

KILBRANDON - THEN, NOW, AND IN THE FUTURE

Abstract

The 50th anniversary of the publication of the Kilbrandon report provides an opportunity to reflect on the impact that the report has had on vulnerable children in Scotland and consider the system's future prospects. The Kilbrandon vision and values have had a profound effect on our legal system and Scottish society at large. The writer declares that, having been involved in Children's Hearings for over 40 years, the views expressed within this paper are not completely neutral. Now is an appropriate time to take stock of the extent to which Kilbrandon's vision remains alive today and to reflect on the changes that have occurred over the years in terms of politics, society, the law and organisational structures. It is also an opportunity to consider how our contemporary knowledge of vulnerable children's needs, and rights, have influenced the development of the Children's Hearing system. This article considers the ways in which the system might adapt in future to ensure that the core values of Kilbrandon continue to influence future policy making concerning the needs of Scotland's children.

Keywords

Kilbrandon report, children's hearing system

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Introduction

Today, the core of Scotland's child care strategy is *Getting It Right For Every Child*. Rereading the Kilbrandon report demonstrates continuity in the thinking that underpins both documents. Both serve to seek the best outcomes for Scotland's vulnerable children and it is a tribute to the genius of the Kilbrandon report that its vision remains alive today.

Since 1971 Scotland has had its own juvenile justice system, based on the principle of the welfare of the child and supported by a lay tribunal, the Children's Hearing, and an independent officer, the Children's Reporter, who determines which cases appear at a hearing.

The foundation for the system was created by a committee chaired by a law judge, Lord Kilbrandon, who reported in 1964. Fifty years after the publication of that report, it is

time to reflect on changes that have occurred since that time and its continued relevance for the future. The prime purpose of the report was the 'prevention of delinquency' and in the early years the majority of referrals were for offending by older children and young people. Residential schooling, especially in what then were called List D schools, was a frequent disposal.

Over the years the type of referral has changed to reflect growing concerns about younger children at risk of abuse, in line with the human rights agenda. More regulation and control has been placed on residential child care placements, especially concerning the use of secure accommodation, and far greater use has been made of foster and kinship care.

POLITICAL AND SOCIAL CHANGE

The remit of the Kilbrandon Committee was:

To consider the provision 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 dealing with such juveniles to report (Scottish Home and Health Department, 1964, p.5).

It is clear that the greatest emphasis was upon the treatment of juvenile delinquency. The majority of referrals were received on children during that period. In advocating a move away from the traditional jurisdiction of courts to deal with children's issues, the Kilbrandon Committee was recommending a radical line and one that was far from universally supported at that time. The Law Society of Scotland commented at a very early stage in the committee's deliberations that:

Consideration has been given to a suggestion that the treatment of children under 14 should be removed from the juvenile courts and entrusted to new tribunals called Children's Welfare Committees, which would be associated more with the educational than legal machinery of the State. We have rejected this suggestion. We consider that the word 'court' is synonymous with the 'law' in the public mind and that this idea should be inculcated at the earliest possible age, along with an understanding that the law must be obeyed. (Martin & Murray, 1976, p.7).

When the report eventually came out, it was subject to very mixed reactions. For instance, the Sheriffs' Substitute Association warned that a substantial section of responsible public opinion would refuse to accept such a 'revolutionary new system' (Martin & Murray, 1982, p.9).

Ironically, the hearing system has outlived the now defunct Sheriffs' Substitute Association. It should, however, be acknowledged that when the Children's Hearings system started in 1971 it came under significant early criticism, especially as rates of offending increased. One of the most persistent critics was Teddy Taylor, then MP for Cathcart. He was not a believer in the welfare approach as he outlined in Parliament in 1976:

I have always believed in the reintroduction of the birch as a penalty for acts of violence and vandalism (HC, 1976, 1328).

While by 1977 he expressed his views on the hearings system: ‘...the indications are that the experiment has not been a great success’ (HC, 1977, 1822).

Within two years of that comment, there would be a UK parliamentary election when a Conservative Government under Mrs Thatcher was put in power. Mr Taylor had been Shadow Secretary of State for Scotland and was only denied from continuing as Secretary of State by the voters of Cathcart who, contrary to national trends, did not re-elect him as their MP. Had they done so, it is not unreasonable to suggest that the subsequent history of the hearings system could have been very different and considerably shorter.

Instead, George Younger became Secretary of State for Scotland and by 1982 he was able to comment on how ‘remarkable and unique the system was’, commending it for dealing with children ‘from the standpoint of their needs’ and concluding that children’s hearings ‘have established themselves in less than 12 years of their existence’ (Martin & Murray, 1982).

Over 20 years later, however, the introduction of the *Anti-Social Behaviour (Scotland) Act 2004* saw a return to a harsher tone in relation both to children and the hearing system. The uptake, however, of many of that Act’s provisions in relation to children was virtually nil, as its limited connection with the principles behind the hearing system had been quickly identified. There was, subsequently, clear evidence of consistent all-party support for those principles in the debates which preceded the introduction of the *Children Hearings (Scotland) Act 2011*.

Society’s views on the hearings system are more difficult to gauge, due not least to the lack of any real knowledge of how the system operates. That is in part owing to the very necessary confidentiality of proceedings. On a more positive note, there must be at least 5,000 current and former panel members, drawn from all parts of the country and society, and this factor in itself has promoted public awareness. Not all may have had wholly positive experiences of the hearing system but all will have left with a greater knowledge and understanding of the issues that impact on children in trouble. That has to be for the long-term gain of Scotland.

ORGANISATIONAL CHANGE

1. *Children’s Panel*

Kilbrandon’s vision of the panel member and their organisation was that:

1. There should be a panel in each local authority area;
2. The panel would be a lay body of members chosen for their knowledge or experience of children’s problems;
3. The duty to appoint panel members and monitor should rest with the local sheriff.

Subsequent proposals by the government placed responsibilities for recruitment, training and monitoring with the Children's Panel Advisory Committee, one of which was appointed for every local authority area. This model lasted until the advent of the *Children's Hearings (Scotland) Act 2011*, when Children's Hearings Scotland was created to provide support to panel members and in particular to develop a national model for the functions above.

The reform is in keeping with the approach taken to similar bodies - police, safeguarders and reporters - with the aim of providing greater national consistency within the system while still ensuring that panel members operate for the most part within their local patches and retain a local connection with their community as set out in Section 7 of the *Children's Hearings (Scotland) Act 2011*. The creation of Children's Hearings Scotland has also led to more visible and authoritative representation by panel members. Their experiences now contribute to national level policy discussions.

2. Children's Reporters

In 1971 the office of what was then known as the Reporter to the Children's Panel was created in line with the recommendations of Kilbrandon: an independent official able to assess evidence, understand children's needs and support the process at hearings and court. To begin with, reporters were appointed as officers of local authorities, which at that time represented over 50 separate authorities, each with their own policies and practice. In 1975 this was reduced to 12 regional departments through the *Local Government Scotland Act 1973*.

Following publication of the *Finlayson Report 1992* and the *Local Government (Scotland) Act 1992*, reporters were placed within a national organisation, the Scottish Children's Reporter Administration. The reasons for this reform included the need for greater consistency in training, policy and practice, as well as ensuring sufficient independence from the local authority.

The role of the Reporter has, however, remained constant throughout albeit with greater challenges in decision making from the increased complexity of cases referred and reported to case law. The most significant change has related to the role of the reporter within the hearing. The traditional role of the reporter in a children's hearing was described as being a 'quasi-legal advisory role to the hearing members'. This role was exercised before, during, and after the hearing. Following an internal review within the Scottish Children's Reporter Administration in 2009, this was revised to clarify the independent roles of the panel members and reporter to ensure that the fair process of the hearing was properly protected.

The reporter is no longer present before or after the hearing other than to address strictly health and safety or administrative issues, while during the hearing the reporter's role is to support the fair process by being able to express views, in particular on procedural issues. They do not have any capacity, however, as an advisor to the hearing. In the few circumstances where an issue cannot be resolved within a hearing, Children's Hearings Scotland has set up an appropriate and independent visible process. Experience thus far has proven that where a procedural issue has occurred panel members have been able to

resolve this by using the resources of all in the hearing: the reporter and any legal representative who is present, as well as using their own knowledge and existing guidance.

3. Social Education Departments

The Kilbrandon Report was not only concerned with reporters and Children's Hearings. It was also concerned with the field organisation which supported the hearing's measures. In this aspect, the original recommendations of Kilbrandon were not followed. The Committee had proposed the creation of Social Education Departments which would combine the functions of what now would be recognised as children and family social work functions with those of the education department; the committee saw this as the 'focal point for coordination of information about all cases of children in need' (Scottish Home and Health Department, 1964, p.71).

It could be argued that adopting this proposal may have saved 40 years of squabbles about responsibility between social work and education departments as well as creating a much-needed solution for sharing information which is now incorporated in *Getting it Right for Every Child* (GIRFEC) proposals. The relevance of Kilbrandon to GIRFEC will be discussed later.

4. Safeguarders

An important new role was created in 1985, that of a safeguarder brought into being by the *Social Work (Panels of Persons to Safeguard the Interests of Children) (Scotland) Regulations 1984* (The Scottish Office, 1984). Their role, when appointed by a Children's Hearing or court in an application for proof or appeal, was to provide an independent view of what would best safeguard the best interests of a child. The original appointments were in cases where there was a conflict between the interests of the child and parent, though this was dropped by the *Children (Scotland) Act 1995*. The responsibility for recruitment, monitoring and training of safeguarders was given to local authorities.

Safeguarders have become an established part of the system since their inception, often providing a valuable independent perspective. While they ensure the child's wishes are known to the hearing, they are not appointed to represent the child's views, a frequent misunderstanding of the role.

The management and administration of safeguarders was reviewed prior to the introduction of the Children's Hearings (Scotland) Act 2011. The new Act has now placed this responsibility with the Scottish Government; this responsibility has been tendered out to a national charity, Children 1st. As with panel members and children's reporters, the level of variation in aspects of local management and practice was seen as needing greater consistency. Early areas of change have included a more visible selection process and complaints procedure, as well as the development of a new training package in areas such as court work.

CHANGING PATTERNS OF REFERRALS AND DECISION-MAKING

Changing patterns of decision-making provide interesting reading. Figures for the first full year of the Children's Hearings System were as follows:

	Year: 1972
Total Referrals Received	24,656
Alleged offences by children	21,594
Alleged lack of parental care	506
Alleged victims of Schedule 1 offences	95

By 2007 the pattern had completely changed with significantly increased referrals and very different patterns of referral:

	Year: 2007
Total Referrals Received	102,759
Alleged offences by children	16,490
Alleged lack of parental care	19,086
Alleged offences against children	19,485

By 2013 the number of referrals overall had reduced to:

	Year: 2013
Total Referrals Received	36,298
Alleged offences by children	8,669
Alleged lack of parental care	11,236
Alleged offences against children	8,501

These figures highlight a number of different issues:

1. The growth and reduction in referrals between 1972 and 2013 show an increasing awareness of the role of the Children's Hearing System in making decisions about Scotland's vulnerable children.

2. A growth of awareness in issues that impact on children: sexual abuse, domestic abuse, and misuse of drugs and alcohol.
3. The impact of early and effective intervention on juvenile offending.
4. The importance of early intervention in the lives of children when needed- 8527 children aged under four were referred to the reporter in 2013 as opposed to 478 in 1976.

In every year between 1972 and 2013, the vast majority of referrals have come from the police; consistently these have been at least 85%. The pattern of referrals is therefore also a reflection of police policies which until the creation of Police Scotland [by amalgamation of the former regional police authorities] in 2013 would vary from force to force. The figures from 2007, however, demonstrate a widespread practice of automatically referring all children in households where domestic abuse or drug abuse existed to the reporter without consideration as to whether these children required compulsory measures of care. This moved Douglas Bulloch, then chair of SCRA, to comment:

The children's hearing system is being used for a purpose for which it is not designed and for which it is not resourced (SCRA Annual Report, 2007).

Since then, as we see above, the number of referrals has decreased, partially as a result of successful early intervention programmes in youth offending and partially because under the banner of GIRFEC, many areas have created interagency screening groups to identify cases which are appropriate for referral as opposed to those which can be diverted to alternative measures.

There are still questions, however, as to whether there is common understanding of the reasons for referral of a child to the reporter. From SCRA's latest statistics, only 20% of all cases referred end up at Children's Hearings and, while there should be allowance for the external eye of the reporter applying discretion in decision-making, instinctively this figure appears low. Yet if that suggests there are still inappropriate referrals, there are also questions as to whether cases which are not referred should be. The recent fatal accident inquiry into the death of Declan Hainey provides such an example (Scottish Courts Reports, 5th September, 2014).

In the longer term the creation of Police Scotland and the further development of GIRFEC under the *Children and Young People (Scotland) Act 2014* provide a significant opportunity to develop a national understanding of these issues.

As the pattern of referrals and age group of children has changed over the years, so has the profile of decision-making. In particular, while there has been a decline in the number of placements in residential schools, the number of children placed in foster care under compulsory supervision orders has gone up from 531 in 1991 to 3787 in 2013. In 1976 there were 157 emergency receptions into care under what were then termed 'place of safety' orders. In 2013 there were 743 child protection orders, which are the equivalent under the 1995 and 2011 Acts.

RESOURCES

Kilbrandon's vision was that:

If society's present concern is to find practical expression in a more discriminating machinery for intervention, it must be recognised that society's own responsibility towards the children concerned will be correspondingly increased, and that this will make commensurate demands on the nation's resources (Scottish Home and Health Department, 1964, p.30).

Sadly, such hopes were quickly dashed as tensions over the availability of resources to serve the hearing system were continually encountered, as seen in particular by some hearing decisions not being implemented. By 1976 he reflected:

The inadequacy, arising from malnutrition of the supporting field organisation, can give rise to only regretful acknowledgement (Martin & Murray, 1976).

With cuts in public spending it is unlikely that these tensions over resources will disappear. There has never been a clear picture of how many supervision orders are not implemented but, under the 2011 Act, the National Convenor now has the duty to provide an annual report to Ministers on the implementation of supervision orders in each local authority and in Scotland as a whole. In addition, Children's Hearings can give the National Convenor a direction to serve notice on a local authority of their duty to implement a supervision order. Where this is not done, the Convenor must apply to the Sheriff Principal for an enforcement order against the local authority.

These powers reflect a concern throughout the years of the Hearings system that some decisions may not have been implemented not solely for reasons of scarce resource alone but because of disagreement with the decision of the hearing. Such tensions were seen early in the days of the Hearings system concerning implementation of decisions to place children in residential schools and more recently in relation to decisions about use of secure accommodation for children and contact with parents. The latter culminated in two social workers in Edinburgh being found guilty of contempt of court for not implementing a decision of a Sheriff on appeal after a decision of a Children's Hearing (Scottish Courts reports 16 December 2013).

Recourse to legal action can never be seen as a good solution. The creation of the post of National Convenor to lead Children's Hearings Scotland, allows for more honest dialogue between social work and panel communities about decisions and their implementation.

IMPACT OF HUMAN RIGHTS

The *Human Rights Act 1998* has introduced fundamental changes in many areas of the law in Scotland. Its possible impact on the Hearings system was seen beforehand as potentially corrosive by those who did not believe that welfare and rights could exist together. Experience, however, thus far has demonstrated the opposite, that human rights provision can enhance the welfare system by ensuring fairness in decision-making and processes.

The earliest impact upon the Hearings system occurred many years before the Human Rights Act was implemented, when developments in European case law around circumstances where minors could be locked up led to the introduction of the *Health and Social Services and Social Security Adjudications Act 1983*. This introduced the statutory criteria and timescales for placement of children in secure accommodation. These have remained part of the legal framework since and have ensured children are placed in secure accommodation with much less frequency and that where it is done, there is a much tighter regulation on the regime which operates in secure units.

The second area affected by human rights concerned the provision of papers for Children's Hearings and was inspired in particular by the case of *McMichael Vs United Kingdom* (1995). As a result, relevant persons became entitled to receive all the papers considered by the Children's Hearing. This was followed in 2001 by children receiving a similar entitlement depending on their age and level of maturity. This was seen as potentially disastrous for the system with fears that reports would be abused and that report writers would be intimidated, from revealing important information and views.

This provision is now seen as so obviously fair and just that it is very difficult to understand the rationale behind the level of anxiety that existed prior to its introduction. In terms of ensuring the legal principle of equality of arms and proper participation within hearings there can be little dispute as to the value of the reform and its consistency with the principles of Kilbrandon.

Legal Representation

On a similar theme, while legal representation was always available within hearings for those parents who could afford to pay, a scheme was introduced for children in 2002 and relevant persons in 2009. This allowed a child whose liberty was threatened or a relevant person who could not otherwise effectively participate in a hearing, to have a legal representative chosen for them from a panel drawn up by the local authority (Children's Hearings (Legal Representation) (Scotland) Rules, 2002, 2009).

This scheme was altered by the 2011 Act to place the control under the authority of the Scottish Legal Aid Board; this allows any solicitor to apply to be registered as a practitioner able to take children's cases. The Scottish Legal Aid Board at the same time introduced a Code of Conduct, which it requires all registered solicitors to abide by, to ensure the ethos of the Hearings System is observed.

While there had been complaints of lawyers swamping hearings and changing the proceedings' central purpose, figures from the Scottish Legal Aid Board show approximately 270 appointments coming out of over 3,000 hearings per month. In the majority of cases, solicitors have played an important role in ensuring their clients' views are properly represented at hearings, where they are unable to do so themselves, as well as keeping a watch on any procedural irregularity that might occur within the hearing.

Ironically, the *United Nations Convention on the Rights of the Child*, although being focused on children, has had less direct influence than the European Convention. The obvious example of this is in relation to the definition of a child which under the UN Convention is up to the age of 18. The jurisdiction of Children's Hearings only covers children up to the age of 16 for initial referrals, although if the child/young person is on supervision this can continue till the age of 18. In practice, 16 still appears to be a magic age where supervision ends and a child becomes an adult. Out of 19,077 children referred in 2013-14, only 606 were 16 or over, while out of a total of 11,420 children on supervision only 235 were over 17.

APPEALS

There were 19 appeals against decisions of the Children's Hearings in 1976. In 2014 there were over 900. Those stark figures may suggest that, in the balance of powers introduced by Kilbrandon between the jurisdiction of the hearing and court system, excessive adversarialism has been introduced, especially by the increase in legal representation. However, the 2014 figures need to be seen against a figure of over 32,000 hearings in the year, often making significant decisions about the removal of a child from home or the termination of contact between child and relevant person.

What is critical is the approach a sheriff should take; the words of Sheriff Principal Nicolson have been followed as the main authority:

The task facing a Sheriff to whom an appeal has been taken is not to reconsider the evidence which was before the hearing with a view to making his own decision on that evidence. Instead that Sheriff's task is to see if there has been some procedural irregularity in the conduct of the case; to see if the hearing has failed to give proper, or any, consideration to a relevant factor in the case, and in general to consider whether the decision reached by the hearing could be characterised as one which could not upon any reasonable view be regarded as being justified in all the circumstances of the case (W v Schaffer, 2001, SLT, Sh Ct 86).

This approach very much avoids the danger of the overlap of the court's jurisdiction set out by Kilbrandon:

If the results of our proposals were to be a duplication of hearings between the juvenile panels and the Sheriff, they would, we recognise, be unacceptable, both 'on grounds of principle and practicability (Scottish Home and Health Department, 1964, p.71).

In terms of appealable decisions, the 2011 Act has widened the potential to cover not only decisions relating to compulsory and interim compulsory supervision orders but also decisions about relevant person status, implementation of secure accommodation authorisation, and the naming of an implementation authority.

Rather than the volume of appeals, it is the rate of success of those appeals that presents one of the most significant challenges for the system. The Scottish Children's Reporter Administration's figures show that in some quarters of the year, that figure has neared 50%. While there will always be successful appeals, not least where the circumstances of a case change, one particular issue comes up repeatedly: the quality of the written reasons provided by the hearing. That area represents one of the more significant challenges for Children's Hearings Scotland in the further development of training.

THE FUTURE

The strengths of the Kilbrandon report lay in its principles for dealing with children in trouble, and the machinery it envisaged to give effect to them, both within the legal system and in the supports to children in the community. Where the report was less strong - in fact silent were in relation to the participation of children/young people in their own hearing. This was as much a reflection of the times when the report was written, when views of young people were given less prominence in law than is the case today. While, however, legal provisions are in place, their implementation is at times less strong, as several reports have reminded us (Who Cares? Scotland, 2011; Aberlour/SCRA, 2011). An immediate challenge for all agencies is to improve the spirit and means by which we listen to children and young people whether by using better communications to allow views to be expressed, improved training for Reporters and panel members or use of the as yet unimplemented provisions in the 2014 Act on advocacy services for children. The establishment of a national participation forum between the Scottish Children's Reporter Administration, Children's Hearing Scotland and Who Cares? Scotland will provide a much needed mechanism for taking reforms forward.

The *Children and Young People (Scotland) Act 2014* provides an excellent opportunity to deal with another current difficulty: where and how the Children's Hearings system and GIRFEC fit together. Reading the Kilbrandon Report of 50 years ago, it is easy to link the thinking with that of GIRFEC:

In recent years there has been increasing public recognition of the need for early forestalling action in the case of children in need such action being taken by a wide variety of voluntary and public agencies. It has been accepted that such needs cannot be met by treating the child in isolation but rather as a member of a family unit in a particular environment. The social education department would be recognised as the focal point for the collation of all information about children in need (Scottish Home and Health Department, 1964, p.32)

Bringing agencies together, collating information for children in need - things which are at the core of GIRFEC today. Key questions, however, remain:

- How do the roles of the named person and lead professional link with the Children's Reporter and within the hearing?
- How is the child's plan used within a hearing and to what extent is it influenced by whatever decisions are taken by a hearing or, indeed, Reporter?

And when it is appropriate to refer a child to the reporter?

- A last resort?
- When all other measures have failed?
- Where an independent external eye is needed to assess the child's requirements?

All these questions are being taken forward by the Children's Hearing Improvement Partnership. National guidelines which allow for appropriate local practice will assist in the further progression of the ideas of Kilbrandon whose final words hold as true and relevant today as they were in 1960:

During childhood the child is subject to the influences of home and school. Where these have for whatever reason fallen short or failed, the precise means by which the special needs of this minority of children are brought to light are equally largely fortuitous. The individual need may at this stage differ in degree but scarcely in essential character and such children may be said at present to be, more than most, in a real and special sense 'hostages to fortune'.The time has come, we believe, where society may reasonably be expected so to organise its affairs as to reduce the arbitrary effects of what is still too often a haphazard detection process; and consequently to extend to this minority of children the measures which their needs dictate, and of which they have hitherto often been deprived (Scottish Home and Health Department, 1964, p.76)

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