

scottish justice matters

Volume 1 | Number 1 | June 2013

CHANGING TIMES

Special features on the reforms facing Scotland's criminal justice system

Also

Problem-Solving Courts

Interview with
HM Chief Inspector of
Prisons, Hugh Monro



REFORM
IN SCOTTISH CRIMINAL JUSTICE

ISSN 2052-7950



9 772052 795005

Scottish Justice Matters is a publication of the Scottish Consortium of Crime and Criminal Justice (SCCCJ). The Consortium is an alliance of organisations and individuals committed to better criminal justice policies. It works to stimulate well informed debate and to promote discussion and analysis of new ideas: it seeks a rational, humane, constructive and rights-based approach to questions of justice and crime in Scotland.

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ISSN 2052-7950 (Print)

ISSN 2052-7969 (Online)

Scottish Consortium on Crime and Criminal Justice is a registered charity [SC029241]

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Getting a Good Hearing?

Maggie Mellon welcomes the Children's Hearings reforms but says more needs to be done.

THE KILBRANDON REPORT of 1964, which laid the foundation for the Children's Hearings System in Scotland, advocated a welfare rather than a disciplinary or punitive approach to children in trouble. The concern was for children "for whom the normal voluntary measures of support had for whatever reason failed or were likely to fail" (Stone, 2003). The Kilbrandon Committee regarded offending, delinquency, being beyond control, or being in need of care and protection as evidence of a need for special measures of education and support that should be addressed in one tribunal or hearing. These welfare-based Children's Hearings were introduced in the 1968 Social Work (Scotland) Act. The new system enjoyed cross-party political support and continued without much scrutiny or evaluation under various Westminster governments.

Post-devolution, the hearings have survived two possible threats from two rather different directions. One came from the Scottish Labour-led coalition's introduction of court-ordered antisocial behaviour orders (ASBOs) for children aged 12-15. Despite much sound and fury, few ASBOs were ever made for children under age 16, and the welfare principle of the hearings was not seriously challenged.

From a different direction, the lack of legal representation for children and families at hearings, and the dual role of Reporters in bringing a child to a hearing, while at the same time convening and advising the panel members, were challenged on human rights grounds. As a result, limited legal representation and a separation of the Reporters' and panel members' roles were introduced, now fully achieved by the introduction, by the Children's Hearing (Scotland) Act 2011, of a new Children's Hearings Scotland (CHS) body. The CHS will have responsibility for panel members, while the Scottish Children's Reporters Administration (SCRA) will continue to decide if there are

grounds to bring a child before a hearing. At the time of writing, these changes have yet to be fully implemented.

Hearings have now been endorsed by both Labour and SNP-led governments and were described in Parliament as a "jewel in Scotland's crown" when the 2011 Act was passed unanimously. So can this 'jewel' now be left to look after itself, or is there room for improvement?

In 2004, Action for Children (then NCH) Scotland called for an independent review of the hearings. The "Where's Kilbrandon Now?" inquiry was led by an influential panel chaired by Richard Holloway. It invited submissions and involved young people, parents, academics, panel members, social workers, and others as advisors and witnesses. Reviewing the recommendations ten years on, it is possible to identify some key issues for the future.

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The Inquiry panel heard many useful analyses of the strengths and weaknesses of the hearings and made several important recommendations. The first was that "hearings and not the courts should remain the forum for making decisions about the compulsory care and supervision of children and young people in Scotland" and second, that "the hearings system should not be used as a route to services for children in need" (NCH Scotland 2004). Both of these recommendations have now been endorsed in the "Getting It Right for Every Child" (2007) policy and the recent legislation.

These recommendations underline a major strength of the hearings, namely that hearings are not courts. Their purpose is not to determine guilt or innocence but to focus on the welfare of the children and young people who come before them. Hearings depend on the unpaid work of hundreds of volunteer panel members – a strength in itself and a sign of collective concern for children and young people. However, their focus on welfare rather than punishment means that all sorts of social problems can be brought to their door, and poverty, deprivation, and injustice are problems that can't be 'fixed' by orders for the supervision and care of children.

The *Kilbrandon Now* panel, recognising the wider social context, also recommended that "community mediation should be extended throughout Scotland to give people from disadvantaged areas and those from minority groups a stronger voice" and that "the serious gaps that exist in mainstream and preventive services must be urgently addressed, and children's right to a full time place in education and to necessary health services should be enforced before any resort to compulsion" (NCH Scotland 2004).

In response to evidence about the lack of preventive services in most areas, they recommended "... a shift of resources from institutional care of children to care within their wider families and communities." A lack of good support available locally to children, young people, and families in difficulty inevitably leads to a failure of prevention. While a panel cannot order preventive services, they can order the local authority to provide high cost care services such as fostering, residential care, and education. This means that preventative services are less favoured than 'out of family' provision in the allocation of scarce resources. The Christie Commission (2011) on the future

of public services in Scotland estimated that 40% of public expenditure was as a result of a failure in preventative spend. In children's services, this means a continual 'sucking up' of money that should be spent on prevention to cover overspend on care services.

Having considered the context of hearing decisions, the Inquiry considered the evidence base for decisions and their outcomes. Professor Fred Stone, one of the original Kilbrandon Committee members, gave evidence. Criticising an "over-reverential" approach to the hearings, he noted that, in retrospect, the system should have had a built-in review mechanism which would have allowed it to grow and develop. The Inquiry panel thus recommended "an independent research, monitoring and performance review system . . . be built into the hearings process" and that "the results and costs of decisions should be publicly available, along with information about the circumstances of children who are referred" (NCH Scotland 2004). They also recommended an independent body to recruit, train and represent panel members in order to establish them as a strong and influential body independent of government.

So where are we now, and what should be the agenda for the future? The impact of the creation of the new 'Children's Hearings Scotland' body has yet to be felt, but should focus on achieving increased accountability for hearing decisions and their implementation. This requires concerted action by national and local government, SCRA and the new CHS on three key issues.

1 Establish a programme of research that reveals the longer-term stories of young people who have been brought before the hearings and enables comparison.

With the exception of the Edinburgh Study of Youth Crime and Transitions, no systematic, large-scale, or longitudinal research has been conducted on the outcomes for children who have come before the hearings. What decisions and resources benefit which children? What are the long-term outcomes of decisions to intervene in children's lives? Without this information, panel members and social workers are essentially guessing at

what decisions are in the best interests of the children and families who appear before them.

2 Transfer resources to community-based prevention.

This is proving difficult for councils to achieve, and none seem to have implemented 'Getting it Right' policy in a way that increases the services they offer on the ground. The flow into 'care' is increasing as a result of growing poverty and decreasing supports in the community. One way to break this cycle would be to give panels the power to order specific community-based support services for children and their families and not just the power to remove children from home to high cost alternatives. Preventive services would be commissioned on the basis of evidence from evaluation, including systematic feedback from young people and their families about what has helped and how. Such power would redirect funding from acute reactive services to prevention.

3 Do things differently, and stop wasting money: youth hearings for 16-18 year olds

A third action is one of the most sensible things that has been proposed for the hearings but is one that every government has considered politically too high risk. If the recession and public sector expenditure reduction represent an opportunity, it is to do things differently, and stop wasting money. This would mean taking young people out of the adult court system altogether and using the savings in fiscal, police, court, legal aid and other costs to introduce well-resourced, evidence-based, non-adversarial youth hearings for 16-18 year olds. This would halt the flow of immature 16-year olds into an expensive and ineffective criminal justice system, where they risk being trapped in a cycle of reoffending and failed rehabilitation.

The hearing system comes to a halt when young people reach the age of 16 years and, despite their immaturity, welfare is abandoned, and they are catapulted into adult courts. There, they are at high risk of ending up in prison – not for serious offending but for failing to appear, breach of bail or probation, or failing to pay fines. These young people

are among the most disadvantaged in our society. Many have been in care, have poor family support, and are without structure or encouragement in their lives. The Edinburgh Study, among many, has found that most young people grow out of offending as they mature and that the one factor that interferes with that normal maturation is early involvement in the criminal justice system, its consequent impact on future employment and other opportunities, and on fracturing positive relationships in their families and communities.

The alternative to this criminal waste is youth hearings, with a strong focus on developing self-respect and responsibility in young people and the power to commission mentoring, training programmes, and supports that could provide the necessary framework of support and diversion from crime that they need.

This move would need to have the kind of cross-party support that secured the introduction of the Children's Hearings. Why should this not be won again?

Children's Hearings (Scotland) Act 2011
www.scottish.parliament.uk/parliamentarybusiness/Bills/17979.aspx

Christie Commission (2011) *Commission on the Future Delivery of Public Services in Scotland*.
www.scotland.gov.uk/About/Review/publicservicescommission

Edinburgh Study of Youth Crime and Transitions
University of Edinburgh
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www.actionforchildren.org.uk/media/1152872/wheres_kilbrandon_now_march_2010.pdf

Scottish Government (2007) *Getting it right for every child: guidance*
www.scotland.gov.uk/Publications/2007/01/22142141/0

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www.scotland.gov.uk/Publications/2003/10/18259/26875

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