

Under threat: Scotland's unique welfare-based forum for decisions about children

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Abstract:

The Scottish children's hearing system adopts a child-centred and welfare-based approach to decisions about children in trouble or danger. It is argued that, until the passing of the Antisocial Behaviour (Scotland) Act 2004, the hearing took precedence over the courts in decisions about children and complied with the UNCROC in its operation. It is submitted that the effect of the 2004 Act has been to give primacy to the courts, rather than hearings, in relation to certain groups of children in Scottish society, and to undermine the UNCROC principles. It is further submitted that the "youth justice" agenda being pursued through the Scottish Parliament may make a fragmented and more punitive approach to certain groups of children in Scottish society more likely in the future.

The position before the Antisocial Behaviour (Scotland) Act 2004

A child-centred, welfare-based forum

The children's hearing system was established in Scotland as a result of the report of the Kilbrandon Committee, published in 1964¹. The Committee was set up in 1961 and its remit was *'to consider the provisions of the law in Scotland relating to the treatment of juvenile delinquents and juveniles in need of care and protection or beyond parental control, and, in particular, the constitution, powers and procedure of the courts dealing with such juveniles and to report.'*² The Kilbrandon Committee was particularly concerned with the inappropriateness of measures that existed at the time, through the courts, for dealing with juvenile offenders. The report began by considering juvenile delinquents and the court system dealing with them, while noting that the same court system was being used for children in need of care and protection. It found that the concentration on ensuring that offenders took responsibility for their crimes made it difficult for a 'preventive' principle to work, since legal measures would only be brought to bear when proof of the crime had been provided. The report then went on to state that the 'care and protection' proceedings in the juvenile court did, in fact, represent an extension of the 'preventive' principle, since compulsory measures could be applied to families based on a lower standard of proof.

The report found the approach in care and protection proceedings to have much merit. It stated that under those proceedings: *"that whole background is put clearly in issue as affording a reasonable, objective, factual basis on which to assess the child's needs, which are judged accordingly"*³. That approach was contrasted with the one taken in the case of juvenile offenders, where the needs of the juvenile could not be so freely and objectively discussed because of *"the nature of criminal procedure which...still imposes constraints on those to whom the task of adjudication is entrusted"*⁴. As a result, the Committee recommended that children who had allegedly committed offences and those who may be in need of 'care and protection' were all to be referred to the same new decision-making forum, the children's hearing.

The operation on the hearing system is now governed by the Children (Scotland) Act 1995 (hereafter "the 1995 Act") and associated regulations and guidance. Children up to age 16 (and those aged 16 to 18 who are already subject to supervision by the hearing) are dealt with using legal criteria called grounds of referral⁵. The Reporter to the Children's Panel⁶ ("the Reporter") is the gatekeeper to the system and is responsible for assessing whether one or more grounds of referral to a hearing are met and whether the child is likely to need

compulsory measures of supervision. If the answer is yes to both, the case would usually go to a children's hearing. In relation to children under 16 who are alleged to have committed serious offences (e.g. rape, murder), there are guidelines that require Procurators Fiscal⁷ to consult with Reporters, to decide whether such children will be retained within the hearing system, or prosecuted in an adult criminal court. The decision is, therefore at the joint discretion of the relevant Fiscal and Reporter and the mechanism is an acknowledgement that dangerous behaviour which poses a serious potential risk to the community may be a trigger for referral to court. Ordinarily, however, children who have allegedly committed offences will not appear in criminal courts.

A hearing makes decisions about the measures to be applied in a child's case⁸ but cannot do so unless the child and 'relevant person'⁹ accept the grounds of referral or these have been established by a court¹⁰. A hearing can place a child on supervision and that may include measures taken for the protection, guidance, treatment and control of the child¹¹. Although a child might be placed in secure accommodation, this would not be used as a punitive measure¹², but as a means of control. A punitive responses to offending behaviour is not part of the hearing philosophy. The separation of adjudication of disputed facts – dealt with by the court – from the consideration of measures to be applied – dealt with by the lay members of the hearing – is also a fundamental features of the system and is intended to allow the round the table discussion of the child's needs to be as full and frank as possible. In deciding any matter with respect to a child, the legislation requires that "*the welfare of that child throughout his childhood shall be [the hearing's] paramount consideration*"¹³ and that the hearing, so far as practicable, give the child an opportunity to express views and take account of those views (there is a presumption of maturity at age 12).

A UNCROC¹⁴ compliant system

The requirement that the welfare of the child be the paramount consideration exceeds the requirement in Article 3.1 of UNCROC that in all actions concerning children, the best interests of the child be the primary consideration. The duty on the hearing to give children the opportunity to express their views and to take those views into account meets the requirement in Article 12.1 of UNCROC that children who are capable of expressing views should have the right to express views in all matters affecting them. In particular, the hearing system may be regarded as complying with Article 40.1 of UNCROC. Article 40.1 gives the child alleged as having infringed the penal law to be treated in a manner consistent with the child's sense of dignity and worth; Article 40.3 states that whenever appropriate, measures for dealing with such children should avoid resort to judicial proceedings; and Article 40.4 requires that a variety of dispositions must be available, such as care, guidance and supervision orders. It may be argued that the provision of a non-court-based forum which is set up to be less formal and to allow consideration of the whole of a child's circumstances and to ensure that the measures that may be taken include protection, guidance, treatment and control, but not punitive measures, such as fines or imprisonment, is precisely the model that the drafters of UNCROC had in mind.

The primacy of the children's hearing as the decision-making forum for children

The UNCROC in Article 40 takes the approach that punitive, judicial proceedings should not be the first or only method of dealing with children who infringe the criminal law and the children's hearing takes the same approach. The Kilbrandon committee's view was that criminal proceedings impeded the ability of decision-makers to assess the needs of the individual child and that such an assessment was essential, to allow the 'preventive' principle to work. The present system sets up the children's hearing as the primary system for dealing with children in trouble and danger in Scotland. Even children who have allegedly committed serious crimes may be referred there, rather than to the criminal courts. The court's role within the Scottish system has being confined to decisions on disputed facts¹⁵ and short-term child protection measures¹⁶ and to appeals against hearing decisions¹⁷.

The advisory role of the children's hearing, even in those cases where a child has been referred to the criminal court system, underlines the importance attached to the hearing's welfare-based approach. Where a child not subject to supervision from a hearing has pled guilty to or been found guilty of an offence, the court may request that a hearing be arranged to give advice on disposal of the child's case¹⁸; where a child is on supervision, the High Court may and a sheriff or district court must, following a finding of guilt, refer the child's case to a hearing for advice¹⁹. The hearing is used as a type of "welfare check", mitigating the harshness of the punitive court response. This can be seen from the terms of the referral from the court, which are "*for the purposes of obtaining their advice as to the treatment of the child*" and the rule governing such advice hearings²⁰ which requires the hearing to give consideration to any report into the child's social background and to take steps to obtain the views of the child and any relevant person.

The independence and pivotal decision-making role of the Reporter also underlines the importance attached to the hearing's welfare based approach. The Reporter has sole discretion to decide whether a child should be referred to a children's hearing and in making that decision, must be satisfied in relation to two distinct matters: that compulsory measures are necessary and that there is at least one ground of referral in respect of the child²¹. If a referral is made to the Reporter by a court in the course of matrimonial or adoption proceedings, or in relation to prosecution where a child has been failing to attend school, the Reporter retains discretion about whether to arrange a hearing: "*where the court has referred the matter to the Reporter...he shall...make such investigation as he considers appropriate; and if he considers that compulsory measures of supervision are necessary, arrange a children's hearing...*"²². It is the Reporter, not the court, who makes the ultimate decision about the next step in the child's case.

The effect of the Antisocial Behaviour (Scotland) Act 2004 ("the 2004 Act")

Provisions relating to Antisocial Behaviour Orders

The 2004 Act makes provision for the granting of new orders, known as Antisocial Behaviour Orders ("ASBOs"). ASBOs will prohibit, indefinitely or for such periods as may be specified in the order, the specified person from doing anything described in the order²³. The possible prohibitions are those necessary to protect relevant persons from further antisocial behaviour by the specified person²⁴. An application for an ASBO is made by a "relevant authority", which is defined as a local authority or a registered social landlord. The person subject to the order, or the relevant authority that obtained the order, may apply for a variation or revocation of the order²⁵ and a person may also appeal against the making or variation of the order²⁶. Breach of an ASBO or an interim ASBO without reasonable excuse is an offence²⁷.

The court may make an ASBO if satisfied that the conditions are met in respect of the specified person. The conditions are²⁸:

- (a) that the specified person is at least 12 years old;
- (b) that the specified person has engaged in antisocial behaviour towards the relevant person; and
- (c) that an antisocial behaviour order is necessary for the purpose of protecting relevant persons from the further antisocial behaviour by the specified person.

The 2004 Act sets up an additional decision-making forum for some children and young people outwith the hearing system. That court-based system has, as its primary objective, safety of members of the community and targeting of certain types of behaviour offensive to community members. There are a number of provisions intended to integrate the court-based system of ASBOs with the existing children's hearing system. Where the specified person is a child²⁹, the sheriff must, before determining the application, require the Principle Reporter to arrange a children's hearing for the purpose of obtaining advice as to whether an antisocial

behaviour order is necessary for the purpose of protecting relevant persons from further antisocial behaviour by the child³⁰. Before making an application for an ASBO, a local authority must, if the specified person is a child, consult with the Principal Reporter³¹ and a registered social landlord must, where the specified person is a child, consult the local authority within whose area the child resides or appears to reside³². In determining an application for an interim ASBO where the specified person is a child, the sheriff shall have regard to any views expressed by the Principal Reporter³³. The sheriff is placed under the same duty to have regard any views of the Principal Reporter in determining whether to vary or revoke an ASBO³⁴. The Act makes clear that children may not be imprisoned for breach of an ASBO³⁵. Arguably, the most significant provision relating to children is the power given to a sheriff who makes an ASBO or an interim ASBO to **require** (emphasis added) the Principal Reporter to refer the child's case to a children's hearing³⁶, and the amendments of the 1995 Act in relation to this.

Changes to the Hearing System as a result of introduction of ASBOs

The 2004 Act amends the grounds of referral to the hearing system in the 1995 Act to add a new ground³⁷, that the child "is a child to whom subsection (2A) below applies". Subsection (2A) applies where –

- (a) a requirement is made of the Principal Reporter under s12(1) of the Antisocial Behaviour (Scotland) Act 2004 (asp 8) (power of the sheriff to require Principal Reporter to refer case to children's hearing) in respect of the child's case; and
- (b) the child is not subject to a supervision requirement.

Second, the provisions in the 1995 Act relating to the Reporter's discretion as regards referral of children to the hearing system are amended to state that:

"Where the Principal Reporter is satisfied that the ground specified in section 52(2)(m) of this Act is established in respect of any child, he shall be taken to be satisfied [that compulsory measures of supervision are necessary]."³⁸

The making of a full or interim ASBO has a significant effect on the role of the Reporter in the children's hearing system, with respect to children who are not yet subject to supervision requirements. A court, having made the ASBO, may require the Principal Reporter to refer the child's case to a children's hearing. If the sheriff does require the Reporter to so refer the child, this requirement constitutes a new ground of referral to the hearing and the Reporter is taken to be satisfied that compulsory measures of supervision are necessary in respect of the child. In effect, therefore, children who have not been involved in the hearing system before but who are allegedly engaged in antisocial behaviour can be sent by the court directly to a hearing. The Reporter has no discretion with respect to these children at all. Indeed, the Reporter's role is to prepare papers for a hearing which has been ordered by the court.

The Act could have provided that the antisocial behaviour itself would constitute a new ground of referral to the hearing. This would have been consistent with the present system, focussing on the child's behaviour and leaving the Reporter to decide what measures would be most appropriate in the child's case. Instead, it is the *court process* which constitutes the ground of referral, and which removes the Reporter's discretion. This is a significant reversal of the decision-making hierarchy which previously saw the hearing, rather than the court, as the primary decision-maker in respect of children.

Where a child in respect of whom an interim or full ASBO is made is subject to a supervision requirement and the sheriff requires the Reporter to refer the child's case to a hearing, the Reporter must arrange a hearing to review that child's supervision requirement³⁹. Again, the effect is that for a selected number of children within the hearing system, the court is ordering a review of their cases.

In relation to determining an application for a full ASBO, the sheriff must have regard to the advice of a children's hearing⁴⁰. The 2004 Act states that the court shall require the reporter to "arrange a children's hearing for the purpose of obtaining their advice as to whether the condition in subsection (2)(c) is met"⁴¹. The condition in subsection (2)(c) reads:

"that an antisocial behaviour order is necessary for the purpose of protecting relevant persons from further antisocial behaviour by [the child]."

Advice hearings are not new to the Scottish system as was noted above. Where a child is found guilty of, or pleads guilty to, an offence and is not subject to a supervision requirement, the court can request the Reporter to arrange a hearing for the purposes of obtaining advice on the treatment of the child⁴². Where a child is found guilty of, or pleads guilty to, an offence and is subject to a supervision requirement, the court may if it is the High Court and must if it is the sheriff or district court, request the Reporter to arrange a hearing for the purposes of obtaining advice on the treatment of the child⁴³.

The contrast in the remit of the hearing where a child or young person has been convicted of an offence and that of a hearing where a child has allegedly been involved in antisocial behaviour is striking. In the former, the hearing will be advising on the measures that are likely to be in child's best interests. In the latter, the hearing is directed to consider what is necessary for "protection of relevant persons". Consideration of this issue could undoubtedly involve the hearing in a discussion of the child or young person's behaviour and the likelihood of that behaviour changing, but the remit seems so tightly drawn as to preclude a wide-ranging discussion of the child's circumstances⁴⁴. The emphasis is on the experience of those in the community affected by the child or young person's behaviour, not on the experiences of the child or young person him or herself. The community's role as the enforcer, through the courts, of responsible behaviour by the child is clear. The children's hearing role has always been to consider the best interests of the child or young person and in giving advice on all other matters, the hearing has, to date, adhered to that role. In relation to ASBOs, however, the hearing is being used for a different purpose: to confirm or deny the effect on the community of a child's or young person's actions.

Welfare test does not operate for some children

The limitations imposed on the hearing in respect of its advice role in respect of a full ASBO are striking. There is no requirement that the hearing advise the court of whether the making of the ASBO would be detrimental to a child's interests, and the remit appears to allow little scope for this. The duty to regard the welfare of the child as paramount operates only in respect of decisions made under the 1995 Act and is not applicable to these advice hearings.

This omission would be more understandable if the court itself were required to consider the child's welfare – even as a primary consideration – in making an ASBO, but this is not the case; the court simply requires to find that the ASBO is necessary for the purpose of protecting members of the public. In determining an application for an interim ASBO, there is no role for the hearing. The court must have regard to any views expressed by the Reporter⁴⁵. The Reporter may, at this stage, indicate that s/he believes matters are best dealt with through the hearing system but the court is under no obligation to defer to the Reporter's view. The court can make an interim ASBO where satisfied that *prima facie* the child has engaged in antisocial behaviour towards a relevant person⁴⁶. The child or young person thus enters the court system and faces a court-based response to his or her behaviour, without any formal mechanism for welfare to be taken into account.

The making of an ASBO is an action concerning a child made by a court of law and as such, under Article 3 of UNCROC, the process should consider the best interests of the child as a

primary consideration. It does not do so, and the UK government is therefore in breach of its obligations under the Convention.

Additional Power: Movement Restriction Conditions

The 2004 Act amended the 1995 Act provisions relating to hearing powers, by adding an additional power to impose a movement restriction condition⁴⁷. The existing legislation has been amended to provide that where the criteria used previously to decide that a child should be placed in secure accommodation are met, the child may instead – or in addition – be subject to a movement restriction condition. First, the hearing must be satisfied that the child has absconded, is likely to do so again, and it is likely that her physical, mental or moral welfare may be at risk OR that she is likely to injure herself or others⁴⁸. The criteria are unchanged from those previously stated and there is clearly an element of concern for the child’s welfare in them. Second, the hearing must be satisfied that it is necessary to exercise the power concerned⁴⁹. Where before, the only power available to the hearing was to specify that the child be liable to be kept in secure accommodation⁵⁰, the hearing now has an additional power to impose a movement restriction condition⁵¹. That condition can be attached to any supervision requirement made by a hearing, and could be used when a child is staying at home, with foster carers or within a residential establishment.

Of itself, the new power does not appear problematic. The criteria are focussed initially on the child’s welfare and any decision made by the hearing is governed by the need to ensure that the child’s welfare is the paramount consideration⁵². Had the power not been introduced in the context of an Act concerned with punitive responses to offending behaviour, there might have been little concern. The guide to the 2004 Act prepared for children’s hearings by the national training units states:

“[electronic tagging] is not a punishment. It provides a structure and basis for accountability and within this structure, intervention work can take place to engage the young person and address that factors identified as contributing to the need for secure care”⁵³.

Some care has been taken to integrate the new power within the existing hearing ethos. While the system does not differentiate between children in need of care and protection and those who are involved in offending behaviour, this may simply be a useful additional mechanism to assist the child. The difficulty might come if a climate of treating offenders “differently” were to emerge. The criteria would be satisfied if a child were likely only to injure **some other person** (emphasis added). The hearing must be satisfied that it is necessary to exercise the power (to tag), but that could be interpreted as being necessary for the protection of others only. The overarching welfare principle still applies, but it might be argued that the imposition of the electronic tagging could result form concerns about members of the community, rather than the welfare of the child.

It can be argued from the above consideration of the effects of the 2004 Act that there has been an undermining of some of the principles that underlie the present Scottish system for making decisions about children. To assess the challenges that may be posed to the hearing system in the near future, a consideration of the on-going Scottish Executive review of the Children’s Hearing System and their initiatives in respect of youth justice is required.

The Review of the Children’s Hearing System

In early 2004, the Scottish Executive⁵⁴ published a consultation document on the children’s hearing system, entitled “*Getting It Right for Every Child*”⁵⁵. The Ministerial foreword asked “*Is the Hearing system able to do everything it needs to in order to protect children?*”. The document explained that this was the first phase of consultation, in which views were sought on the outcomes and principles of the system and that the second phase would then consider how to achieve those agreed outcomes and principles. 17 questions were asked, divided into 6

sections⁵⁶ and a report on responses was published later in 2004⁵⁷. Those concerned at the emphasis on the importance of the community view of a child's behaviour imported into the hearing system in its advisory role in relation to ASBOs and at the differential treatment of one group of children under the 2004 Act found some alarming themes in Phase 1.

The first two objectives of the hearing system were said to be the delivery of effective outcomes for “*children, brothers and sisters, families **and communities***” and to lead to “*changed behaviour, **safer communities** and reduced offending*” [emphases added]. One section of the consultation dealt with “hearings and the community” and noted that “*there is little information or direct accountability from those within the system to the community itself*”. Consultees were asked how links between the community and the hearing could be improved. The option of a “family hearing system” was presented, under which a hearing would balance the various interests of family members. The child's welfare would be “*the main, but not over-riding interest*” and “[*t*]*he protection of members of the public from serious harm would remain the other key consideration*”. The prospect of a system that was no longer child-centred but which chimed with the punitive approach in the 2004 Act appeared to move a step closer. The responses, however, did not accept the Executive's premises. The summary report of responses noted that a significant number of respondents felt strongly that the objectives outlined needed to be more explicitly linked to delivering effective outcomes for children and that a majority were against moving to the proposed system of family hearings. The report noted that “*The vast majority of respondents felt strongly that the Children's Hearing system should remain focused on meeting the needs of the individual children rather than balancing these with the needs of family members and the wider community*”.

The consultation asked whether it was still right that one generalist system should look at all types of children's cases, noting that the need for the system to cope with a very wide range of issues was a drawback. Even if a generalist system were to be retained, it was suggested that specialisation of panel members within the system could benefit the child – particularly in cases involving “*adoption, persistent offenders, serious child sexual abuse cases or mental health issues.*” Although not explicitly stated, an agenda involving differential treatment for different groups of children could be discerned. Again, however, the responses did not support the suggestion. The summary report found that there was very little support for establishing specialised Hearings to deal with specific problems and that “*a large majority of respondents were against having some Panel members specialise in hearing particular types of cases.*”

As a result of the consultation, identified issues for Phase 2 of the Review do not include the needs of the community or specialisation within the hearing system. Instead, the agenda includes the need for additional resources, training, development and support for panel members and the role that the hearing can play in supporting families without undermining the fundamental principle of focusing on the needs of individual children. It would appear that any further eroding of the principles is unlikely to come through the Review itself, assuming the agenda resulting from the consultation is adhered to.

The Youth Justice Agenda

In the debate on the Children's Hearing Review in the Scottish Parliament on 18 May 2004⁵⁸, the Deputy Minister for Education and Young People, perhaps in an effort to allay fears about the Scottish Executive's commitment to the hearing system which had arisen in response to the introduction of the Antisocial Behaviour etc (Scotland) Bill, stated:

*“Parliament should be quite clear that the review is not motivated by any desire to hive off youth offending to another system.”*⁵⁹

As has been noted, consultees were resistant to differential treatment of groups of young people within the hearing system itself, but the “youth justice” agenda is being pursued on other fronts. In June 2002, the Scottish Executive launched a Youth Crime Action Plan⁶⁰, updated in May 2004. The plan included a pilot a fast track hearings for persistent offenders and a pilot youth court for 16 and 17 year olds. In addition, the Justice 2 Committee of the Scottish Parliament is carrying out an inquiry into youth justice⁶¹.

Fast Track Hearings

Fast track hearings began in February 2003. Under the scheme, the Scottish Executive allocated resources⁶² to the “fast-tracking” of the cases of certain children involved in offending behaviour through the children’s hearing system in 3 pilot areas⁶³. A child’s case qualified as a persistent offender and therefore to be “fast-tracked” if s/he had been referred to the Reporter on 5 or more occasions within a 6 month period. The overall aim of the scheme was to reduce offending rates. This was to be done by reducing the time taken for each stage of processing the children’s cases, by promoting more comprehensive assessments, including offending risk and by ensuring that the children would have access to an appropriate programme. An interim research report was published on the scheme in November 2003⁶⁴ with the final report expected shortly. At the end of the first 5 months of the research⁶⁵, there were 133 children in the pilot areas identified as persistent offenders, 83% of whom were male. The offences included breach of the peace (25%), assault (21%), vandalism (14% and shoplifting (7%). Interestingly, a significant number of the children were also referred to the hearing on other grounds⁶⁶.

The research found that the time targets which had been set⁶⁷ for the various agencies were often met, but that a significant minority of social work reports were late. Perhaps more interesting – and concerning – was the observation that the proportion of late reports was much higher in comparison local authority areas. The final report will give indications of the impact of specialist programmes on offending, but one theme may be discerned from the contact interviews carried out: the need for adequate mainstream resources to allow the hearings to work effectively.

Social workers were pleased that more resources had meant recruitment which allowed some staff time for other work, but stressed that it was vital to improve mainstream services for children and families directly, to tackle the circumstances that contribute to youth offending⁶⁸. They noted that under the “fast-track” scheme, assessments and direct work with the children were both improved⁶⁹. Panel members stated that unlike in the “normal” system, they would be given a guarantee of services for the child with whom they were concerned⁷⁰. They and reporters stated that social work reports in the fast-track system were more comprehensive and in-depth. Perhaps the most telling finding was that many respondents told the researchers that “if operated properly, this was the way the children’s hearing system was meant to be”⁷¹.

In response to the introduction of fast track, most of the pilot area local authorities had provided specialist staff, usually located in the children and families teams. One authority had instead trained existing staff to deal with fast track cases. The rationale for the latter was to treat young people as ‘*children first and offenders second*’⁷².

The potential dangers and opportunities are thrown into sharp relief by this last comment. The essence of the fast track scheme is to single out a group of children for a particular approach. If the systemic and procedural aspects were to be applied across the board, this could mean additional supports to allow the hearing to do the job it has been trying to do (provide all children who require compulsory measures with protection, guidance, treatment and control). The rationale given by the local authority points to another approach that could be applied following the pilot: the fragmentation and specialisation of services. Those taking part in the children’s hearing review had rejected this within the hearing itself: could the Executive be attempting to accomplish the same thing via an alternative route?

Pilot Youth Court

The pilot youth court was introduced in one sheriff court⁷³ in Scotland in June 2003. The overall aim of the pilot was stated by the Scottish Executive to be to reduce the frequency and seriousness of offending by 16 and 17 year olds and some 15 year olds through targeted and prompt court disposals and social work involvement. Again, the phrase “fast tracking” was used and again, additional resources were to be made available to provide a quality service to tackle offending behaviour. “Persistency” was the main criteria for entry to the pilot and was defined as at least 3 incidents of alleged offending in a 6 month period. It was also possible for a referral to be made where the “contextual background” suggested it would be appropriate⁷⁴.

In July 2004, a research report into the first 6 months of the pilot was published⁷⁵. During the period, 147 referrals involving 120 young people took place⁷⁶. Although several 15 year olds were referred to the fiscal, only one actually appeared in the youth court. The researchers specifically teased out issues relating to this age group⁷⁷. Some police identified major shortcomings in the hearing system, although thought more resources might be a solution. Procurators Fiscals and Reporters were reluctant to send children to court, but thought it might be appropriate where the hearing had run out of options. Reporters stressed that under 16 year olds should be referred to the youth court only in exceptional circumstances and specifically stated that they should not be electronically monitored⁷⁸. Social workers were opposed to referral on principle, in contrast to defence agents, who thought the formality of the experience might benefit the young people. One important finding was that the agencies were clear that there was no sign that 15 year olds were being “sucked into the court”, a concern for some working with young people.

The research showed that more cases were referred to the court on the grounds that they met the “contextual criteria” than on the grounds that they were “persistent offenders” and contrasting approaches emerged in relation to these contextual criteria, from fiscals and sheriffs. Fiscals emphasised the community safety context of an alleged crime: they would mark a case for the court if there was a weapon involved, even where it was a first offence. Sheriffs felt that the young people appearing in the court who did not have three previous offences should demonstrate a clear risk of further offending, because of their family, personal and social problems.

Respondents considered that review hearings in the court encouraged young people to become accountable for their behaviour and provided a motivating factor for changing behaviour⁷⁹. While the research only gives a preliminary impression of issues raised, some matters of interest emerge. A difference between agencies in relation to reasons for referral to the youth court was identified, with an emphasis from fiscals on the impact on the community of an offence, where sheriffs were more concerned with a young person’s social situation. All agencies agreed that under 16s should not be drawn into the court system, and that this was not happening, but there was also general agreement that the court-based approach could encourage taking of responsibility for behaviour.

Conclusion

2003 and 2004 saw much interest by the Scottish Executive in the appropriate response that should be made to children and young people who were causing concern. The consultation paper⁸⁰ that preceded the Antisocial Behaviour (Scotland) Bill had stated:

“One of the most frequent concerns raised by MSPs and Councillors is the problem of youth disorder and particularly the need to strengthen our response to persistent young offenders.”

The 2004 Act introduced ASBOs for under 16 year olds, and gave the children's hearing system the power to tag some young people. The overall effect of the Act appeared to be to make available court-based, punitive measures for a particular group of children and young people, who would formally have been dealt with only by the children's hearing system. At the same time, the Act reduced the independence of Reporters to the children's hearing system and imposed a new role on the hearing – to advise on whether a court order should be made in respect of a child, to protect members of the public.

The theme of community safety was continued into the Scottish Executive's review of children's hearings, with a suggestion that family hearings might balance the needs of the child, members of the child's family and the community. This suggestion was rejected by those who replied to the consultation, as was the suggestion that there should be specialisation within the hearing system to allow young offenders and other groups to be dealt with by those trained in the particular problems they presented. The idea of a differential approach to young offenders has, however, been pursued in two other pilot schemes: the fast-track children's hearing scheme and the pilot youth court. The essence of both schemes may be regarded as a differential approach to young people who offend and both appear to suggest that the Scottish Executive favours such an approach.

The Executive was persuaded to make changes to the 2004 Act to acknowledge the place of the children's hearing system in decision-making about children in Scotland, but appears to be pursuing a separate "youth justice" agenda. The concern must be that, unless the Review of the Hearing system produces significant resources to strengthen the hearing system's ability to respond to difficult young people, that separate agenda may result in the continued marginalisation of the welfare-based approach to children and young people in trouble. The concern is only heightened by the fact that a relatively new Scottish Parliament and Scottish Executive will inevitably be influenced by politically sensitive issues. "Youth offending" has consistently proved itself to be one of those issues in the UK context. There seems no reason to expect that the Scottish political scene will be any different.

¹ *Report of the Committee of Children and Young Persons* (the Kilbrandon report) (Cmnd 2306) (1964)

² The Kilbrandon Report, para. 1

³ The Kilbrandon Report, para. 59

⁴ The Kilbrandon Report, para. 59

⁵ The question of whether compulsory measures of supervision are necessary in respect of a child arises if at least one of the conditions in s52(2) (the grounds of referral) of the Children (Scotland) Act 1995 are satisfied; these conditions include lack of parental care, that the child has committed an offence, and that the child is beyond the control of a relevant person (usually a parent or carer)

⁶ The 1995 Act refers to the "Principal Reporter", who may delegate authority to all other Reporters in Scotland and this paper will refer to "the Reporter" throughout

⁷ The guidelines come from the Crown Office, which employs Procurators Fiscal to prosecute cases on behalf of the state in criminal courts in Scotland

⁸ Under the Children (Scotland) Act 1995, s70, children's hearings may make supervision requirements in respect of children and attach conditions to those requirements

⁹ Children (Scotland) Act 1995, s93(2)(b) defines a 'relevant person' as any parent or person with parental responsibilities and rights under the 1995 Act and any person who ordinarily has charge of or control of the child (other than by reason only of employment)

¹⁰ Children (Scotland) Act 1995, s69(1) provides that the hearing may consider the case once grounds have been established under s68 of the Act (application to sheriff to establish grounds)

¹¹ Children (Scotland) Act 1995, s52(3)

¹² That is not to say that it would not be viewed by a child as punishment

¹³ Children (Scotland) Act 1995, s16(1)

¹⁴ United Nations Convention on the Rights of the Child, ratified by the UK government on 16 December 1991

¹⁵ The Hearing must direct the Reporter to apply to the court for a finding on grounds of referral, or discharge the hearing, in certain circumstances under s65 of the Children (Scotland) Act 1995

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- ¹⁶ Under Children (Scotland) Act 1995, application must be made to the court for a child protection order (s57) or child assessment order (s55); a CPO may be appropriate where there is some urgency and can last for up to 8 working days; a CAO may be used to investigate a child's circumstances where there are concerns, and can last for up to 7 days
- ¹⁷ Court can hear appeals under s51 of the Children (Scotland) Act 1995
- ¹⁸ Criminal Procedure (Scotland) Act 1995, s49(1)(b)
- ¹⁹ Criminal Procedure (Scotland) Act 1995, s49 (3) (a) and (b)
- ²⁰ Children's Hearing (Scotland) Rules 1996, r22
- ²¹ Children (Scotland) Act 1995, s65(1)
- ²² Children (Scotland) Act 1995, s54(3)
- ²³ Antisocial Behaviour etc. (Scotland) Act 2004, s4(5)
- ²⁴ Antisocial Behaviour etc. (Scotland) Act 2004, s4(6)
- ²⁵ Antisocial Behaviour etc. (Scotland) Act 2004, s5(1)
- ²⁶ Antisocial Behaviour etc. (Scotland) Act 2004, s6
- ²⁷ Antisocial Behaviour etc. (Scotland) Act 2004, s9(1)
- ²⁸ Antisocial Behaviour etc. (Scotland) Act 2004, s4(2)
- ²⁹ "child" is defined in s18 of the Antisocial Behaviour (Scotland) 2004 Act as a person who is under the age of 16
- ³⁰ Antisocial Behaviour etc. (Scotland) Act 2004, s4(4)
- ³¹ Antisocial Behaviour etc. (Scotland) Act 2004, s4(11)(a), s18
- ³² Antisocial Behaviour etc. (Scotland) Act 2004, s4(11)(b)
- ³³ Antisocial Behaviour etc. (Scotland) Act 2004, s7(3)
- ³⁴ Antisocial Behaviour etc. (Scotland) Act 2004, s5(2)
- ³⁵ Antisocial Behaviour etc. (Scotland) Act 2004, s10, which amends The Criminal Procedure (Scotland) Act 1995 to that effect
- ³⁶ Antisocial Behaviour etc. (Scotland) Act 2004, s12(1)
- ³⁷ Children (Scotland) Act 1995, s52(2)(m), as inserted by Antisocial Behaviour etc. (Scotland) Act 2004, s12(3)
- ³⁸ Children (Scotland) Act 1995, s65(1)(1A), as inserted by Antisocial Behaviour etc (Scotland) Act 2004, s12(4)
- ³⁹ Children (Scotland) Act 1995, s73(8)(a)(v)(aa) as inserted by Antisocial Behaviour etc (Scotland) Act 2004, s12(5)
- ⁴⁰ Antisocial Behaviour etc. (Scotland) Act 2004, s4(4)
- ⁴¹ Antisocial Behaviour etc. (Scotland) Act 2004, s4(4)
- ⁴² Criminal Procedure (Scotland) Act 1995, s49(1)(b)
- ⁴³ Criminal Procedure (Scotland) Act 1995, s49(3)(a), (b) (amended by the Crime and Disorder Act 1998, s119, sch 8, para 118)
- ⁴⁴ The author has had sight of the "*Children's Hearings Guide to the Antisocial Behaviour etc (Scotland) Act 2004*" prepared for the purpose of training panel members by the Children's Hearing Training Units; there is no guidance in that document on matters to be dealt with by hearings arranged to give advice in relation to ASBOs
- ⁴⁵ Antisocial Behaviour etc. (Scotland) Act 2004, s7(3)
- ⁴⁶ Antisocial Behaviour etc. (Scotland) Act 2004, s7(2)(b)
- ⁴⁷ Sometimes referred to as "tagging", where electronic device is used, as is done in respect of some adults already in Scotland
- ⁴⁸ Children (Scotland) Act 1995, s70(10), as substituted by Antisocial Behaviour etc. (Scotland) Act 2004, s135(3)
- ⁴⁹ Children (Scotland) Act 1995, s70(9)(b), as substituted by Antisocial Behaviour etc. (Scotland) Act 2004, s135(2)
- ⁵⁰ This remains an option available under Children (Scotland) Act 1995, s70(9A(a)), as substituted by Antisocial Behaviour etc. (Scotland) Act 2004, s135(2)
- ⁵¹ Children (Scotland) Act 1995, s70(9A(b)), as substituted by Antisocial Behaviour etc. (Scotland) Act 2004, s135(2)
- ⁵² Children (Scotland) Act 1995, s16(1)
- ⁵³ the "*Children's Hearings Guide to the Antisocial Behaviour etc (Scotland) Act 2004*", Children's Hearing Training Units; 2004, p6
- ⁵⁴ Power to govern Scotland was devolved by the Westminster Parliament to the first Scottish Parliament since 1707, by way of the Scotland Act 1998

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- ⁵⁵ “*Getting it Right for Every Child: Consultation Pack on the Review of the Children’s Hearing System*”, Scottish Executive, 2004, available at www.scotland.gov.uk/consultations
- ⁵⁶ The 6 sections were: objectives; principles; improving outcomes; single system; the system and parents; and hearings and the community
- ⁵⁷ “*Report on the Responses to the Phase One Consultation on the Review of the Children’s Hearing System*” Stevenson, R and Brotchie, R, 2004 Scottish Executive, available at www.childrens-hearing.co.uk
- ⁵⁸ For the full debate the Official Report of the Scottish Parliament, 18 May 2004, cols 8291-8398; can be viewed at www.scottish.parliament.uk/business/officialReports
- ⁵⁹ Official Report of the Scottish Parliament, 18 May 2004. col 8398
- ⁶⁰ For full text, see www.scotland.gov.uk/about/ED/YPLAC/00017927/ActionPlan.aspx
- ⁶¹ For the remit of the Youth Justice Inquiry, see www.scottish.parliament.uk/business/committees/justice2/inquiries/yji/yji-remit.htm
- ⁶² “*Fast Track Hearings Research: Interim Report November 2003*”, Scottish Executive, November 2003, para 6.2.2 Table 9 shows totals of £1.4m allocated for 2002-3 and £3.4m for 2003-4
- ⁶³ The 3 areas were (1) Dundee City; (2) Scottish Borders and East Lothian; (3) East, North and South Ayrshire
- ⁶⁴ “*Fast Track Hearings Research: Interim Report November 2003*”, Scottish Executive, November 2003
- ⁶⁵ The research began mid-February 2003 and the figures was given at end July 2003, at “*Fast Track Hearings Research: Interim Report November 2003*”, Scottish Executive, November 2003, para 5.1.2, Table 5
- ⁶⁶ “*Fast Track Hearings Research: Interim Report November 2003*”, Scottish Executive, November 2003, para 5.1.8
- ⁶⁷ Referral by police to reporter – target 10 working days; referral received to decision by reporter – target 28 days; request for initial assessment and social background reports to submission to reporter by social work – target 20 days
- ⁶⁸ “*Fast Track Hearings Research: Interim Report November 2003*”, Scottish Executive, November 2003, para 7.1.2
- ⁶⁹ “*Fast Track Hearings Research: Interim Report November 2003*”, Scottish Executive, November 2003, p 7.7.1.2
- ⁷⁰ “*Fast Track Hearings Research: Interim Report November 2003*”, Scottish Executive, November 2003, p 7.7.1.1
- ⁷¹ “*Fast Track Hearings Research: Interim Report November 2003*”, Scottish Executive, November 2003, para 7.5.1
- ⁷² “*Fast Track Hearings Research: Interim Report November 2003*”, Scottish Executive, November 2003, para 7.14.5
- ⁷³ Hamilton Sheriff Court
- ⁷⁴ “Contextual background” was not clearly defined and the research noted differing opinions on the issue, which are noted later in the paper
- ⁷⁵ “*The Hamilton Sheriff Youth Court Pilot: the first six months*”, Scottish Executive, July 2004, available at www.scotland.gov.uk/library5/justice/hsycp-02.asp
- ⁷⁶ “*The Hamilton Sheriff Youth Court Pilot: the first six months*”, Scottish Executive, July 2004, Section 3, page 10
- ⁷⁷ “*The Hamilton Sheriff Youth Court Pilot: the first six months*”, Scottish Executive, July 2004, Section 3, pp 7-9
- ⁷⁸ “*The Hamilton Sheriff Youth Court Pilot: the first six months*”, Scottish Executive, July 2004, Section 3, p8; this option was not yet available to the children’s hearing at the time research was carried out
- ⁷⁹ “*The Hamilton Sheriff Youth Court Pilot: the first six months*”, Scottish Executive, July 2004, Section 7, p2
- ⁸⁰ *Putting Our Communities First: a strategy for tackling antisocial behaviour*, Scottish Executive, 2003