“NEEDS NOT DEEDS”: The Scottish Children’s Hearing and the Enduring Legacy of Lord Kilbrandon

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The Scottish Children’s Hearing System began its work in 1971 and has survived very much as it was first outlined by Lord James Kilbrandon in his report Children and Young Persons Scotland in 1964. Children in Scotland will be referred to a Children’s Hearing when compulsory measures of care or supervision are considered necessary due to the child being at risk from their own behaviour, from the behaviour of others, or where the child is offending. Hearings are convened by a paid figure called the “Reporter” who identifies children who appear to be in compulsory need of care and protection or who have offended and cites them and the significant adults in their lives to attend a Children’s Hearing. A Children’s Hearing, unlike a traditional Court does not have a judge, and legal assistance for those attending occurs in a minority of cases. The Hearing takes place away from traditional Court buildings in settings that are designed to encourage informal discussion between the child, the significant adults in the life of the child, and the three trained, unpaid, volunteer members of the local community who form the Children’s Panel. Decisions made by the Children’s Panel are made in the interests of the child, are legally binding and can include placing the child under state supervision, at home, or by separation from their parents, in a care setting.

This article traces this unique system of dealing with children who offend or are in need of care and protection from its original formulation by Lord Charles Kilbrandon to the current workings of the Children’s Hearing. The five principles upon which Kilbrandon established the Hearings in 1964 will be identified and discussed and then revisited to see whether, forty years later, they have stood the test of time.

At the conclusion of the article, the writers will argue that, beyond the enduring practice of the Children’s Hearing in meeting the needs of the minority of children who need compulsory state intervention in their lives, Kilbrandon’s legacy can be clearly seen in “Getting it Right for Every Child” the national approach to all children, and the
“Whole System Approach” to children involved in persistent offending, and in the new approaches to adult offenders that are based on “needs rather than deeds”.

**Background**

In post-war Scotland, children could be brought before the local courts in four circumstances:
- when, aged 8 – 16, they had broken the criminal law
- when they needed care and protection
- when they were beyond the control of their parents
- when they were persistently failing to attend school

When the concern was established in law, the Court were able to, as appropriate, punish or protect the child, including detention and separation from parents.

Due to political concern about rising youth offending rates in the late 1950’s, the Scottish Office in Edinburgh established in 1961, a committee of enquiry under the chairmanship of judge Lord Charles Kilbrandon to:

“consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care or protection or beyond parental control, and in particular, the constitution, powers and procedures of the courts dealing with such juvenile offenders” (Kilbrandon, 1964, para 1)

The Committee was composed of a professor of law, a psychiatrist, a solicitor, a chief constable, and representatives of judges in the lower courts who would normally decide on matters dealing with children. The approach of the Committee to their work and their outcome were surprising and radical.

Rather than as was the custom of the time for Scottish legal reform to follow and adapt legal structures and practice from England and Wales, Kilbrandon took inspiration from practice in the Scandinavian countries of Sweden, Norway and Denmark where they found an emphasis on informality in process and social education in outcome.

Kilbrandon’s vision of the Children’s Hearing which would deal with all “children in trouble” found favourable reception at a period of Scottish political and social history of expanding welfare, an emphasis on family, and on the prevention of problems (Fox-Harding, 1991).

The Kilbrandon Commission presented its unanimous findings to the Secretary of State for Scotland in April 1964. The report “Children and Young Persons Scotland” known colloquially (and henceforth) as “the Kilbrandon Report” (Kilbrandon, supra) made recommendations that were “radical, humane, and far-reaching” (Asquith, 1995, p.vii), both in terms of their physical legacy in the structure and practice of the Children’s Hearing but also in the laying out of a set of principles that continue to underpin Scottish policy for children fifty five years later. Such is the significance of the Kilbrandon Report in formulating a distinctly Scottish view of children in trouble and community responsibility in ensuring their well-being that Whyte (2018) argues that its publication and early political and continuing public support was a significant factor in the re-emergence of a distinct Scottish identity within the United Kingdom that would lead to the referendum on Scottish devolution in 1979 and that of independence in 2014.

Kilbrandon argued that whichever of the four reasons for children being referred to the Courts, they were all “children in trouble” because:

“in terms of the child’s actual needs, the legal distinction between juvenile offenders and children in need of care and protection, was – looking to the
underlying realities – very often of little practical significance. At one extreme, there were cases in which children committed as being in need of care or protection were by reason of background and upbringing suffering from serious emotional disturbance [...(and)] it might be that a child’s quite minor delinquency was simply a symptom of personal or environmental difficulties” (Kilbrandon, 1964, para 13)

And consequently:

“these various classifications could not be usefully considered as presenting a series of distinct and definable problems calling in turn for distinct and separate principles of treatment. The basic similarities of (the) underlying situation far outweighs the differences, and from the point of view of treatment measures, the true distinguishing factor, common to all children concerned is their need for special measure of education and training, the normal up-bringing processes having, for whatever reason, fallen short” (supra, para 15).

Kilbrandon’s location of the causes, to a significant degree at least, of behaviour that communicated distress and delinquent behaviour within the family and the wider social spheres of community and public institutions drew not only on learning from psychology about the importance of parental attachment but also from the social sciences on emerging understanding of the links between social need and offending. Implicit too in Kilbrandon is the United Nations Declaration of the Rights of the Child (The United Nations General Assembly, 1959) which specified for the first time, not only the existence of rights that are specific to children but also the responsibilities of adults towards them. Juvenile offending, according to Kilbrandon was a consequence of the failings of the adults in the child’s lives, not only the direct failings of their parents but all of those associated with “the normal upbringing processes” (Kilbrandon, 1964, para15).

When conducting their research for the Report, Kilbrandon found unanimity in the view that the current legal responses to children appearing in the Courts in Scotland in the early 1960’s was not meeting the needs of children referred to them. Specialist juvenile courts with their particular insights and expertise, were not available in all towns. Kilbrandon doubted too that the criminal court setting with its orientation to the justice paradigm of personal responsibility and punishment for offending behaviour and its range of corresponding measures, was suitable for children who were in trouble due to failures that could not be exclusively attributed to them. The Courts, despite their best intentions were simply not suited to finding solutions to children’s problems. This was founded on four observations; firstly, the high standard of proof for criminal liability that is necessary in Courts prevented the identification of offending related needs within the child that might be addressed at an earlier stage in their development. Secondly, whereas punishment for offending behaviour could not be extended beyond the child held by the Court to be responsible, prevention of further offending within Kilbrandon’s paradigm lay in intervening within the family and social environment. Thirdly, whereas punishment is to a very large degree dictated by the nature and the magnitude of the offence, the underlying causes of offending behaviour in the child would be overlooked due to the narrow focus of the Court and a lack of Court time. Finally, punishment in the form of a criminal sentence is limited in its effectiveness as a rehabilitative measure due to the length of the sentence not being correlated to duration of need and finally, due to the inability in Scottish legal provision to adapt the measure as it proceeds, including extending supervision where this is warranted according to the child’s needs.
Whilst Kilbrandon highlighted the shortcomings of the preventative and rehabilitative capacities of the criminal court as it related to children he did hold that the Court with its procedures for presenting and debating evidence and clarifying points of law was the place most suited to establishing the facts in the 5% of criminal cases involving children at that time where culpability was in dispute. When the facts of the criminal behaviour or the concern for the child in danger were agreed by the child and their parents or established by the Court on hearing the evidence, Kilbrandon argued that responsibility for deciding on the care and treatment of juvenile offenders and other children in trouble could be delegated to a separate tribunal called “the Children’s Hearing”. In contrast to the adult Courts Kilbrandon’s Children’s Hearings would involve both the child and their parents, be participative and informal in its proceedings and would remain involved in the supervision of the child as long as need persisted. Kilbrandon’s Hearing would not be presided over by a judge but three lay volunteers from the local community trained to consider and order the implementation of care and treatment, in the interests of the child.

The Kilbrandon principles

Kilbrandon’s alternative paradigm is founded on 5 key principles upon which Scottish policy towards children continues to stand despite calls during the period of the British Blair government to get tough on youth crime gaining some momentum in Scottish political discussion in the early years of this century.

The first principle is the clear separation of the adjudication of the facts of the case and determining the culpability of those responsible, from the decision of care and treatment. Lord Hope, President of the Scottish Court of Session in 1995 referred to this principle, as the “genius of this reform which has earned it so much praise” (Fraser of Carmyllie, 1995, pix)

The second principle is that of welfare. All children who come into contact with the legal apparatus of the state must be dealt with “in their best interests”, the interests of other members of society, being secondary, except in the most exceptional cases where the child has committed the most serious forms of harm to others. The welfare principle, indeed the paradigm of Kilbrandon, can be summed up in the expression “needs rather than deeds”, the former being the focus of the discussion of the Children’s Hearing, and the latter being the concern of any Court proceedings to establish culpability where this is contested. Kilbrandon stated that: “the offence, while the essential basis of judicial action, has significance only as a pointer to the need for intervention” (Kilbrandon, 1964, para 71)

The third of Kilbrandon’s principles is that whilst the reasons for children coming before Courts whether that be due to their offending or being in need of care and protection may appear to be different, they are all children who are in need due “to the normal upbringing processes having fallen short” (Kilbrandon, supra, para 15). Lockyer and Stone (1998) note that Kilbrandon does not seek any categorical attribution of this failing to parents or to the wider environment but states that treatment responses must be specific to the needs of the child once identified in careful discussion within the legal process.

Fourthly, meeting the individual needs of the child would be through a process of “social education”. Whilst Kilbrandon does not define “social education” as a term, he did write that its objective was to “strengthen and further those natural influences for...
good which assist the child’s development into a mature and useful member of society” (Kilbrandon, 1964, para 17). To this end, the home would be the focus of intervention as the place of “most powerful and direct influence” (supra, para 17) where social education specialists would work “in the closes co-operation with parents” to the extent that, where appropriate attention is “directed as much (if not more so) against the parents as the child” (supra, para17). Whyte (2018) locates Kilbrandon’s undefined “social education” within the concept of social pedagogy which opposes the individualisation of responsibility for problems, seeking instead to generate understanding and remedy through partnership working in non-coercive relationships between state services, the child, parents, the wider family and social relationships. The final of Kilbrandon’s primary principles is that of “prevention”. Lockyer and Stone (1998) highlight that the concept of prevention has two apparently contradictory aspects; the prevention of future harm to the individual child by securing their welfare and the avoidance of harm to society by curtailing the actions of the child. For Kilbrandon the needs of society for safety and the interests of the child in being assisted through “social education” to develop “into a mature and useful member of society” (Kilbrandon, 1964, para 17) were two sides of the same coin.

The Implementation of Reform

The Kilbrandon Report, with few modifications, was drafted into law to form part III of the Social Work (Scotland) Act, 1968 (hereafter, the 1968 Act). The 1968 Act was wide ranging, creating a generic social work department within each of the Scottish local authorities each one having an over-riding duty to “promote welfare” (sec 12 of the 68 Act) within their geographical area across all areas of need. The new social work departments absorbed the work of the local committees for the protection of children and for vulnerable adults. The Scottish Probation Service was a casualty of this reform, McNeill (2005) noting that the reasons for its demise were practical as much as political and ideological. Probation as a Court disposal had struggled to gain traction in the 1950’s and 60’s as a sentence for adult offenders. It was therefore inevitable that that social work services to the Courts for adult offenders such as there were, would be drawn into the local authority social work departments. The Children’s Hearings as envisaged by Kilbrandon began its work as a department within the local authority in April 1971. The 1968 act made the local authority social work department responsible for the assessment of children referred to the Children’s Hearing and for carrying out the instructions of the Hearing in the supervision of children on formal orders. The establishment of the Children’s Hearings had the instant effect of removing the 95% of children from Court processes where responsibility for offending behaviour or the reasons for referral to the Hearing were not in dispute. Children who had committed the most serious offences such as treason, murder, and rape would remain within the criminal court system where, whilst the needs and interests of the accused child would be central to the Court concern during the proceedings, sentencing could be justified in the interests of others. It is surprising that Kilbrandon does not record any dissent to this concession to his principle that the offence a child has committed is not a reliable indicator of the seriousness and complexity of the child’s overall needs. Kilbrandon here seems to be making a concession to the legal establishment in instances where the punishment if fixed by law
and arguments about acting in the child’s best interests become difficult to sustain when significant harm has been caused. Despite changes to the political and legal contexts in which the Children’s Hearing operates imposed by the Children (Scotland) Act, 1995 and the current legislation, The Children’s Hearing (Scotland) Act, 2011, and to the profile of the “children in trouble” referred to the Hearings, the principles of the Kilbrandon Report, the basic practice of Children’s Hearings and the responsibility of the local authority social work department for implementing the decisions of the Children’s Hearing remains largely as it was 48 years ago when it began its work.

The Children’s Hearing

The Children’s Hearing is a formal tribunal with powers to order the supervision of children by the local authority in their home or elsewhere. Kilbrandon considered however that the “rigid framework” of the Court setting mitigated against uncovering and meeting the needs of the child. The Children’s Hearing proceedings are, as Kilbrandon envisaged them, informal in their character in order that the issues can become clear in “an atmosphere of full, free, unhurried discussion” (Kilbrandon, 1964, para 109) where consensus may be more likely to be reached and compulsory measures, where possible, avoided. The Children’s Hearing system relies on three key office holders who will attend each Hearing; the Reporter to the Children’s Panel, the Children’s Panel, and the local authority. Each will be examined in turn before identifying others who have a duty and a right to attend particular Hearings.

The Reporter

The Kilbrandon Report (supra, para 98) recommended that referral to the Children’s Hearing could be made by any private individual, child or representative of an organisation to a “single independent official” who he named as “the Reporter to the Children’s Panel”. In the 1968 Act, the Reporter was an employee of the local authority but otherwise held independent status, answerable on matters of discipline to the Secretary of State for Scotland. In 1994 the Local Government (Scotland) Act created a clear separation of Reporters from the local authorities by creating The Scottish Children’s Reporters Administration (www.scra.gov.uk) who as the national employer of all Reporters, is responsible for supporting the work of Reporters, standardising practice and training, and providing premises for Children’s Hearings. The role of the Reporter is to receive referrals concerning any child who appears to the person making the referral to be in need of care and protection or who is alleged to have offended and to consider whether a Children’s Hearing is required to ensure the child’s well-being. While it is tempting to seek similarities in roles between jurisdictions, the role of the Reporter is unique to the Scottish Children’s Hearing system and resists comparison. In its formulation by Kilbrandon, he considered that a comparison could be made between the role of the Reporter and that of a public prosecutor as far as their roles in determining which of the cases referred should be taken to a formal hearing, and to the role of Reporters in leading evidence in the Courts where the facts of the matter are in dispute. Once the Children’s Hearing begins, attempts at comparison break down. With
the essential facts of the referral agreed by the child and family attending the Hearing or by the Courts where the facts have been in dispute, there being no further need for a prosecuting figure, the Reporter takes no further part in the Hearing, apart from to offer advice on process where this is sought by the Children’s Panel members conducting the Hearing. The Reporter will make a formal record of proceedings. The second way in which comparison breaks down is that there is no requirement for the Reporter to be qualified in law. Kilbrandon’s ideal candidate for this new role could not he said, be defined by an existing qualification but relied instead on the possession of characteristics that made them suitable for the role. Kilbrandon did not consider that technical matters of law would dominate the daily work of the Reporter, their role being concerned to the greatest extent with the careful consideration of “the measures to be applied in the child’s interests” (Kilbrandon, 1964, para 98). Kilbrandon’s ideal Reporter would be someone able to demonstrate “practical knowledge and understanding of children’s problems”, competent to assess legal issues (in the few instances that he considered that they were likely to arise) and able to determine the public interest (supra, para 98). In practice, Reporter’s to the Children’s Panel have been appointed from the ranks of legally qualified professionals, social workers, and psychologists.

The Children’s Panel

The Children’s Panel is, in our times, the 2700 men and women who are recruited, trained, and supported by the independent body Children’s Hearing Scotland (www.chscotland.gov.uk) which was established by the current legislation the Children’s Hearing (Scotland) Act, 2011. Three members of the local Children’s Panel will be called upon by the Reporter to attend each Hearing where they will make legally binding decisions based on the needs of children. All members of the Children’s Panel are over 18 years of age, are unpaid, and selected to serve for periods of three years (renewable). When considering the necessary attributes of Children’s Panel members, Kilbrandon wrote that establishing the needs of children “is in itself a task calling for essentially personal qualities of insight and understanding, which obviously cannot be guaranteed under any system of selection” (Kilbrandon, 1964, para 78). The Social Work Services Group, responsible for implementing the new system in 1971 stated that the Panel members would be selected by their “knowledge and experience of dealing with families”, their representativeness of the community in which the family lived in terms of age and income group, but the most significant qualification would be their ability to fulfil Kilbrandon’s mission through their personal characteristics of open-mindedness, interest in children, and their ability to communicate with children within the Hearing setting (Social Work Services Group, 1969).

The Local Authority

Whilst the local authority social worker does not have a right to attend the Children’s Hearing, the local authority has been a part of the day to day operation of the Children’s Hearing since the first Hearings were held in 1971. The Social Work Department of the local authority has a duty in law to carry out an investigation and make an assessment of the circumstances of the child on behalf of the Reporter to inform the Reporter’s decision to arrange a Children’s Hearing. Within the Hearing, the local authority social worker will be asked to present their assessment and to
contribute to discussions involving the child and their parents. The local authority is responsible for carrying out the decision of the Children’s Hearing whether this is under the auspices of compulsory measures of supervision or on the preferred, voluntary basis. Other public authorities may be asked to provide reports to help the Reporter form a view as to whether “compulsory measures of care” are required or to inform any subsequent Children’s Hearing so teachers, nurses, and psychologists may also be required to attend to provide their professional view on the needs of the child. The Children’s Panel members are however obliged to ensure that the number of people attending is kept to a minimum to ensure the proper functioning of the Hearing, that is, to make decisions that are in the best interests of the child.

The Safeguarder

It can be easily argued that Kilbrandon’s view (Kilbrandon, 1964, para 18) that parents possessed “natural instincts for the good of the child […] even though they may be temporarily latent or overlaid by extraneous factors”, derived from an overly optimistic view of parenting. An early awareness that the needs and interests of parents and children may not be so naturally aligned led to the creation by section 66 of the Children Act, 1975 of the Safeguarder. In the terms of the 1975 Act, the Safeguarder is an individual who is independent of all parties in the Hearing who is appointed by the Children’s Hearing or in any related Court proceedings where a conflict of interest is thought to exist between the child and their parents. The subsequent legislative reforms in 1995 and 2011 removed the necessary precondition of there being a conflict of interest between the child and their parents and insisted only that the three Panel members in a Children’s Hearing or the Sheriff (the judge in the local Court) had to consider the necessity of the appointment of a Safeguarder in all Hearings and Court proceedings in the most general terms to “safeguard the interests of the child in the proceedings” (the Children’s Hearing (Scotland) Act, 2011 (section 30(1))).

Originally a local authority responsibility, the Children’s Hearing (Scotland) Act, 2011 (hereafter, the 2011 Act) transferred the recruitment, training, support, and payment of Safeguarders from the local authority to the Scottish Government. Safeguarders, like the Panel members and the Reporter are selected and training on the basis of their capacity to carry out the role rather than being holders of any particular qualification. Safeguarders carry out necessary investigations into the circumstances of the child, obtain where possible the views of the child, and to form and present to the Hearing or Court a view of what is in the best interests of the child. Section 154 of the 2011 Act underlines the importance of the Safeguarder by giving them a right of appeal to the local Court against a decision of the Hearing if they do not consider it to be in the interests of the Child.

The Child

The 1968 Act, defined a “child” for the purposes of the Children’s Hearing as someone under the age of 16 at the point of referral or under 18 if they are already under the supervision of the Children’s Hearing system. This remains the definition under the current legislation. In all cases, when the child reaches the age of 18, they will be discharged from the care, protection, and supervision of the Hearing. The child has both a duty and a right to attend the Hearing and must be in attendance throughout
unless excused by the Panel member occupying the role of Chair. In the event of the absence of a child, a warrant to secure their attendance may be issued.

Parents and other “Relevant Persons”

Whilst section 30 of the 1968 Act did not attempt a definition of a “parent”, seeming to hold this term as self-evident at that time, it did add the term “guardian” to include those who had day to day care of the child but who were not biological parents. The changing nature of family life, the often-temporary presence of adults in the home and the requirement under article 8 of the European Convention of Human Rights that public bodies demonstrate respect for the privacy of private and family life, required the Children’s Hearing to establish legal processes for deciding who, in the child’s family sphere, is of particular significance to the child and should have a right to attend a Hearing.

The current legislation, the 2011 Act recognises two categories of adult, who they refer to as “relevant persons”. The first category is those with parental responsibilities or rights that are recognised in law (normally natural or adoptive parents), and the second are those who make a successful application to the Hearing to be considered as a “relevant person”. In the second category, a formal meeting attended by the Panel members will be held in advance of the Children’s Hearing, where the Panel members, will consider the request. Once the applicant becomes a “relevant person” for the purposes of the Children’s Hearing proceedings they will have a right to receive all relevant documentation relating to the Hearing, to attend the Hearing and to appeal against any Hearing decision. The decision to grant “relevant person” rights is therefore a significant one and will only be agreed where the applicant is able to demonstrate significant involvement in the day to day care of the child, over time, on an unpaid basis. The status of relevant persons is kept under review by the Children’s Hearing at each stage of their involvement with the child.

All relevant persons and the child have a right to be accompanied to the Hearing by a friend or other person acting in a supportive capacity.

Solicitors

Neither Kilbrandon or the 1968 Act made provision for the payment of legal assistance at Children’s Hearing. There is little doubt that the intention of Kilbrandon was to create distance between the essential problem-solving character of the new system and the adversarial character of the old. Whilst solicitors would not be excluded from Hearings when appointed and paid for by families, they were disallowed from carrying out their usual role in the anglo-saxon system of speaking on behalf of their clients. Their role was confined to that of “assisting” which is more familiar to those observing French Courts. In all cases the legal representative could not be paid from public funds except where the facts were being disputed or an appeal was being heard in the Sheriff Court. Norrie (1997) considered that the omission of a right to publicly funded legal representation was a “fundamental flaw” in the original formulation of the 1968 Act and its revision in the 1995 Act. Appeals against Children’s Hearing decisions on the basis of human rights legislation in the first decade of this century would see children and all “relevant persons” gaining rights to paid representation in Hearings.
The Press

Although Children’s Hearings are heard in private with no public access, representatives of the press do have a legal right to attend although this right is very rarely exercised. The ability of a journalist to report on proceedings is very limited due to their requirement to safeguard the privacy of the child, and the Chair of the Hearing has the power in law to exclude them if they are considered to be preventing the child from participating in the Hearing or if their presence is causing the child distress.

The Process of the Children’s Hearing System

The Referral

The legal process involving all children referred to the Children’s Hearing whether they are in need of care and protection or whether they have offended is the same and is prescribed in the 2011 Act. On receiving a referral, the Reporter must determine three things: whether the child appears to need “protection, guidance, treatment, or control”, whether any of the 17 legal grounds of referral stipulated in section 67 of the legislation are met, and whether the need for “compulsory measures of supervision” is indicated. To make this judgement the Reporter will carry out an investigation into the circumstances of the child by seeking information from the local authority and other public services who may have knowledge of the child or their family. Once a decision has been made to convene a Children’s Hearing, the local authority will meet with the child and their parents to carry out an assessment of the child’s needs and circumstances to inform the proceedings.

A child may be referred to the Reporter on more than one of the 17 grounds but in order to proceed with a Hearing, only one of the grounds needs to be accepted by the child and their “relevant persons” or proved in a judicial hearing. The 17 grounds of referral can be grouped into two categories – where the child is considered to be at risk from the presence or behaviour of others/at risk from their own behaviour (the non-offence grounds), and where the child has committed a criminal offence.

Figure 1 Children and young people referred, by year
Figure 1.1 Children and young people referred, by year*

*please note that offence and care and protection splits are unavailable prior to 1976.


Figure 2 Children and young people with non-offence referrals...

Of the 13,240 children and young people referred, 65.1% had care and protection (non-offence) referrals. Some children and young people had both care and protection and offence referrals in the year.

The figures above show the pattern of referrals and decision making in relation to children referred to the Reporter to the Children’s Panel. It is worth noting (figure 1) that Kilbrandon’s Hearing system, designed with the needs of juvenile offenders in mind is now more concerned on a daily basis with the care and protection of young children. A second point worth highlighting is that one third of those referred on offence grounds were also referred as being in need of care and protection (figure 2), seeming to support Kilbrandon’s observation about the differences between the two categories of children being of very often of little practical significance when their needs were considered. Figure 3 demonstrates that since 2005, the number of children being referred to the Reporter in both categories has fallen sharply. We will return to this at the end of this discussion. Finally, figure 4 reveals the proportion of children who are referred to the Reporter who actually attend a Children’s Hearing.

The Children’s Hearing

The Hearing will be heard in private within the local office of the Scottish Children’s Hearing Administration. The room where the Hearing is held bears little resemblance to a formal Court setting, the participants in a Hearing usually sitting round a table, and in all cases, setting at the same level.
Three members (male and female) of the local Children’s Panel make up the Children’s Hearing. All Panel members take responsibility for the discussion and decision making. The Hearing begins with the formal identification of those present to ensure that only those with a right and all those with a duty are in attendance. The Chair of the Hearing will explain to the child and to others present the purpose of the Hearing (to decide whether compulsory measures of care are required) and then the Chair will read the “grounds of referral” to the child and the “relevant persons” and ask them whether they accept them. Where at least one of the grounds of referral are accepted, the Hearing continues. Where they are not accepted or are incapable of being understood by the child or any relevant person, the Hearing is adjourned, and the case referred to the Court for determination in an adversarial hearing.
From their first visualisation by Kilbrandon to the present day, practice within the Hearing has remained largely unchanged despite the changing profile of children referred and the presence in a small number of Hearings of legal representatives. Once the formalities of the grounds of referral had become established, Kilbrandon’s ambition for the Children’s Hearing was that by enlisting the cooperation of the child and their parents a family could be helped by the Panel members to find solutions to their own problems in “an atmosphere of full, free, and unhurried discussion” (Kilbrandon, 1964, para 109).

At the conclusion of the discussion, the members of the Panel will, in the presence of those in attendance, deliberate on their decision. A decision will be made on a simple
majority and be based on what is considered by them to be the interests of the child. In their decision making at an initial Hearing, the Panel members have four options; to make no order, make an order to supervise the child at home, make an order to supervise the child elsewhere, or to continue their decision to another Hearing. Within these limited options, the Panel would, according to Kilbrandon, be able to exercise the “widest and unfettered discretion” both in terms of the conditions attached to the supervision imposed at the initial Hearing but at later Hearings when modifying or extending the period of supervision, according to the needs of the child (supra, paras 73 and 79).

The Chair of the Panel will explain the decision to the child and to the “relevant persons” and the Reporter will record the decision. Where an order is made, the Chair of the Panel will advise the child and the “relevant persons” that the decision will be reviewed within 12 months, that the local authority social worker can request a review at any time, and that the child or relevant persons can seek a review of the initial order after 3 months.

Appeals

In common with other legal forums and Courts, rights of appeal against Children’s Hearings decisions can be made at the local Sheriff Court by the child or any “relevant person” or any Safeguarder appointed to the child. In considering the appeal, the Sheriff must base their decision on the welfare of the child “throughout their childhood as the paramount consideration” (section 25 of the 2011 Act). In upholding an appeal, the Sheriff can discharge the order, make a new order, or refer the child back to the Children’s Hearing for further consideration.

The evolution of the Children’s Hearing

This paper has argued at several points that the principles and practices outlined by Kilbrandon have largely stood the test of time and when external pressures have been brought to bear on the system the Children’s Hearing has, without altering its essential character, evolved in response. The first comprehensive review of Scots law in relation to children since the 1968 Act was announced in 1988 by the Secretary of State for Scotland but at the outset he was quick to assure the public that the existing law concerning the Children’s Hearing was “fundamentally sound and met main needs of children and their families” (Scottish Office, 1988). The new legislation would have to take into account the United Nations Convention on the Rights of the Child (ratified in by the UK in 1992) and the findings of the Clyde Committee (The Clyde Committee, 1992) into the removal of nine children from their parents on the island of Orkney in 1991 which held that the decision of the local authority to remove the children had infringed the rights of the children and their parents. The proposals for the new law published in 1993 however concluded quite emphatically that “the Children’s Hearing System with its emphasis on community and parental involvement, [........] was well placed to continue its important role” (Scottish Office, 1993, 37).

The outcome of these deliberations was the Children (Scotland) Act, 1995 in which the Children’s Hearing was legislated for in chapter 2. The Children (Scotland) Act sought to balance the well-meaning paternalism of Kilbrandon with a rights-based approach to
children and the adults who cared for them. The Act was founded on three principles that related to decision making by Courts, Hearings, and public agencies:
- The welfare of the child is paramount (unless members of the public need to be protected from serious harm)
- Children should be given an opportunity to express a view and that this view should be taken into account.
- No Court or Children’s Hearing should make an order relating to a child unless they consider that to do so would be better than making no order at all.

Commentators on the impact of the new legislation raised two concerns that were related to the particular political environment at the time. Lockyer and Stone (1998) commented that whereas the 1968 Act obliged the Hearing to make decisions that were solely in the interests of the child, those drafting the new act seemed to be bowing to political pressure on youth offending of the Labour led administration in Edinburgh by adding that the interests of the child appearing before a Hearing might be subordinate to the interests of others in certain instances. For them, this represented a deliberate dilution of Kilbrandon’s overarching principle that decisions made about children should reflect their needs and not their deeds. Whilst in truth, Children’s Hearings have always had to make decisions for children in relation to their impact on others, such were the political debates at the time, that Lockyer and Stone’s (supra) note of caution was entirely appropriate, particularly in the absence of a definition of “serious harm”.

A second perceived threat to Kilbrandon was contained in the third of the principles, the so called “no-order principle”. Waterhouse and McGhee (1998) were concerned that the early intervention ethos of Kilbrandon was being sacrificed by a political principle of minimum state intrusion in family life that would leave problems to fester and grow in the longer term. The “no order” principle was in fact concerned with two things, diversion from formal proceedings entirely and the avoidance of creating or continuing a measure when it was not required. Both aspects of “no order” were entirely consistent with Kilbrandon’s principles and consistent with Reporter practice of only bringing children to Hearings when “compulsory measures of care” seem to be required. What the “no order principle” did do for Panel members was to force them to consider the benefits of state intrusion in the family sphere and to specify clear objectives when making or continuing an order.

In 1998 the United Kingdom adopted into law as the Human Rights Act, the European Convention on Human Rights (hereafter, ECHR) and this, along with the requirement of all legislation to take into account the United Nations Convention of the Rights of the Child, led to a number of challenges to Children’s Hearing process, raising such fundamental questions as to its legal standing. Kilbrandon stated that his Children’s Hearings “would neither be a local authority committee or a Court of law”. It would instead by a “duly constituted public authority appointed to deal with juvenile offenders” (Kilbrandon, 1964, para 75). Whilst it appears in its operation and design to be informal, the Children’s Hearing does have significant powers to intrude in the family sphere, in some cases over several years, including the separation of children from their parents. The question was certain to arise as to whether the Hearing as constituted met the requirements of Article 6 of the ECHR as being “an independent and impartial tribunal established in law”.

It is certainly the case that the Children’s Hearing constitutes neither a civil not a criminal court in the conventional sense. It does not settle competing claims on evidence where the facts are disputed, not does it rule on points of law. One would
argue also that it does not administer what would be seen in law as punishment. Another key difference is that the Children’s Hearing unlike the adult Court did not make provision for state funded legal representation, or equal access to written information for those attending until processes were reformed by the 2011 Act. Marshall (2007) notes that until these elements were included as a matter of right, the Hearings could not claim to be compliant with Article 6 and the right to a “fair trial”. The cases of S v Principal Reporter and the Lord Advocate (Court of Session, 2001) challenged several aspects of Hearing practice under the Human Rights Act, 1998, the conclusions of which recognised, the Children’s Hearing as in independent tribunal within the terms of the Human Rights Act, 1998. In the case of S v Principal Reporter and the Lord Advocate (supra, 2001), S had been charged with a very serious assault and appeared at a Children’s Hearing. One of the grounds of his challenge was that he had not had a “fair trial” under the requirements of Article 6. The Scottish Court of Session ruled that this aspect of article 6 did not apply because S was not on trial, the grounds of referral having been accepted, S was no longer involved in a criminal process. Furthermore, the Hearing in reaching their decision were, unlike a criminal court, unable to administer punishment, their decision being made on the basis of S’s needs and not on the nature of the index offence. The Court of Session did rule that the ability of S to influence the outcome of the Hearing had been compromised by a lack of legal assistance. As a consequence of the S case, the rules governing legal assistance were adjusted initially, to ensure the availability of legal assistance in some cases, and in the 2011 Act this was extended to being available to all participants in all cases.

The Enduring Legacy of Kilbrandon

No public system can continue to exist without questions being raised about its effectiveness, particularly so within the field of justice where the pendulum continues to swing between the extremes of welfare and justice (Burman et al, 2006). It is of testimony to the vision of Kilbrandon and the support of the Scottish public that his refusal to separate the deeds of children from their needs continues to this day. Kilbrandon’s distinct Children’s Hearing system must not however be simply viewed through some proud tartan tinted spectacles or alternatively through prisms of fear that youth crime is spiralling out of control. Waterhouse (2007) states quite correctly, that public systems upon which the wellbeing of our children depend need to be evaluated by evidence of their effectiveness rather than from positions of political anxiety, or national pride. Kuenssberg (2007) and Waterhouse (2007) both highlight significant shortcomings in attempting to evaluate Children’s Hearings in the absence of data that allows the scientific establishment of cause and effect. The location of the Children’s Hearing within a complex system of agencies with competing aims, conflicting outcomes and increasingly scarce resources makes this task even more challenging. It is perhaps easier to re-examine the basis of the Hearing system and see whether Kilbrandon’s principles stand the test of time. The most comprehensive review of the Children’s Hearing took place between 2004 and 2006. The review “Getting it Right for Every Child” would, according to Peter Peacock, Scotland’s Minister for Children and Young People be “a wide and open discussion on the issues facing the Hearings system, its principles and its objectives” (The Scottish Executive, 2004, p 4). What would emerge
would be a preventative and collaborative approach to meeting the needs of all Scottish children, based firmly on the principles first articulated by Kilbrandon in 1964. The initial consultation took place in 2004 and was concerned with a review of the basic principles underlying the Children’s Hearing System. Whilst political pressures were emerging for a more punitive approach to young people who were offending, 85% of respondents to the consultation endorsed the fundamental principles that the future wellbeing of the child should be the paramount consideration of the Hearing and that children who offend and those at risk of harm should continue to be considered within a single agency (Stevenson and Brotchie, 2004).

To arrive at conclusions on the appropriateness of a welfare oriented Children’s Hearing for considering cases where children were offending, McDiarmid (2005) drew on two studies, that of Reporter Iain Gault (SCRA, 2003a) and Waterhouse et al (2004) which looked at the extent to which their needs were comparable. Gault examined the records of all children referred to the Reporter in Glasgow between December 2000 and February 2001. From this sample of 2,113 offences, he identified a group of 171 children who he classed as “persistent offenders” (those being referred for an offence 3 times in the 6 months prior to the study). Gault discovered that most of the children in the persistent offender group had “already been formally identified as children in need of care and protection” (SCRA, 2003a, p16). Gault noted too that his research design excluded those children who were already in the system on care grounds in January 2000 but whose original referral had been for reasons of offending, his figures therefore underestimating the correlation between offending and care needs.

Waterhouse et al (2004) reached very similar conclusions. They examined the files of 482 of the 1,155 children referred to the Reporter in the first two weeks of February 1995 who had been previously referred. Waterhouse et al discovered that most children 309/482 had in fact been referred on both offending and welfare grounds. McDiarmid (2005) in her commentary on this research noted that the practice of Reporter’s in determining a single basis on which to take children to a Hearing was both hiding the extent of care needs within those referred on offending grounds and unhelpfully labelling some children as “offenders” when their day to day experience more accurately defined them as children in need. These findings were replicated by Henderson, Kurlus, and McNiven (2016) who observed in their sample of 100, 8 – 11 year old children that offending, particularly persistent offending, was correlated to exposure to extrinsic risk factors, in the home, school, and in the community, and an absence of protective factors.

What emerged from the Getting it Right for Every Child Review of the Children’s Hearing is a national policy for all children and young people in Scotland. Getting it Right for Every Child (hereafter, GiRFEC) (The Scottish Government, 2014) is a child-centred ecological and preventative approach to the well-being of children that seeks to identify and meet need at an early stage before problems become more established. The policy became law in the Children and Young Persons (Scotland) Act 2014 and is binding on all public authorities and those agencies providing services to children on their behalf. Through a common language of risk and need and a system of shared processes, children appearing to be in need or are at risk of offending can more easily identified and support offered in the right way, to the right extent, at the right time, and by the right person. In day to day practice GiRFEC can be recognised by multi-agency collaboration between public agencies (local authority, social work, police,
medical and health services, housing, education, and nursery staff), families, and young people.

For those young people involved in offending, the Whole System Approach to Young Offending (The Scottish Government, 2011) is part of the GiRFEC strategy. It is a needs-based approach and founded on the Kilbrandon principles of early and proportionate intervention, diversion from prosecution, alternatives to detention, and early community resettlement. The Whole System Approach, within GiRFEC appears to have been startlingly successful, the Scottish Government claiming, within the context of falling recorded crime, a reduction of 50% in offending by young people since 2008-9, a 70% reduction in the number of under 18’s in custody (333 to 66) between 2007 and 2014, an 83% reduction in children referred to the Children’s Hearing on offence grounds in the same period, and a 74% reduction in children appearing in Court (Murray, McGuiness, Burnam, McVie, 2015).

Kilbrandon’s observation of the proximity of behaviour resulting from emotional harm in childhood and offending behaviour (Kilbrandon, 1964, para 13) can also be seen Scotland’s recent adoption of preventative public health approaches to offending behaviour. Vanwani (2014) found within imprisoned young men in Scotland, aged 16-20, extremely high levels of exposure to bereavement, particularly traumatic and repeat bereavements and high levels of exposure to violence at levels that would predict post traumatic distress disorder as a potential contributing factor to the young men’s behaviour. Among the imprisoned female prison population, the Report of the Commission on Women Offenders (The Scottish Government, 2012) identified high levels of lifetime incidences of trauma, substance misuse and mental health problems which were associated both with repeated sexual and physical victimisation. In his book, “Poverty Safari”, Darren McGarvey (McGarvey, 2017), makes a compelling argument for the links between chronic poverty, exposure to violence, and subsequent offending behaviour.

In the current programme for Scottish Government, increasing awareness of the impact of adverse childhood experiences on children and adults is an overarching policy objective. Within these words of First Minister, Nicola Sturgeon we can recognise, three aspects of Kilbrandon’s legacy, the impact of childhood events on offending, social justice, and the responsibility of the state to provide a remedy.

“Many of the people who end up in our prisons […] are already victims of other forces in society. Our prisons will be disproportionately populated by people who have suffered trauma and abuse in childhood, who have grown up in care. The prison system is compounding the injustice they have suffered in their lives” (in, Brooks, 2018)

The report Children and Young Persons Scotland published in 1964 is one of those rare documents that created a paradigm shift in thinking about the causes of offending and its subsequent treatment that has set Scotland apart from other countries in the United Kingdom. Kilbrandon’s central idea that emotional disturbance and offending behaviour have shared roots in personal and environmental difficulties effectively mixes concerns about criminal justice with approaches favouring prevention, social justice and public health. In 2018, Scotland celebrated 50 years since the passage of the Social Work (Scotland) Act, 1968 that created the Children’s Hearing and the local authority social work departments, both of which were founded directly, in the first instance, and indirectly in the second by the work of Lord James Kilbrandon.

Kilbrandon’s legacy remains strong, Getting it Right for Every Child (The Scottish Government, 2014) is now enshrined in law as a preventative, child-centred
partnership approach to all children, and the “Whole System Approach” (The Scottish Government, 2011) is delivering real benefits to the small number of children who are persistent offenders, to their families, and to their communities as a whole. Finally, the links that Kilbrandon made between unmet need in childhood and subsequent offending behaviour is re-emerging as Kilbrandon’s latest legacy to those within the Scottish adult justice system as paradigm for prevention, understanding, and intervention.

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**ABSTRACTS**

Due to political concerns about rising juvenile offending, the Scottish Office in Edinburgh established in 1961, a committee of enquiry to review systems and procedures for children appearing in Scottish Courts. The committee under judge Lord James Kilbrandon reported in 1964. Kilbrandon found that it was not possible to separate the underlying causes of children appearing in Court due to offending behaviour from those requiring care and protection. In both instances, he argued, the needs of the child had not been met by the adults responsible for their upbringing. Kilbrandon proposed a new system based on the needs of the child, the central role of the family in meeting the child’s needs, and the adoption of a preventative and educational approach to children in difficulty. The Scottish Children’s Hearing, a formally constituted legal tribunal but informal in its operation was created in law by the Social Work (Scotland) Act, 1968. Fifty years later it has stood the test of time and continues to operate in the way that Kilbrandon first envisaged it in 1964. In the words of Bottoms (2002,154), “the Children’s Hearing system is a relatively rare surviving example of a full-fledged, welfare-oriented system, and an assessment of
its contemporary functioning is of great theoretical interest.” Kilbrandon’s legacy extends beyond the Children’s Hearing. His vision of shared community responsibility for the welfare of children and the lasting impact of adverse childhood events forms an essential element of Scottish public policy to children, to public health and to justice.

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**Keywords:** Juvenile Justice, Scotland, Problem Solving Court, Children’s Hearing, Children’s Panel, Youth Justice

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