gov.uk

APS Group Scotland
DPPAS13045 (06/12)

w w w . s c o t l a n d . g o v . u k