

The 12th Kilbrandon Lecture - University of Strathclyde, 27 Nov 14 - Remembering Lord Kilbrandon

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It is a very real honour for me to have been invited to give this lecture. As you know, it is part of the series that was set up to commemorate the establishment of the Children's Hearing system in Scotland. I accepted the invitation with some diffidence, as I am not nearly so closely involved with the system as most of you are, even before my retirement from the UK Supreme Court. To be frank, I am not really in a position to speak with any authority on how the current system is working today or what steps, if any, are needed to improve it.

But I have two rather modest qualifications which persuaded me that I should accept the invitation. The first is that I have the great advantage of having known Lord Kilbrandon. So my admiration for him is not just at second hand. The second is that I had to deal with a number of important cases under the legislation that gave rise to the system - the Social Work (Scotland) 1968 - during my time as Lord President of the Court of Session from 1989 to 1996. I also had to deal with one more case under the Family Law (Scotland) Act 2005 - the statute which preceded the Children's Hearings (Scotland) Act 2011 which has restated the legislation into its current form. This was a case, which, by a rather odd route, reached the Supreme Court in 2011. I remember the close interest that I took in the workings of the system as seen from the Bench, and my admiration for the system, too, and for all those who had the responsibility of putting it into effect. I am, of course, conscious that all of this is now past history. But a sense of history does help to put how things are today into its context. So I hope that you will forgive me for dwelling on it a bit this evening. How that history fits in with how the system is working today, I must leave you to judge. For it is you, who know so much more about it, who are the experts - not me.

As I said a moment ago, I have the great advantage of having known Lord Kilbrandon. I did not know him as a colleague, either at the Bar or on the Bench, as he was already 32 when I was born, and he died just weeks before I became a judge. But I did meet him when I was a student, and I appeared before him occasionally when he was sitting as judge in the Court of Session and the House of Lords. It was our meeting when I was a student that has made a lasting impression on me. One of my contemporaries had the rather bold idea of asking people whom we thought might be interesting to have dinner with us to my home in Moray Place in Edinburgh. My mother very kindly agreed to be the caterer, which was just as well, as none of us could possibly have produced something that was suitable for the occasion. We - there were three or four of us - would provide the conversation. When we cast around for suitable candidates for this encounter, it was suggested that we might try to persuade Jim Shaw, as he was known at the time by almost everybody. This was in the

early 60s - I think in the winter of 1962-1963. Jim Shaw was already a judge by then, having chosen as his judicial title the name of Lord Kilbrandon after the home he had made for himself and his family at Kilbrandon on the island of Seil in Argyll. But his horizons were very wide. He had a reputation for openness, and for a willingness to talk to anyone. As someone who knew him well once said of him, his easy presence in any gathering, talking to all and interested in all, was unforgettable. I would find it hard to believe that any of the other judges of those days would have accepted an invitation to spend an evening over dinner with a group of students whom he had never met. But he did accept it, and I think that our relaxed evening together was a remarkable success. Of course, it happened so long ago that I cannot now remember what we talked about. But it was the fact that he accepted our rather cheeky invitation in the first place that really impresses me, as I look back. It tells you quite a lot about the person he was.

It was shortly after that meeting that the report of the Committee of which he was asked to be Chairman was published and presented to Parliament. That was just fifty years ago last April (Cmnd 2306). The Committee had been invited 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 procedure of the courts for dealing with such juveniles. It had twelve other members, including two sheriffs, three lay justices, a physician and a professor of law. I do not know why Lord Kilbrandon was chosen to chair this Committee. It is unlikely that he had come across many cases involving juveniles of the kind described in that invitation while he was at the Bar or on the Bench. His practice was in the Court of Session, not the lower courts where juvenile offenders were usually prosecuted. A quick search of the cases reported during his last year at the Bar before he became a judge showed that his work extended from income tax and company law on the one hand to a case in which damages were claimed for the loss of a car, which had been destroyed by a fire while garaged in the premises of a hotel on the other. There is nothing in this list of cases that would have brought him into contact with juvenile offenders or with children in need of care and protection. But it is certain that he was the most broad-minded and interested of men, and I am sure that he would have greeted an invitation to serve on this committee with real enthusiasm. The invitation would not have been extended to him without the knowledge and approval of the Lord President of the time, Lord Clyde. It may even have been at Lord Clyde's suggestion that he was selected. However it came about, it was, as we now know, an inspired choice.

We can also be sure that, according to the usual practice, the remit of the Committee would have been discussed with him before the Committee was set up. Some of the language it used, particularly the phrase "juvenile delinquents", may seem to us rather antiquated today. The phenomenon of child abuse was not mentioned. There must have been a lot of it going on, but it still lay under the surface - unobserved, not talked about. Of course, the remit was constrained by the system which the committee was being asked to scrutinise and try to reform. But the title that the committee gave to its report was "Children and Young Persons", rather than "Juvenile Delinquents". This set the tone for the entirely fresh approach, which the committee was to take to this area of our law, and for the wide-ranging nature of its inquiry. One might note in passing that the setting up of the Committee was spared the controversy that has so sadly beset the inquiry into

historical child abuse, which is currently starting its work in England. It had, of course, the advantage of being asked to consider an area of law, which was widely believed to be in need of reform. As far as I know, its setting up was not controversial in any way and there was no suggestion that the chairman was not suitable to the task.

The line of thought that was developed in the Committee's report, in the light of its examination of the issues, makes interesting reading today. To begin with, the basic problem was identified. The Committee said that its primary concern was with children in trouble: those with delinquent behaviour, those in need of care and protection, those beyond parental control, and those who persistently played truant from school. And its primary focus was on the field of criminal justice. The arrangements for dealing with children and young persons accused of offending in those days were, to say the least, very untidy. But there was another, more fundamental problem, too. It was to be found in the "crime-responsibility-punishment" approach to dealing with offenders. This problem was highlighted by the fact that the categories into which children and young persons were divided for this purpose by the statutes were related entirely to forms of punishment. While that was all very well for adults, it was unsatisfactory when applied to children and young persons. That was because of the conflict between the competing aims of punishment and of prevention. Given their age and stage of development, preventing future offending ought in their case to be given priority. But the primary aim of the existing procedures was that of punishing those who were found to have been responsible for committing an offence. The Committee appreciated that these procedures were missing the point that they ought to have been addressing.

Having gotten this far with the offending chapter of its inquiry, the Committee then looked at the existing arrangements for dealing with those children who for other reasons were in need of care and protection. Rather to my surprise, in the light of my own experience of cases under the 1968 Act during the early 90s, and even more surprising in view what we know now, cases falling into this category were described as being comparatively rare. No doubt this was a reflection of the available statistics, which differ from those which are produced today, and are on the public record. So many children who are alleged to have committed an offence are now dealt with outside the criminal process. The result is that precise statistical information about their total number is hard to come by. Those dealt with by the courts are, as you would expect, a tiny proportion of all the children falling within this group. The figures for 2012-2013 show that only 34 children under the age of 16 had charges proved against them in the criminal courts in Scotland during the whole of that period, and that only 10 received custodial sentences (The Scottish Government, 2013: Table 11). The figures for the previous period were 47 and 6. There were cases of neglect which did come before the courts, but the phenomenon of child abuse had yet to attract the attention of the authorities. What matters, however, is that there were features of the process for dealing with children in need of care and protection that pointed the Committee to a solution of the problem that had been identified in the case of the other category. The emphasis in the case of children in need of care and protection was on prevention, not punishment. Should that approach not be adopted in the case of child offenders, too? It is here that we can see the germ of what in one of my judgments I was later to describe as the "genius" of the reform that the Committee said should be adopted (*Sloan v B* 1991 SC412, p.438).

The Committee's stroke of genius, if I may continue to use that expression, was to realise that the process of arriving at a judicial finding of fact - whether the child had committed the offence - was an entirely different one, calling for quite different skills and qualities, from those to be applied in deciding on the action to be taken in relation to delinquent children once the fact is established. Research into how these matters were dealt with in other countries, especially in Scandinavia, showed that this dichotomy of function had been recognised by completely separating the two in practice. The courts of law were concerned solely with the establishment of the truth or otherwise of the allegation. The treatment of the offender was entrusted entirely to a separate and specialised agency, whose sole function was the consideration and application of training measures on referrals by the courts. In the Committee's view, the shortcomings which had been causing dissatisfaction with the existing juvenile court system arose essentially from the fact that they sought to combine the characteristics of a court of criminal law with those of a specialised agency for the treatment of offenders according to the preventive and educational principle. While the underlying conflict between the two separate principles might to some extent be diminished with experienced persons on the Bench, that could not be assumed to be so where those sitting in the juvenile courts were lay justices. This analysis seemed to point in favour of separating these two issues except for those charged with very serious offences, if the practical problems that making this change could be overcome, and a system could be created that would be workable.

Another feature of the existing system that caught the Committee's attention was the fact that about 95 per cent of prosecutions in the juvenile courts resulted in a plea of guilty. The vast majority of these cases were not contested before the tribunal that was concerned with the establishment of the truth or otherwise of the allegation. This suggested that these cases were being proceeded with, to start with, in the wrong way. So it was that the concept of children's hearings emerged, and of a new system under which not only was the adjudication of the allegation issue separated from consideration of the measures to be applied, but the point of reference to start with was the panel system and not the court. In the limited number of cases where the allegation was disputed, reference would be made to a court of law. If it upheld the allegation, the court would then remit the case to the panel to consider the treatment measures to be applied. That, broadly, was the system which was put into law in 1968 by Part III of the Social Work (Scotland) Act. All members of the Committee contributed to its Report from their various points of expertise, and they received evidence, both in writing and orally, from a large number of witnesses. But much of the credit for the ideas expressed in it must go to Lord Kilbrandon himself. I do not wish to diminish the importance of the contribution that was made by the other members, but his leadership was all-important. The Report can be seen as his finest and most lasting achievement.

The 1968 Act, when it was enacted, had a broader purpose than that which had been considered by the Committee. This was to promote social welfare in Scotland generally, including the care and protection of children. In that regard it implemented proposals for reorganising local authority services outlined in another report, a White Paper called Social Work in the Community, which was published in 1966 (Cmnd 3063).

This was entirely appropriate, as these reforms fitted in well with the Kilbrandon scheme and added their support to it. Social work was re-organised in the form of distinct departments serving a variety of needs, as well as the provision of reports and supervision duties to the children's hearings. That was the scheme set up by this enactment, and it was relatively untroubled by criticism during its first 20 years. But, just as I was beginning my term as Lord President, some quite difficult problems began to emerge. It was a feature of these cases that they were about children in need of care and protection, not about children who had been referred to a reporter because they were alleged to have committed an offence. They revealed problems about the working out of the new system as it was put into practice in that field, which, not surprisingly, had not been commented on by the Committee and which, it seems, had not been anticipated by the drafters of the 1968 Act. The most serious were those presented by the Orkney and Ayrshire cases, which reached me a year or two later. They concerned the removal of children from their families on suspicion that they were victims of child sexual abuse. I sat on the applications and appeals that both those cases gave rise to. The controversy that surrounded them was intense, as was the attention that they attracted in the media. They were far from easy to resolve in a way that put the interests of the children first, while making sense of the legislation that had to be given effect to meet their situation. Those whose work was in the social service departments faced particular challenges. Unhappily, they were the subject of much unwelcome, and, as it seemed to me, unjustified criticism in the press. I should like to say a bit about these cases.

The reporter in the Orkney case (*Sloan v B* 1991 SC413, p.438) was the acting reporter to Orkney Islands Council. He had referred nine children from four separate families to a children's hearing. They had been removed from their parents to a place of safety on the mainland in February 1991 following allegations made by the children of another Orkney family who themselves had undoubtedly been the victims of serious sexual abuse. The allegations, in brief, were that these nine children had been exposed to moral danger due to ritualised behaviour between the children and their parents, which was said to have involved sexual intercourse or simulated sexual intercourse. The rituals were said to have taken place out of doors during the hours of darkness, and to have involved music and dancing, and the wearing of strange garments. The bizarre nature of the allegations excited the attention of the media, and they were widely reported on television and in the newspapers. But they were just allegations. The children's parents refused to accept the grounds of referral, so the reporter was directed to apply to the sheriff of Orkney and Shetland to determine whether the grounds of referral had been established. But there was a problem. The children had been removed from the remote community in which they had been living in Orkney to the mainland. There was no provision in the procedure rules which would enable a sheriff sitting in Orkney to conduct any part of the proceedings outside the sheriff court district in which that court was situated. The mainland, where the children were, was in a different district. Furthermore, the Act required the chairman of the hearing to explain to the child and his parents the grounds of referral. This gave effect to the Kilbrandon principle that the children were to be involved at each stage of the process. For this to be done, they had to be present at the hearing at which the grounds of referral were to be discussed. There was no provision in the Act which said that this requirement could be dispensed with. Obviously, this could not be done if, as was the

case here, the children were not present when that explanation was given to their parents.

Our legal system does, however, provide a way in which difficulties of this kind may be overcome. The Court of Session has an inherent power to cure difficulties in a legislative scheme if the circumstances are unusual and unforeseen, and if the legislation is not so tightly worded as to prevent this. So it was that the court over which I was presiding gave authority under its inherent power to cure the gap in legislation so as to enable the sheriff to take evidence from the children when sitting in a different Sheriffdom on the mainland (Sloan, Petitioner 1991 SC281). But the case never got as far as that. The sheriff held the application to him as incompetent because the children had not been present when the parents were asked whether they accepted the grounds of referral, nor had they for their part been asked whether they accepted them. And he went on to say that, whatever the truth might be of the allegations, he was in no doubt that the risks to their welfare in returning the children to their families were far outweighed by the certain damage being done to them by their continued detention, and that the sooner they were returned to the parents the better. His remarks were widely reported in the press and on television. They were seen as an attack on the reporter and the social workers. The consequence was that, without further ado and without any further inquiry as to whether the allegations were true or not, the children were returned to their homes in Orkney later the same day, five weeks after their removal.

The summary way in which the sheriff dealt with the case led to an appeal against his decision to my court by the acting reporter. For reasons I do not want to go into here, which in themselves were controversial (Norrie, 1993 SLT [News] 67), we held that the application to the sheriff was competent as in the special circumstances of that case the children's presence could be dispensed with. We also held that he should not have done or said what he did (Sloan v B, supra). So his finding that the proceedings were incompetent was set aside. That should have led to the matter proceeding to an inquiry as to whether the grounds for the referral had been established. But the fact was that the children had now been returned to their families. The prospect of their being removed from their homes and taken to the mainland again after such a traumatic experience was, of course, appalling. Just a few days later, the proceedings were abandoned by the reporter without the truth or otherwise of the allegations ever being established. It was an extraordinary result, which not unnaturally was the cause of much concern.

So it was that an inquiry was set up in June of that year to examine the circumstances. It was under the chairmanship of a Court of Session judge, Lord Clyde (HC Papers 1992-1993, No 195). The remit of his inquiry, which itself was the subject of much media attention, was carefully chosen. You might like to compare it with the very different and much wider remit, which appears to have been given to the current historic child sex abuse inquiry in England. Wisely, he was not asked to investigate the truth or falsity of the allegations that had been made by the children of the other family. The best thing, for the sake of all the children involved in the case, was to leave that in the past. No doubt, if there were further grounds for concern about their welfare, fresh proceedings could be brought. If so, they would be for the reporter to deal with, not an inquiry in public of this kind. Nor, for similar reasons, was Lord Clyde asked to assess the effects on the children who were

removed of what had happened to them. His task was to examine the procedure and to make recommendations as to what should be done to improve it. He heard a great deal of evidence during his inquiry which was held in Kirkwall and lasted for many months, much of it from experts in child care. His report, which he submitted to the Secretary of State for Scotland with exemplary speed at the end of July 1992, and was presented to Parliament in October of that year, extended to over 360 pages. It contained detailed recommendations about the protection of children, how to investigate allegations of child sexual abuse, the removal of children to places of safety, the management and care of children while they are there, the interviewing of children, and the rules relating to children's panels and the reporter. There was much that was to be learned from it. It was by far the best thing to come out of a very unhappy chain of events.

The other case involved eight children from three separate but closely related families in Ayrshire who had been made the subject of place of safety orders in June 1990. They were made on the ground that the children had been sexually abused or were members of the same household as children who were sexually abused. So they were removed from their parents and placed elsewhere. Their cases were referred to a children's panel. Only one of the parents accepted the grounds of referral, so the case was referred to the sheriff who held that they were established. The parents then applied to the Court of Session for an order that another sheriff should rehear the case. This was on the grounds that they had obtained expert evidence after the first hearing which cast doubt on the sheriff's findings and that, since the publication of Lord Clyde's report, there was now a greater understanding of various features in their case. A point of very real importance was the defective way in which the children had been interviewed, which was a subject about which had been learned as a result of mistakes made in the past. It was said that proper attention as to how this should be done would allow another sheriff to examine the evidence in a more critical way. There was no provision in the Social Work Act for a re-hearing. But the Act did not say that there could not be one, and the Court of Session has an inherent power to make good omissions of that kind if the circumstances are exceptional and unforeseen. The application for a rehearing came before my Division. We held that, as the special problems that had arisen in this case had not been foreseen by the Act and, that as the original sheriff had not had all the information before him to make a sound decision, there should be a re-hearing by a different sheriff (L, Petitioners 1993 SLT 1310; L, Petitioners (No 2) 1993 SLT 1342). That was a relatively simple step for our court to take. What then followed was much more difficult.

After the re-hearing, the second sheriff reported to the court that the grounds of referral were, after all, not established. The obvious consequence of this was that the children should be returned to their families. But it was now February 1995, and they had been separated from their parents and from each other for five years. An immediate return, as had been achieved in the Orkney case, was out of the question. We had to give very careful thought to the way their return should be brought about. We were provided with information that indicated that, while some of the children were willing to be returned, the others were not. The effect of their removal had been to turn their minds against their parents. There were deep-seated feelings of suspicion and mistrust, and it was obvious from the outset that great care had to be exercised if matters were not to be made worse. Our court of three appeal judges, sitting in public in wigs and robes in our

courtroom in Edinburgh where only counsel could address us orally, was as far removed from the atmosphere of a children's hearing as it was possible to imagine. But it was agreed that we had no alternative but to deal with the matter as best we could ourselves. We appointed experts in the field of child psychology, who already knew a good deal about the facts of the case, to act on behalf of all the children. They were there to advise the court as, step-by-step and child by child, the process of return was brought about. We had numerous hearings as we studied what they had to tell us, listened to counsel's submissions, made the appropriate orders and received reports about their effect, stage by stage. In the end, after a process that extended over a period of more than six months, all the children were returned to their parents and the proceedings came to an end with what we hoped was the minimum of distress and delay to all those involved. We could only hope that no long-term damage had been done. This, then, was another very unhappy case, which the system laid down in the Act could not cope with, but it was possible to resolve in another way.

The result of these cases was a careful reappraisal of the legislation that had been enacted in 1968. It was much assisted by a report into child care policies in Fife by Sheriff Brian Kearney which was published in 1992 (HC Papers 1992-1993, No 191) and the Finlayson Report on the role, functions and accountability of children's panels (Finlayson, 1992). This resulted in the repeal of the Part of the Social Work (Scotland) Act 1968 which gave effect to the Kilbrandon Report and the enactment of new provisions in its place in Part II of the Children (Scotland) Act 1995. But an assessment of how these provisions were working out in practice did not stand still. Many changes have taken place in the way families live their lives today from that which was current in the 1960s. Much has been learned from the increasing number of child abuse cases, which make great demands on the time and resources for all those involved, from social workers to reporters. Large parts of the legislation has had to be re-designed and brought up to date. The provisions in Part II of the 1995 Act have in their turn been repealed and replaced by the Children's Hearings (Scotland) Act 2011, an enactment by the Scottish Parliament of high quality which does credit to the skills of all those who contributed to it. As I said at the start, I am not equipped to add a view of my own as to how these new provisions are working out. They were brought into effect on 24 June 2013, just three days before I retired. But I was glad to note that they were able to take into account of a problem which came to my attention in my last contact with this area of child care legislation, which came before me in the UK Supreme Court by a wholly unexpected route. It was unexpected because it was never the intention that decisions of the Court of Session in cases of this kind should be appealable to London. The avenue to London was opened up by proceedings at the principal reporter's instance of a quite different kind that were appealable.

The case was about the rights of unmarried fathers - a not unusual person, these days - to take part in children's hearings under Part II of the 1995 Act (Principal Reporter v K 2011 SC (UKSC) 91). The relationship between the father and the mother in this case had broken down and they had separated. The father wanted to maintain his relationship with his child. So he applied to the sheriff for an order giving him full parental rights and responsibilities in relation to the child. He also applied for a contact order, which was granted. Allegations were then made against him of child sexual abuse, the alleged victim being his own child. The case was referred to the principal reporter on the ground that the

child was in need of compulsory measures of supervision. A children's hearing was held, but the father was not allowed to attend it because only those who were described by the Act as a "relevant person" was allowed to attend. The problem was that the definition of "relevant person" in the 1995 Act, Section 93(2)(b), did not include an unmarried father. Parental responsibilities or rights were given by an earlier provision in the same Statute only to a father if he was married to the mother at the time of the child's conception (Scottish Executive, 1995, Section 3(1) (b)). The fact that the statute treated unmarried fathers differently attracted powerful academic criticism. But on the face of the statute the children's hearing had no alternative but to exclude him. So it considered whether the grounds of referral were established in the father's absence. This deprived the father of the opportunity to dispute the allegations against him, on which the grounds for referral had in part been based.

The case then came before the sheriff again in the proceedings in which the father was seeking a contact order. The sheriff, after a welfare hearing, decided to grant the father parental rights to the extent that he was to become a relevant person in the children's referral in relation to the child. He continued the contact order that he had previously granted. His order would have the effect of enabling the father to be treated as a "relevant person" by the children's hearing so that they could hear what he had to say. But the principal reporter questioned the competency of the order. He applied to the Court of Session to have it set aside on the ground that it was incompetent. The father in response asked for a declaration that the statutory definition of "relevant person" was incompatible with his rights under the European Convention on Human Rights, especially his right to family life. The Court of Session set aside the sheriff's order as incompetent, and it refused the application for a declaration. The effect of that was to leave the father still with no opportunity of being heard. Its decision on these matters was appealable as of right to the Supreme Court under the ordinary rule about appeals under the Court of Session Act 1994, Section 40(1), as it was outside the Part of the 1995 Act which excluded the possibility of appeals to London.

So it was that, wholly unexpectedly, I found myself once again presiding over a court that was faced with a problem under the legislation relating to children's hearings. On this occasion, I had sitting with me Lady Hale who is very experienced in family law, and we had the advantage of having sat together on many cases concerning the scope of the right to family life under the European Convention. We decided that the definition of "relevant person" in the section of the 1995 Act should be read as including a person who appears to have established family life with the child with which life the decision of a children's hearing may interfere. We said that that person's right to respect for his family life meant that he had a right to be heard before any decision was taken by a children's hearing that might deprive him of it. As a result of the reforms introduced by the 2011 Act the rule now is that the panel must deem a person to be a relevant person if the individual has, or recently had, a significant involvement in the upbringing of the child. That, in slightly changed wording, is the principle that the Supreme Court laid down in the case of the unmarried father. It is a principle that can now be applied generally so as to give a right to be heard to everyone in the category it describes.

As you will appreciate, we have now moved forward a long way from the report of the Committee that Lord Kilbrandon presided over all those years ago. It has been a process of learning and development. Many hands have contributed to it, from all parts of our legal system. Inevitably there were flaws and gaps in the original scheme which, one by one, were revealed and then addressed by the Court of Session in Edinburgh and then taken into account by everyone else as the legislation was revised and re-stated. It is remarkable, however, that the structure of the legislation in its application to the area of practice to which the Committee directed most of its attention, that of children and young persons in trouble because they alleged to be offenders, appears to have given rise to very few problems. The statistics about the number of children against whom charges have been proved in the criminal courts that I mentioned earlier are a testament to its success (see above). It is worth noting, too, how the law in England and Wales is still struggling with issues such as whether, and if so how, anonymity can be given to children being investigated for a crime with a view to prosecution that very seldom arise given the children's hearings system that we have. The cases of concern about how our legislation was working have come almost exclusively from situations where children were, or were alleged to be victims of abuse.

Some of those gaps and flaws, arising from problems that had not been anticipated, could be cured by a process of interpretation. Others were of a more fundamental kind, which required the legislation to be amended, strengthened and in some respects reformed. And there were underlying defects in the procedures for investigating and dealing with cases of child abuse which, in the light of the Orkney and Ayrshire cases, had to be dealt with by changes of approach and procedure. It has not been easy. But I believe that the system we now have is much better able to cope with the extreme demands which cases of this kind present. And through it all has been the essential character of the system. The primary focus is on the handling of each case by the children's hearing, leaving the courts of law out of it unless there are facts that are disputed and in need to be established. So the genius of Lord Kilbrandon's reform lives on. It is much to his credit that it was strong enough to survive through it all, and that shows no sign of weakening. That lamp shines as strong as it ever did.

Let me leave with you a glimpse of Lord Kilbrandon's broad-mindedness and humanity as seen through one of his judgments in the House of Lords, which was delivered in December 1976. The case was about adoption (*Re D [An Infant] (Adoption: Parent's Consent)* [1977] AC 602, [1977] 2 WLR 79; see also T, *Petitioner* 1997 SLT 724, 732). The child was living with his mother and a stepfather, his father having separated from his mother following a divorce. The divorce was on grounds of cruelty, the main allegation being that the father was gay. The mother and the stepfather applied to adopt the child, partly out of concern about the possible effect on him of learning that his father was a homosexual. The father refused to give his consent to this, as the child's adoption would mean that he would lose his right to have contact with the child. The question was whether the withholding of his consent was unreasonable. The judge at first instance held that it was, as it was in the child's best interests to be adopted, and the father's influence was not likely to be otherwise than harmful. The Court of Appeal reversed his decision, but it was restored by the House of Lords.

To our ears, today, the view that homosexuality per se could be a ground for divorce on the grounds of cruelty, or for treating the father's wish to retain contact with his son as unreasonable, seems absurd - even offensive. But there were other aspects of the case which justified the decision. The law lords who heard the appeal were at pains to point out that, as it saw the case, it was not the law that consent to adoption could be dispensed with because of the parent's homosexual tendencies alone. The approach, which they adopted, shines through the words of Lord Kilbrandon, which I was later to find especially valuable when my court was dealing with an appeal against the refusal of an application for adoption by a gay man who was living with another man. What he said was this (ibid. [1977] 2 WLR 79, 99D-F):

it could easily be productive of injustice if one were to attempt any hard and fast rule as to the attitude which the courts ought to adopt ... It is not possible to generalise about homosexuals, or fair to treat them as other than personalities demanding the same assessment appropriate to their several individualities in exactly the same way as each heterosexual member of society must be regarded as a person, not as a member of a class or herd. Naturally, in a family law context, the fact of homosexual conduct cannot be ignored; but no more can the consequences of taking it into account be standardised. The kind of influence, in this type of problem, which the fact may have will be infinitely variable.

It is difficult for us; in these, much more enlightened times, to appreciate the importance of these remarks. At the time when he was, writing prejudice against homosexuals as a class was deep-seated, and it was still lingering on when the adoption case arrived in my court. The child in my case was severely and permanently disabled, and the prospective adopter and his male partner were both nurses with considerable experience of dealing with disabled children. Adoption by them was clearly in the child's best interests, so we allowed the appeal and gave authority for the child to be adopted (T, Petitioner 1997 SLT 724). Lord Kilbrandon's wise and forward-looking words gave us much encouragement as we resolved upon what was bound to be seen, even in 1996, as a controversial decision. They were almost his last words as a judge, as he retired at the end of the month in which judgment was given in that case. But I believe that they are typical of a man whose open-mindedness and freedom from prejudice contributed so much to the way our system deals with some of the most difficult problems that affect children and their families.

He, I am sure, would welcome what has been happened to develop that system since his Committee completed its work. And I am sure that he would wish, as I do, to congratulate all those many people who, by working together to look for what is best, have given us what we now have. It is a tribute to that system that we in this country have been spared the bitter personalised and very public attacks on individuals within the social services that have so damaged recruitment and retention in social services in England. If, as I hope is the case, the morale of social workers is much higher in this country; we have a lot to be thankful for. I know, from my own time as Chancellor of this University when I had the pleasure of meeting and talking to students who had taken the courses on offer here after their graduation ceremonies, how much they were looking forward to developing their careers in the social services up and down the country. Their enthusiasm for their subject was high, and it was infectious. They had enjoyed their courses, and they were really

looking forward to putting what they had learned into practice. So I think that we have much to celebrate as we look back over these past fifty years and contemplate what, thanks to Lord Kilbrandon and his Committee, has been achieved.

About the author

David Hope, Baron Hope of Craighead, was, as Lord Hope, Lord President of the Court of Session and Lord Justice General, Scotland's most senior judge. In 2009, Lord Hope was appointed one of the first justices of the Supreme Court of the United Kingdom, and was Deputy President until his retirement as a judge in 2013. He was Chancellor of the University of Strathclyde from 1998 to 2013, and appointed Lord High Commissioner to the General Assembly of the Church of Scotland in 2015.

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